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**Taking Rights
Consciousness Seriously:
A Rights-Based
Approach to Promoting
Rule of Law Culture in
the EU**

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Culture in the EU

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Abstract

In spite of the key role that individual rights play in the EU legal system from its origins up to this day, the lack of effectiveness of those rights is a major problem for the functioning and the legitimacy of this system. This paper argues that enhancing rights consciousness across society can help make individual rights more effective and strengthen individual and collective confidence in the EU's legal system. The paper follows the following structure: firstly, a brief reminder of the nature, function and value of rights in the EU legal system; secondly, a discussion of rights consciousness as a precondition for rights effectiveness; thirdly, an overview of the EU's current – uneven – efforts at enhancing rights consciousness. A few suggestions are formulated as to how to progress towards this objective.

Keywords: individual rights, rights consciousness, effectiveness, due diligence, rule of law culture

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Taking Rights Consciousness Seriously: A Rights-Based Approach to Promoting Rule of Law Culture in the EU

Catherine Warin¹

Introduction

I was a PhD student when I started volunteering at an accommodation centre for newly arrived asylum seekers, peculiarly located in Luxembourg city's chic *Limpertsberg* neighbourhood. We, a small group of volunteers taught basic French to the newcomers (*Comment ça va? - Comme ci comme ça...*). One of them was from Iraq, where he had practiced law for many years. He wanted to know what my doctoral research was about. When I told him the topic was 'individual rights under European Union law', he replied kindly but in a sad tone: 'you will come to see that unfortunately, *these simply do not exist.*'

This study responds to the (not isolated) perception that rights exist only on paper, especially for vulnerable individuals who have no means of enforcing them. From an EU lawyer's perspective, that perception is all the more disturbing and frustrating considering that individual rights have been, ever since the landmark *van Gend en Loos* case of 1963², a major feature of the EU legal order. Of course, difficulties in realizing the full potential of this concept are to a certain extent inherent to the EU's legal architecture, characterized by multilevel modes of governance, and the intertwining of legislation and legal sources.

The realization of the founding principles of the EU legal order exacerbates certain types of vulnerabilities. The free movement of goods and services creates a market of consumers who also become potential victims of rights violations by market operators; the development of the single digital market creates additional types of consumer vulnerabilities. The free movement of persons has generated an unprecedented degree of intra-European mobility of individuals, meaning that workers encounter new types of legal issues and new obstacles to exercising their rights, e.g. against their employers, social security services or tax administrations. And in parallel, the EU's many successes in various fields contribute to its attractivity for third country nationals, including those who seek asylum and whose hopes are often shattered. Overall, our *Union based on the principles of democracy and the rule of law* forms a legal system that is becoming increasingly difficult for individuals to navigate.

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² CJEU, 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1.

It is not groundbreaking to suggest that the ignorance of rights, by right-holders and by those facing them – other private natural or legal persons, administrations, courts – is a major obstacle to the effectiveness of these rights. Socio-legal scholarship has documented countless stories of individual experiences with the law and highlighted that the outcome of problematic situations depends on each actor’s perception and appropriation of legal frameworks and concepts.³ Such work has been done especially in the U.S. context but it is easy to find its relevance in the EU context. One example is a frontier worker who is unaware that her work contract is illegal and that under the national employment legislation she would be entitled to the parental leave that her employer is denying her. Another example is national administrations and courts that, despite the many international and EU law instruments enshrining the rights of children, dismiss the question of what is in a child’s best interests because of his/her administrative status as an asylum seeker.⁴ The list could go on; the point is that insufficient awareness of the existence of rights conferred by EU law renders these rights ineffective. The EU institutions and legislator acknowledge this issue to a certain extent, but they address it in a way that is anything but systematic.

This paper argues that enhancing rights consciousness across societies in Europe can help make individual rights a reality and strengthen individual and collective confidence in the EU’s legal system. The paper follows this structure: firstly, a brief reminder of the nature, function and value of rights in the EU legal system; secondly, a discussion of rights consciousness as a precondition for rights effectiveness; thirdly, an overview of the EU’s current – uneven – efforts at enhancing rights consciousness and a few suggestions on how to advance that objective.

