The (dis)integrative potential of rights

Dr Audrey M Plan

ERC Postdoctoral Researcher

Sutherland School of Law
University College Dublin
Belfield, Dublin 8

Prof Dagmar Schiek

PI RIGHTS-TO-UNITE (ERC project)

Sutherland School of Law
University College Dublin
Belfield, Dublin 8

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ABSTRACT

European integration studies conventionally focus on the relationship between the European Union and its Member States. RIGHTS-TO-UNITE (RTU) shifts this focus from the integration of people's states to the integration of states' peoples. This paper is informed by the question "Can (EU-derived) rights unite, or are they bound to divide?" It explores rights as mediums through which individuals organize their place in society across all its components, spanning economic, social, and even digital spheres, drawing on literature across law, philosophy, political science, and sociology, among others. We conceptualize rights as inherently interactive, with a right-holder relating to one or multiple duty-holder(s). The lived experience of rights is characterised by complexity of sources, content, and nature. Rights extend beyond legal obligations, shaping culture and informal institutions in ways that can make them even more real than through right-claiming through judicial and quasi-judicial institutions. This working paper builds on an extensive critical literature review to propose an initial framework of societal integration through rights. It innovates by accounting for the possibility of disintegration through rights, identifying potential points of failure in a rights-based framework for integration. Going beyond traditional public law/private law divides, and accounting for the substantial diversity of economic, social and digital EU-derived rights, this first RTU Working Paper contributes to a new theoretical framework to evaluate successes, failures, and crises of integration through rights on the ground.

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Authors	Dr Audrey M. Plan, Prof Dagmar Schiek
Author Affiliation	Sutherland School of Law University College Dublin Belfield, Dublin 4 Ireland
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Introduction

The European Union (EU) seeks to create "an ever closer union among the peoples of Europe" (Article 1 paragraph 2 TEU). Achieving this goal seems to require integrating the States' peoples rather than the peoples' States. Yet, European integration theory continues to focus on the integration of states, and legal research on European integration still focuses on integration through law. The RIGHTS-TO-UNITE project asks whether and how "integration through rights" can be achieved in the EU and its neighbourhood. Thus, it changes the perspective of research by connecting the relevance of European integration to Europe's societies with researching the impact of law from a bottom-up perspective. That bottom-up perspective renders the concept of rights decisive, while our concern for the grounded, lived reality in the EU and its neighbourhood leads us to a pragmatic approach to rights, which elucidates whether and how they are used in the mundane, daily life. While internationally guaranteed human rights remain relevant, it is their specification in areas ranging from social security coordination (originating in a 1950 EEC Regulation) to data (ab)use by businesses (originating in a 1990s EC Directive). Our research encompasses rights traditionally categorised as deriving from private law alongside those traditionally perceived as falling under public law.

All this requires to overcome the focus of European integration studies, and in particular its socio-legal section, on the vertical transfer of competences and movement toward supranational centralisation instead of international coordination (Leuffen, Rittberger, & Schimmelfennig, 2022, p. 9) and the gradual pooling of national sovereignties (Schramm, 2024, p. 12). Instead, we are interested in the interactions of real people through the medium of EU derived rights. This endeavour chimes with early European integration research, such as Haas' neo-functionalism, which also considered the effects of European integration on societal integration through the gradual shifting of loyalties of societal and political actors (Wiener et al., 2018, p. 3), while the ensuing 'Integration through law' research project (Augenstein, 2012; Cappalletti, Seccombe, & Weiler, 1986) theorised the role of law in European integration from an institutional perspective. Yet, it has limits (Frerichs & Losada, 2022), while offering first steps toward connecting research of European integration to European societies (Azoulai, 2024; McNamara, 2010).

This paper aims to craft a working notion of "rights" and "integration" based on reflection and theorization. First, it offers a critical review of central notions (sections 1 and 2), and second, it develops an inchoate framework for investigating how rights may impact on (dis)integrating societies. To this end, it sketches our starting point of what integrates societies, and reviews this notion with a focus on European integration theories (section 3) The last section links those two themes, summarising which qualities of rights and their usage need to be accounted for to conduct further work – both in terms of refinement the theoretical framework itself, and of empirical research to feed into the development of this framework.

Section 1: The Rights Paradox

1.1. What paradox?

Rights as a subsection of the law on the one hand give individuals agency to demand respect of a personal sphere from public entities such as states, and autonomy in that very sphere from other individuals (negative rights). Even positive rights can be shaped as demands

to provide things or actions. This dimension of rights appears combative, adversarial and aimed at distancing human beings from each other. It seems barely conceivable that such rights may contribute to integrating societies. On the other hand, rights also have an interactive quality. Even demands to refrain from future interactions shape relations and relationships individuals have with each other or public entities. Moreover, rights can also enable interactions, across a variety of areas of life, including work, consumer protection or internet safety. It is in this enabling and interactive function of rights that they may contribute to societal integration. This section reviews the concept of rights to substantiate the idea of their interactive quality.

1.2. Rights between trumps, claims and powers

While the **formal definition of a right** developed by **Wesley Hohlfeld** (1919) has been rightly criticised,[1] his categories are a useful starting point. He distinguished between rights, privileges, powers and immunity, limiting the notion of rights to those situations where the claim of one person corresponds to a duty of another (claim-rights). Privileges were distinguished from rights by the lack of that correlative, while powers allowed someone to act without liability (the correlative of power), and immunities had disabilities as their correlative. The starting point that rights are only those legal institutions (not a term used by Hohlfeld) which have a corresponding duty is useful for a project seeing rights as having a relational or interactional component. Those claim-rights were even said to give rise to waves of duties (Waldron, 1989, pp. 509–512), which suggests that claim-rights can be a starting point for interactions.

