Editorial note

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CELEBRATING THE 20TH ANNIVERSARY OF THE CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY: THE ROLE OF EU LAW AND ACADEMIC WRITING IN TIMES OF CHANGE

Europe is changing. Policies and rules that seemed socially, morally, politically and legally unacceptable twenty years ago have over the past years become permissible and, in the eyes of many, even necessary. Europe's truths are shifting into new and sometimes obscure territories. We are in the midst of sometimes conflicting political and social changes and movements whose end result is difficult, if not impossible, to predict. These changes could shake the foundations of European liberal democracies, human rights, freedoms and the rule of law. Paradoxically, the European continent feels simultaneously more integrated and more divided than ever.

The ongoing changes could have transformative effects on EU law. In order to understand EU law, as a social construct, it is important to critically observe and analyse these changes and their effects. Then again, law is a powerful society-making tool. It can be both the consequence of social transformation and its driver. Consequently, EU law has become the new battleground of change in Europe. In this context, it is essential to understand and interpret EU law not just textually, as mere words on paper, but in line with basic Union principles, aims and values, including justice and respect for human rights.

Here, a brief digression about divergent views on the nature of law seems in order. In 1958 the Harvard Law Review published a debate between two law scholars, HLA Hart and Lon L Fuller, whose contention relied on the following summary of the case of *Grudge Informer*.[1] According to Hart, in 1944, a German woman, who wanted to get rid of her husband, denounced him to the Nazi authorities by alleging that he had

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[1] Herbert Lionel Adolphus Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630.

made insulating remarks about Hitler and the Nazi regime, while being on leave from the army. The husband was found guilty of having violated two Nazi statutes for making such remarks and was sentenced to death. After the war, the woman was prosecuted for her deed. Her defence was that she had acted in accordance with the law that was in force at that time and, consequently, that she had not committed a crime. The court decided that 'the sentencing judge should be acquitted, but that the wife is guilty since she utilized [...] a Nazi "law" which is contrary "to the sound conscience and sense of justice of all decent human beings" to bring about the death or imprisonment of her husband'.[2] In other words, the court established that, even though what she did was lawful at the time of the Nazi regime, that law itself was against human conscience and justice. Put differently, the court suggested that there is something above the law.

Without going into details of the Hart-Fuller debate, we can say that Hart considered that law and morality could exist independently and that, as a result, there could be unjust laws which would still be valid. Unlike Hart, Fuller viewed law as inherently linked to moral standards internal to law and referred to this as the 'internal morality of law.[3] According to Fuller, law needed to adhere to a sense of fairness and justice in order to be legitimate.

There is a clear link between the Hart–Fuller debate and the discussion on the transformation of law in contemporary Europe. Fuller's arguments about the internal morality of law, which suggest that there is something higher than the legal norm itself, set two conditions for the validity of existing and new national and EU rules. First, EU Member States' and EU rules need to adhere to the internal morality of the Union's legal order, enshrined in Articles 2 and 3 TEU, as well as other Treaty articles. Second, the interpretation and application of these rules need to follow the same internal logic of the system. Otherwise, the rules fail the internal morality test and cannot constitute valid and applicable law. Thus, the internal morality of the Union's legal order acts as a safety valve, allowing only those legal changes that respect the foundations of European liberal democracies and precluding those that would have a negative effect on these foundations.

However, the internal morality of the Union's legal order is not enough to justify its existence and its rules. Contemporary challenges in Europe and the world demand novel and original legal answers and justifications that need to be responsive to current problems and that

[2] Hart (n 1) 619.

[3] Fuller (n 1) 645.

are acceptable to society, while at the same time capturing the internal morality of the system. Harari rightly stated:

> The only place rights exist is in the stories humans invent and tell one another. These stories were enshrined as self-evident dogma during the struggle against religious bigotry and autocratic governments. Though it isn't true that humans have a natural right to life or liberty, belief in this story curbed the power of authoritarian regimes, protected minorities from harm and safeguarded billions from the worst consequences of poverty and violence. It thereby contributed to the happiness and welfare of humanity probably more than any other doctrine in history. Yet it is still a dogma.[4]

Consequently, the power of the EU's dogma, or the internal morality of the Union's legal order – however you choose to call it – depends on its ability to be credible and resonant to contemporary challenges.[5] Fulfilling the demands of credibility and responsiveness to today's problems in Europe might be a difficult task, but it is necessary if we want to ensure the sustainability of the EU's legal order and European liberal democracies. Responding to contemporary challenges could result in certain alterations in the internal logic of the EU's legal order, as it is not static. However, there are certain 'fixed points', as named by John Rawls, which represent our basic convictions about certain issues and to which any legal transformation needs to adhere to be legitimate.[6] These 'fixed points' of the legal systems of the EU and its Member States should not be transgressed.