1. Rights in the EU legal system

1.1 In the beginning there were (individual) rights

A long time before the Union equipped itself with a Charter of fundamental rights, the European Economic Community was already concerned with rights. In its *van Gen den Loos judgment*, the Court of Justice of the European Union (CJEU) famously identified such rights by reference to obligations laid down in the original EEC Treaty allowing individuals who pursue the protection of their own interests to also contribute to the enforcement of Community law.⁵ This notion of ‘functional subjectivation’ or, as Professor De Witte also describes it, ‘the useful effect of direct effect’⁶ has led to recurring, often acute critique of the EU integration project as one that instrumentalizes individuals, who become mere agents of

³ P. Ewick and S. Silbey, *The common place of law. Stories from everyday life* (1998). See also Calavita, K., *Invitation to Law & Society* (University of Chicago Press 2016); Calavita, K. and Jenness, V., *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* (University of California Press 2015).

⁴ Both examples are drawn from the author’s practice in Luxembourg.

⁵ CJEU, 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1. H. Hofmann and C. Warin, ‘The concept of an individual right under Union Law’, Z. Kmiecik (ed.), *Contemporary Concepts of Administrative Procedure* (University of Lodz - Wolter Kluwer, 2022), 49-64.

⁶ B. De Witte, ‘Direct Effect, Primacy and the Nature of the Legal Order’, in G. De Burca and P. Craig (ed.), *The Evolution of EU Law*, Oxford University Press, 2011, 340.

the integration process.⁷ Admittedly, the CJEU was at first mainly preoccupied by the need to ensure the effectiveness of ‘objective’ law laid down by the Treaty⁸ and so, perhaps, individual rights were merely a secondary – accessory – concern in the development of the case law on direct effect. Nevertheless, the result was that individuals were granted significant power: the power to request from their national administrations, from the EU institutions, and even from other individuals, the effective observance of obligations provided for by EU law.⁹

Of course, if obligations and rights are only laid down and multiply in the economic sphere, perhaps other (societal, political) aspects of our ‘community’ suffer from the process. As analysed by Habermas, one of the causes of the EU’s often criticized democratic deficit is that ‘the direct actionability of basic economic freedoms as subjective rights has removed decisions over alternative economic policies for the most part from the democratic process’.¹⁰ So, rights as they were originally conceived might have been part of the problem.¹¹ But very soon, they were upheld by the Court of Justice as possibly also part of the solution.

1.2 Constitutionalisation of fundamental (and) human rights

It was not long before the CJEU proclaimed that fundamental human rights were an integral part of the Community’s legal order as general principles of EU law, and went on to develop a sophisticated list of such general principles.¹² The Charter of fundamental rights is a further major step in that process in that it aims to give substance to ‘values with which, intrinsically, most people can readily identify’.¹³ Back in 1979, the Commission started advocating for the

⁷ M. Borowski, ‘The Charter of Fundamental Rights in the Treaty on European Union’ in M. Trybus and L. Rubini (ed.), *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Elgar, 2012, 203; E.F. Hinton, ‘Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice’, *NYU Journal of International Law and Politics*, vol. 31, 1998, 307.

⁸ T. Eilmansberger, ‘The Relationship between Rights and Remedies in EC Law: in Search of the Missing Link’ (2004) 41 *Common Market Law Review*, 1204; J. Coppel and A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 *Common Market Law Review*, 669.

⁹ J. Rondu, *L’individu, sujet du droit de l’Union européenne*, Bruylant, 2020; C. Warin, *Individual Rights under European Union Law. A study on the relation between rights, obligations and interests in the case law of the Court of Justice*, Nomos, 2019 ; L. Azoulay, S. Barbou des Places and E. Pataut, ‘Being a Person in the European Union’ in L. Azoulay, S. Barbou des Places and E. Pataut (ed.), *Constructing the Person in EU Law: Rights, Roles, Identities*, Bloomsbury Publishing, 2016, 5. J. Masing described the same mechanism under the German term *‘Versubjektivierung’*: J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht*, Duncker & Humblot, 1997, 22. M. Poiras Maduro referred to the ‘subjectivation of the Treaties’: M. Poiras Maduro, *We the Court*, Hart, 1998, 9.

¹⁰ J. Habermas, ‘Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible’ (2015) 21 *European Law Journal*, 547.

¹¹ The original lack of a clear statement on individual rights is far from being the only reason suggested for the ‘legitimacy gap’. Other often suggested reasons include the weakness of the European Parliament, the lack of transparency in policy-making, accountability issues. See S. Saurugger, *Théories et concepts de l’intégration européenne* 333-335 for a detailed review of the theories advancing explanations for the legitimacy gap and the democratic deficit, and an overview of the various theorisations of the notion of ‘legitimacy’.

¹² Starting with CJEU, 12 November 1969, *Stauder*, C-26/69, ECLI:EU:C:1969:57 and developing especially with CJEU, 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, ECLI:EU:C:1970:114 and CJEU, 14 May 1974, *Nold*, C-4/73, ECLI:EU:C:1974:51.

¹³ J. Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’, in T.K. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart, 2003), 4. See also K. Lenaerts, ‘Fundamental Rights to be included in a Community Catalogue’ (1991) 16 *European Law Review* 367; D. Neacsu, ‘The Draft of the EU Charter of Fundamental Rights: A Step in the Process

Community to adhere to a catalogue of human rights, whether through accession to the European Convention on Human Rights, or through drafting a new bill of rights. The Commission listed as the main advantages: '[i]mproving the image of Europe as an area of freedom and democracy', '[s]trengthening the protection of fundamental rights in the Community' and '[s]trengthening of institutions.'¹⁴ The Charter also constitutes an attempt to correct the EU's 'social deficit',¹⁵ by including in a single document several generations and categories of (civil, political, socio-economic...) rights.¹⁶ As Kenner argues,

'the Charter's proclamation of indivisible values and its express reference to solidarity alongside dignity, equality and freedom, sends a clear message that the EU institutions, when carrying out their obligations, will be bound to take note of the more elevated position that economic and social rights now occupy.'¹⁷

We see, here, the other side of the medal: rights are derived from obligations, yes, but obligations may also derive from proclaimed rights.¹⁸

To a certain extent, this means that the often-criticised instrumental rationale of rights, oriented towards the integrative *telos* of the EU, does not disappear with the Charter: the insistence on rights remains a way of legitimising the European legal order and integration process,¹⁹ meaning that rights remain means to an end. Nevertheless, the shift of focus from fundamental freedoms to fundamental rights denotes an evolution in the perception of the holders of these various rights: individuals are no longer perceived primarily as economic

of Legitimizing EU as a Political Entity and Economic-Social Rights as Fundamental Human Rights' (2001) 7 Columbia Journal of European Law 141; J.H.H. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 Journal of Common Market Studies 563; Saurugger, *Théories et concepts de l'intégration européenne* (2020), 326; H. Raulus, 'The Charter of Fundamental Rights as a set of constitutional principles' in M. Trybus and L. Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (The Treaty of Lisbon and the Future of European Law and Policy, Edward Elgar 2012), 181; E. Muir, 'The Court of Justice: a fundamental rights institution among others' in M. Dawson, B. De Witte and E. Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013), 79.

¹⁴ Commission Memorandum on Accession of the Communities to the European Convention on Human Rights (COM (79) final, Bulletin of the European Communities, Supplement 2/79), 11-12.

¹⁵ G. Katrougalos, 'The Implementation of Social Rights in Europe' Columbia Journal of European Law 1996, 277.