What is our role, as legal scholars and academics, in this challenging moment of potential transformations? We have the responsibility to take note of the current challenges and do what we do best as our vocation: teach, write and publish, with a view to educating future jurists, stimulating critical thinking and discussions on EU's values, principles and roles, and informing policymakers and practitioners. If successful, our teaching and academic writing could affect tomorrow's policies and practices and make a change for the better.

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[4] Yuval Noah Harari, *21 Lessons for the 21st Century* (Penguin Random House 2018) 215.

[5] César Rodríguez-Garavito, 'Human Rights 2030: Existential Challenges and a New Paradigm for the Field' (2021) New York University School of Law Public Law and Legal Theory Research Paper Series Working Paper Nos 21-39.

[6] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 17–18. Rawls states: 'There are questions which we feel sure must be answered in a certain way. For example, we are confident that religious intolerance and racial discrimination are unjust. We think that we have examined these things with care and have reached what we believe is an impartial judgment not likely to be distorted by an excessive attention to our own interests. These convictions are provisional fixed points which we presume any conception of justice must fit'.

In the uncertain times Europe faces, academic journals need to promote both academic freedom and academic social responsibility. Academic freedom implies that academic journals should not align with only one particular ideological perspective and accept only such papers. Instead, academic journals should enable a free exchange of ideas, intellectual openness and curiosity, diversity of thought, competing points of view and counterarguments. At the same time, academic freedom does not authorise writing that denies human rights or relies on false or fabricated arguments. The commitment of academic journals to the truth is becoming highly relevant today, as it is increasingly difficult to distinguish truth from lies. Responsible academic writing implies honesty and ethics in one's research and argumentation. It also entails a commitment to social justice and social progress. Academic writing, just like (EU) law, needs to be responsive to current challenges, compliant with basic ethical standards as its 'fixed points', and credible in order to respond to today's challenges in Europe and worldwide.

The Croatian Yearbook of European Law and Policy (CYELP) represents one such bastion of independent academic writing and critical thinking on EU law and policies. Today, as CYELP celebrates its 20th anniversary, we remember, with pride and gratitude, all its editors-in-chief, executive editors, members of the Editorial Board, reviewers, student assistants, readers and numerous authors from more than thirty countries round the world, many of whom presented their papers at the annual Jean Monnet Seminars on 'Advanced Issues of European Law', organised in Dubrovnik by the Department of European Public Law of the Faculty of Law in Zagreb. All of them have contributed to CYELP's growth and success, as one of the leading European academic journals on EU law and policy, indexed in the strongest databases such as WoS–ESCI and Scopus, which ranked it as a Q2 journal. I would especially like to single out and thank its editors-in-chief, starting with its founder and conceptual creator, Judge Siniša Rodin, followed by Advocate General Tamara Čapeta, then by Judge Tamara Perišin and myself, and now led by Associate Professor Melita Carević. I am also immensely grateful to all its executive editors who have worked so diligently over the past years and who have made CYELP even better, more visible and modern, introducing important novelties in CYELP's work, such as 'Online First', which enables all accepted articles to be published immediately online and ahead of print. Here, special thanks go to Assistant Professor Nika Bačić Selanec and Dr Davor Petrić, now joined by Dr Antonija Ivančan, as well as to one of our former executive editors Filip Kuhta. I am also most grateful to CYELP's excellent language reviser and copyeditor, Mark Davies, and its library and database coordinator, Aleksandra Čar. I am confident that future generations of CYELP's team members, especially

its editors-in-chief and executive editors, will continue this impressive work, further enhancing CYELP's quality and increasing its readership.

Over the past twenty years, CYELP has witnessed all the important transformations of EU law and policies. Many of CYELP's writings closely followed Croatia's transformation into a fully fledged EU Member State from the start of accession negotiations until Croatia's accession to the EU on 1 July 2013 and onwards. Its articles have reflected on many EU transformations triggered by Treaty amendments, different legislative reforms and judgments of the Court of Justice of the European Union. CYELP has analysed various EU crises including constitutional, financial, refugee and rule-of-law ones. Its articles have as well discussed the transformations of EU law caused by security and climate change threats, the use of digital technologies and other global challenges.

Today, as CYELP enters its third decade, Europe's reality is marked by new types of challenges. CYELP will continue to encourage novel and original writings addressing these problems and other relevant and contemporary matters in EU law and policies. As there is a growing number of issues encompassed by EU law, and as EU law is becoming increasingly complex, CYELP is open both to new topics and to the clarification of current discussions on EU law and policies. CYELP is looking for more knowledge and insights, hopefully helping to move our society forward.

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