¹⁶ Fredman and Wesson, 'Social, Economic, and Cultural Rights', in D. Feldman (ed), *English Public Law* (2nd Ed., Oxford University Press 2009), 455.

¹⁷ J. Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility', *op. cit.*, 15. On the indivisibility of rights see also La Torre, 'The Law beneath Right's Feet. Preliminary Investigation for a Study of the Charter of Fundamental Rights of the European Union' 534 and the Communication from the Commission on the legal nature of the Charter of Fundamental Rights of the European Union, 28.10.2000 (COM (2000) 664 final). This has not solved all issues, however: implementation deficit of socio-economic rights: European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)).

¹⁸ This also echoes Nedelsky's vision of rights as a relational concept which she develops in her discussion of vulnerability. J. Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (Oxford University Press, 2011). See M. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 20 *Yale Journal of Law and Feminism* 2008.

¹⁹ G. De Burca, 'The Language of Rights and European Integration' in G. More and J. Shaw, eds., *New Legal Dynamics of the European Union*, (Oxford University Press, 1995), 40.

agents with market-related rights,²⁰ but also as citizens,²¹ and simply as human beings, since many, if not most of the fundamental rights enshrined in the Charter are not reserved to EU citizens but instead applicable to ‘everyone.’²²

As a consequence of the Charter entering into force and being increasingly invoked and dealt with in the case law, a shift in the CJEU’s role has been observed. As suggested by Muir: ‘[w]hile for many years the EU, and therefore also the Court of Justice, was primarily focused on identifying fundamental rights, the new challenge is now to flesh out these rights: interpret them, identify their limits and balance them with each other.’²³ The Charter unburdens the Court from the task of identifying rights and shifts its responsibility towards applying them. Since then the CJEU has indeed been observed to shift its role from a predominantly ‘pro-integration court’ to mainly a ‘protecting court’ and ‘human rights adjudicator’²⁴ or ‘human rights court’²⁵.

There is also perhaps a shift in the EU legislator’s conception of fundamental rights and motivation for their protection. The proclamations at the beginning of the General Data Protection Regulation perhaps signal a true paradigmatic shift. Human beings are to be protected for themselves: see Recital 4 stating that “the processing of personal data should be designed to serve mankind.”²⁶ This is an interesting development compared to the (earlier) approach in consumer protection law where individuals are provided with a high level of protection but are still considered as means to an (economic integration) end: take for instance the 2011 Consumer Rights Directive, the objective of which was ‘through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market.’²⁷

²⁰ A broad definition of ‘worker’ was developed starting with Judgment of 19 March 1964, *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten*, C-75/63, EU:C:1964:19.

²¹ E. Meehan, ‘Citizenship and the European Community’ (1993) 64 *The Political Quarterly* 172; N. Reich, ‘Union Citizenship - Metaphor or Source of Rights?’ (2001) 7 *European Law Journal* 4; S. Kadelbach, ‘Union Citizenship’ in A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2006); L. Azoulay, ‘The (Mis)Construction of the European Individual. Two Essays on Union Citizenship Law’ EUI Working Paper, Law 2014/14.

²² To give just a few examples, ‘Everyone’ has the right to life (Article 2(1)), to liberty and security (Article 6), to respect for private and family life (Article 7), to protection of personal data (Article 8), to freedom of thought, conscience and religion (Article 10), to freedom of expression and information (Article 11), to education (Article 14), to property (Article 17), to an effective remedy and a fair trial (Article 47), to presumption of innocence (Article 48); ‘no one’ shall be subjected to torture or inhuman or degrading treatment (Article 4), held in slavery or forced labour (Article 5); and ‘every person’ has rights to good administration (Article 41).

²³ Muir, ‘The Court of Justice: a fundamental rights institution among others’ op. cit., 85.

²⁴ G. De Burca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 20 *Maastricht Journal of European and Comparative Law* 168.

²⁵ D. Sarmiento, ‘A Court that Dare Not Speak its Name: Human Rights at the Court of Justice’, 7 May 2018, <https://www.ejiltalk.org/a-court-that-dare-not-speak-its-name-human-rights-at-the-court-of-justice/>, last accessed 27 April 2023.

²⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1–88.

²⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights OJ L 304, 22.11.2011, p. 64–88, Recital 65.

We now have an ambitious catalogue of fundamental rights, recognised as having intrinsic value, and a Court busy providing us with guidance on its application. How do we ensure then the *effective* application of those rights?

2. Rights effectiveness and rights consciousness from a rule of law perspective

2.1 Rights effectiveness, a major concern from a Rule of Law perspective

Article 2 of the Treaty on European Union expressly grounds the EU conception of the rule of law on a series of proclaimed values, including the protection of human rights. If we proactively embrace this commitment,²⁸ we can only agree that the effectiveness of those rights is directly rule-of-law-relevant, as emphasized by the European Commission in its 2019 Rule of Law Blueprint.²⁹ If individuals cannot assert the rights that the (rule of) law supposedly confers on them and obtain the corresponding protection, they risk being excluded from all democratic mechanisms instead of benefitting from the European project of ‘integration through law.’ This ultimately leads to loss of confidence in our legal system³⁰ and it feeds the growing criticism on the effects of the integration process³¹. There is also an additional consideration, building on the ‘functional subjectivation’ line of argument: individual rights are not just tools for protecting individual interests, they are also important for nourishing collective confidence in the functioning of the EU legal system. In this respect, rights consciousness can be said to be a vital component of a broader rule of law culture.³²

2.2 Why is rights consciousness important for rights effectiveness?

The notion of rights consciousness may be defined as the awareness of and insistence on legal entitlement of individuals.³³ It is a part of legal consciousness, which is itself the sum of ‘ways in which people experience, understand, and act in relation to law.’³⁴ One strand of legal consciousness studies, especially in the American context, has focused on the legal consciousness of individuals who are being ‘failed by the legal system’, i.e. individuals whose

²⁸ T. Smith, ‘Neutrality isn’t Neutral: On the Value-Neutrality of the Rule of Law’ 4 Washington University Jurisprudence Review 49 (2011). On the notion that rights are values see also A. Bailleux, ‘Droits de l’homme à l’est des Vosges, valeurs à l’ouest ? Les récits judiciaires de l’Europe au prisme de l’article 52 de la Charte’ Revue trimestrielle des droits de l’homme (115/2018) 583-592.

²⁹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union. A blueprint for action, COM/2019/343 final, 17 July 2019.

³⁰ See e.g. A. Vauchez, ‘Integration-through-Law.’ *Contribution to a Socio-history of EU Political Commonsense*, EUI RSCAS, 2008/10 - <https://hdl.handle.net/1814/8307>, last accessed 27 April 2023.

³¹ L. Azoulai, ‘Solitude, désœuvrement et conscience critique. Les ressorts d’une recomposition des études juridiques européennes’, *Politique européenne* 2015/4 (n°50), pp. 82-98.

³² On the concept of rule of law culture see T. Fournier’s re:constitution Working Paper, ‘An essay on the place for rule-law-culture in liberal democracies’ (forthcoming).

³³ Engel, D.M., ‘Vertical and Horizontal Perspectives on Rights Consciousness’, 19 *Indiana Journal of Global Legal Studies* 2012, 423-455.

³⁴ L.J. Chua, D.M. Engel, ‘Legal Consciousness Reconsidered’, 15 *Annual Review of Law and Social Sciences*, 335 (2019). See also J. Pélisse, ‘Les Legal Consciousness Studies: une sociologisation domestiquée des Critical Legal Studies ?’ in H. Bentouhami, A. Kupiec, N. Grangé (ed.), *Le souci du droit. Où en est la théorie critique ?* Sens et Tonka éditions 2010.

belonging to minorities (migrants, members of the LGBTQ communities...)³⁵ translates into particular vulnerability. Rights consciousness has been explored especially by socio-legal and psycho-legal researchers, often in a global and/or postconflict perspective.³⁶

According to some specialists of socio-legal studies, while in the US rights consciousness implies a tendency to turn to courts to solve societal issues, this is not so developed in States with a (continental European) civil law tradition: in those countries, the sociocultural understanding of legality traditionally emphasizes the general, abstract nature of the law in rights consciousness. Therefore, rights litigation – a significant indicator of rights consciousness – develops (unlike in the US) *against* historical traditions. This might be an obstacle to importing legal consciousness studies into non-American cultural settings.³⁷ Yet, this objection seems to have been overcome since legal consciousness studies are now developing in the global legal setting³⁸ and, as regards specifically the European legal environments, socio-legal scholarship has awakened to the relevance of legal consciousness as well.³⁹

If we look at the history of rights litigation in the EU legal system, we find some clear connections between rights consciousness and rights effectiveness. For example, let us look briefly at the major steps in the fight against gender-based discrimination in employment in the EU. Ms. Vogel-Polsky, who was Ms. Defrenne's lawyer in the famous *Defrenne v Sabena* case, explained that she deliberately drew a parallel with the CJEU's case law on the direct effect of Treaty provisions on the fundamental (economic) freedoms, and asked the CJEU to apply the same line of reasoning to Article 119 of the EEC Treaty, which imposed on the Member States certain obligations to address gender-based discrimination.⁴⁰ The Court agreed that provisions phrased as obligations on the States may also give rise to correlative rights for individuals who have an interest in seeing those obligations observed.⁴¹ This translated, in the case in point, in the right for Ms. Defrenne to rely on the prohibition on discrimination to challenge her employer's decision to send her in retirement earlier than her

³⁵ S. Halliday, 'After Hegemony? The Varieties of Legal Consciousness Research', *Social and Legal Studies*, 865 (2019). See also A. Kirkland, 'Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement', *Law & Society Review*, 42:2 (2008) 397-432 – challenging the idea that some categories of people do not 'deserve' rights.

³⁶ D. Cassel, 'The Globalization of Human Rights: Consciousness, Law and Reality', 2 *Northwestern Journal of International Human Rights* 2004; Leidner, B. and Li, M., 'How to (Re)Build Human Rights Consciousness and Behavior in Postconflict Societies: An Integrative Literature Review and Framework for Past and Future Research', 21 *Peace and Conflict: Journal of Peace Psychology* 2015, 106-132.

³⁷ J. Pélisse, "A-t-on conscience du droit ? Autour des Legal Consciousness Studies », *Genèses* 2005/2 (n°59), pp. 114-130.

³⁸ e.g. A. Mihr, 'Global Human Rights Awareness, Education and Democratization', 8 *Journal of Human Rights* 2009.

³⁹ M. Hertogh, 'A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich', 31 *Journal of Law and Society* 2004, 457-481 (with emphasis on the Netherlands). See also sector-specific works: A. Lejeune and J.-F. Orianne, 'The Construction of Workers' Rights Consciousness Through Legal Intermediations: the case of employment discrimination in Belgium', *International Journal on Discrimination and the Law*, vol. 14 (2014) 221-243; K. Sarikakis and L. Winter, 'Social Media Users's Legal Consciousness about Privacy', *Social Media + Society* (Jan-March 2017) 1-14.

⁴⁰ E. Vogel-Polsky, « Agir pour les droits des femmes », *Raisons politiques* 2003/2, n°10, p. 146.

⁴¹ CJEU, *Defrenne / SABENA*, *op. cit.*, pt. 31.

male colleagues. Afterwards, in the 1980s other women, also victims of inequality, relied on the *Defrenne* precedent to challenge their employers: Ms. Smith against Macarthys⁴², Ms. Jenkins against Kingsgate⁴³, Ms. Garland against British Rail⁴⁴, Ms. Nimz against the city of Hamburg.⁴⁵ Then in the 1994 *Smith and others* case again five women challenged the financial disadvantages that they suffered in the implementation of their retirement scheme and the CJEU expressly citing the *Defrenne* case law, agreed with their claims.⁴⁶ That is but one telling illustration of how awareness of rights conferred by EU law, knowledge of how these rights function, and willingness to claim these rights, advances their effectiveness.

3. (How) does EU law currently support the development of rights consciousness?

3.1 The heterogeneous EU law instruments favoring rights consciousness

A survey of EU secondary law points to implicit acknowledgment by our institutions – the EU legislator, the Court of Justice also – of the importance of rights consciousness.

Firstly, several instruments protect the right to information on one's rights and correspondingly impose obligations to proactively provide information on rights in situations of informational asymmetry. Some of those instruments validate the role of civil society in contributing to the diffusion of such information (as highlighted by the abovementioned Rule of Law Blueprint). This is particularly the case in policy areas where individuals concerned are considered to be vulnerable, i.e. in a position of particular relative weakness: they are still (or all the more) entitled to receiving information and correspondingly, the administrations or companies interacting with the latter have an enhanced duty to provide this information. This has been observed in the fields of criminal law and of consumer law⁴⁷; it is also a key requirement of legal instruments composing the Common European Asylum System, e.g. under the 'Dublin Regulation' and the 'Procedures' Directive.⁴⁸

This tendency of including in the set of rights that come with a fundamental right, the right to be properly informed, has been accentuated in the past years especially if we look at the ambitions and logics of the General Data Protection Regulation (GDPR)⁴⁹. The GDPR

⁴² CJEU, 27 March 1980, *Macarthys v Smith*, C-129/79, EU:C:1980:103, para 17.

⁴³ CJEU, 31 March 1981, *Jenkins v Kingsgate*, C-96/80, EU:C:1981:80.

⁴⁴ CJEU, 9 February 1982, *Garland v British Rail*, C-12/81, EU:C:1982:44.

⁴⁵ CJEU, 7 February 1991, *Nimz v Freie und Hansestadt Hamburg*, C-184/89, EU:C:1991:50.

⁴⁶ CJEU, 28 September 1994, *Smith e.a. v Avdel Systems*, C-408/92, EU:C:1994:349, para 15.

⁴⁷ L. Waddington, (2020), 'Exploring vulnerability in EU Law: An analysis of 'vulnerability' in EU criminal law and consumer protection law' *European Law Review*, (6), 779-801.

⁴⁸ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95.

⁴⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and

emphasizes that individuals should be in a position to give their consent to the processing of their personal data “by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement”; and that they should be made “aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing.”⁵⁰ The effectiveness of the right to the protection of personal data is clearly connected with the data subject’s awareness of their rights and knowledge of the means of enforcing those rights: i.e., of the data subject’s *rights consciousness*.

Secondly, the EU’s legal system also integrates an approach not just to inform individuals of their rights but also to encourage *the debtors of the corresponding obligations* to effectively, if not proactively enforce them. This manifests in the national courts’ duties of *ex officio* review which the CJEU has developed in its case law on consumer protection.⁵¹; in the ‘compliance’ requirements that bind companies collecting and processing data under the GDPR; in the development of a ‘human rights due diligence and corporate accountability’ scheme for businesses⁵²; in the systematization of (fundamental) rights training e.g. for EU administration officials.⁵³ The Whistleblower Protection Directive will provide an additional tool for putting pressure on institutions and companies that commit violations of certain areas of EU law (this may include violations of rights including the right to personal data protection).⁵⁴

Thirdly, we see more and more instruments allowing for, if not encouraging, *collective forms of action* e.g. in EU consumer law (representative actions)⁵⁵ and in data protection law (NGOs being allowed under the GDPR to represent a data subject who considers that his/her rights under the regulation have been violated⁵⁶). This acknowledgement of the collective dimension of rights protection is also present in the EU Institutions’ Strategy to strengthen the application of the Charter of Fundamental Rights in the EU⁵⁷, which expressly aims to promote awareness’ of rights and of ‘where to turn to’ when they are breached. The new Citizenship, Equality, Rights and Value funding programme also entails a line specifically focused on promoting capacity building and *awareness* on the Charter. It aims to support activities on

repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

⁵⁰ See recitals 32 and 39 of the GDPR.

⁵¹ See e.g. CJEU, 11 March 2020, *Lintner*, C-511/17, EU:C:2020:188.

⁵² See the February 2022 Proposal for a Directive on Corporate Sustainability Due Diligence to tackle human rights and environmental impacts across global value chains, COM/2022/71 final – see also the earlier European Parliament’s resolution of 10 March 2021 with recommendations to the Commission (2020/2129/INL).

⁵³ See in particular the Commission’s Strategy for effective implementation of the Charter of Fundamental Rights by the EU (COM(2010) 573 final), and the Council’s 2014 Guidelines for checking fundamental rights compatibility at the Council preparatory bodies.

⁵⁴ On this directive see V. Abazi, ‘Whistleblowing in the European Union’, *Common Market Law Review* 58: 813-850 (2021).

⁵⁵ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) OJ L 409, 4.12.2020, p. 1–27.

⁵⁶ Article 80 GDPR.

⁵⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM/2020/711 final.

strategic litigation relating to democracy, the rule of law and fundamental rights breaches, thereby acknowledging the role of civil society organisations in upholding the knowledge and therefore the respect of those rights.

These recent trends signal an acknowledgement that rights consciousness is key for the effective protection of individuals and the functioning of our legal system. There is also an effort, although far from systematic, to nourish this rights consciousness. How shall we take this forward?

3.2 Towards more consistent support for rights consciousness

Rights consciousness, as discussed above, is part of a rule of law culture and therefore, efforts to foster this culture should include systematic efforts to develop rights consciousness. If the connection between rights effectiveness, rights consciousness and the broader rule of law culture is not clear in policy makers' minds, the risk is to keep ignoring gaps or to lack convincing arguments to address those gaps. And there are still major gaps that need to be addressed.

EU secondary law protects some fundamental rights more than others. We have directives on the prohibition of discrimination, we have a whole regulation focused on protecting just one fundamental right (to personal data protection). The Whistleblower Protection Directive covers more than one policy area, but it is 'first and foremost protecting internal market interests,' although it admittedly covers a few other fields as well – but some preoccupations are completely absent from the text such as working conditions, health and safety of workers.⁵⁸ This means that the debtors of obligations correlative to certain types of rights are under more pressure than the debtors of obligations connected, for instance, to the health and safety of workers. We could hope for more consistent, more encompassing approaches to substantive rights protection in the future.

As pointed out above, EU civil servants now get systematic training on human rights issues, and they integrate fundamental rights checks into their impact assessment processes. Private companies are increasingly subjected to human rights due diligence obligations. What about civil servants who apply EU law in their national administrations (for instance, those who work in immigration services and face highly vulnerable asylum applicants)? They, too, could be provided with a fundamental rights 'check-list' and trained to refer to that check-list in their daily work.

Conclusion

In the current EU legal system, rights consciousness is at least implicitly acknowledged as a prerequisite for rights effectiveness. What is still missing is a more consistent approach to

⁵⁸ V. Abazi, 'The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?' *Industrial Law Journal* Vol 49, Issue 4, December 2020, 640-656. According to the authors the limited scope is connected with the choice of Article 114 TFEU as the main legal basis for the directive. A. Van Waeyenberge, Z. Davies, 'The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System', *European Journal of Risk Regulation*, Vol 12, Special Issue 1, March 2021, 236-244.

substantive rights protection and to the prevention of rights violations. We certainly are nowhere near a General Fundamental Rights Regulation where all fundamental rights would be afforded equal implementation efforts, but if we want to live up to the proclamations in our Treaties and Charter, we can and should already push for more consistent approaches to cultivate rights consciousness as an inherent component of our rule of law culture.