It would not be wise though to exclude privileges in Hohlfeldian terms from the category of rights. Those rights, which Bentham had dubbed liberty-rights **(**whereby one is simply *not forbidden* to do a certain action), have been said to be bilateral by none lesser than **Hart**: "the exercise of this liberty will always be protected by the law to some extent, even if there is no strictly correlative obligation upon others not to interfere with it" (1982, p. 171). Power, on the other hand, is not necessarily a right, as **Weber** recognised. However, legal rights for Weber may grant individuals a specific type of power over others. The rights Weber refers to here are property rights, which can be used through the medium of contract to shape socioeconomic relations. The right-holder here profits from the state lending them coercive enforcement power for fulfilling contracts and defending property (Weber, 1954). The connection of rights and duties is not limited to property rights and contractual rights: Hart conceptualised public law rights as allowing an individual to interact with the rest of society at large represented by the state. The relational conception of rights requires recognising and mediating conflicts of rights as privileges with each other as well as of rights and corresponding duties though.

Conflicts between rights and their mediation can be avoided by **minimalist conceptions of rights,** most radically put forward by **Dworkin**'s idea of "rights as trumps" (1977), who perceived of rights as absolute barriers to any competing societal interest. This idea was challenged even by other liberals such as Nozick, who demanded that rights must cede before the collective good at times. They thus become relative side-constraints of either state action or one's own actions (Nozick, 1974, pp. 28–34). Nevertheless, non-violation of rights may be part of the collective good as well, requiring that the total sum of violations be as low as possible, while still allowing for curtailing individual's exercise of their rights at times (Nozick, 1974). Such liberal concepts of rights disregard factual preconditions of exercising rights, and ultimately rely on these preconditions being created beyond the public sphere where women, slaves, animals

[1] It is not intended to give a full literature coverage here. See only (Hurd & Moore, 2018).

combine resources allocated to the right-wielder (land for example) to enable him to live. In other words, minimalist concepts of rights are inextricably linked to the differentiation between a private and a public sphere, where rights are only protected in the latter. In the words of Loughlin, the precondition of public law in modernity is that "the political realm can define itself as an autonomous sphere" (Loughlin, 2010, p. 7). This again is based on the idea that the public sphere emerges with modernity, while simultaneously other specialised spheres also emerge, such as the economic, scientific, technical, intellectual and political spheres. Which of those are public and private can change over time, but anything economic has so far been firmly in the private sphere.

Minimalist conceptions of rights are almost always linked to rights in that public sphere, either as constitutional rights guaranteed by nation states, or human rights embedded in international law instruments, which have recently been emulated by the EU in its Charter of Fundamental Rights requiring for the EU to protect liberal, democratic and social rights. Even in relation between states, transnational and international organizations of public law on the one hand and natural persons (as well as companies) on the other hand, minimalist concepts with their strictly categorial and absolute approaches have their problems. The stakes of their recognition by courts and alternative juridical institutions are high, which may result in judges hesitating to recognise (new) rights (Cecco, 2023; Greene, 2018). Moreover, absolute rights are ill equipped to address conflicts of different rights, different right holders or different spheres in which rights are guaranteed. In order address those conflicts, rights need to be weighed against each other, through "lexical ordering" (Waldron, 1989), using proportionally in order to balance conflicting rights (Grimm, 2015; Lenaerts, 2019; O'Leary, 2018), relying on a differentiation between essential and non-essential elements of rights (Cecco, 2023) or regarding rights as principles requiring (mutual) optimisation (Alexy, 2021, pp. 132–264).

Maximalist conceptions of rights offer an alternative perspective, replacing formal constructions of rights by the substance those rights are meant to guarantee or safeguard. For example, Amartya Sen grounds rights in everyday life. With the capability approach, the emphasis is on whether one is in a position to actually achieve said capability, rather than theoretically have said rights. (Sen, 1982, 1996). In this aspect, rights are goals, rather than simply "side-constraints". This approach implicitly disregards the public character of rights guarantees. Building on Sen, Martha Nussbaum develops a conception of capabilities largely oriented toward welfare and well-being, setting out a list of "core capabilities" which individuals are to be able to rely on effectively. These include integrity of body, senses, imagination and thought, or play. As rights and capabilities are "equivalent", both can be pursued as goals of public planning (Nussbaum, 1997). This is a more vertical approach, centred on protection and welfare often associated with the state, although neither Nussbaum nor Sen explicitly focus on who the duty-holder or provider of (common) goods necessary for the capability to be realised is meant to be. However, this approach does not address the issue of capacity-holders having different interests falling under these capabilities, and that the interests of different persons may clash (Raz, 1988), transferring these contradictions to capabilities as well. And with such broader conception of what falls under rights/capabilities, the likelihood of conflicts between different right-holders, or unmanageability of multiple duties toward multiple right-holders is unavoidable.

1.3 Overcoming the public/private divide

While distinguishing between rights derived from public and private law may help with taming the teeming literature on the concept, it is questionable whether this divide is still sensible.

Framed as public law concepts, rights are defined as human or constitutional rights, in the latter dimension often as citizens' rights (Marshall, 1950). Their oldest layer is meant to prevent public power (the state) from interfering with the preferences of individual rights to property and personal liberty. Even that layer is rooted in what is common to human beings, namely the essence of human personhood, albeit in a misunderstood and crippled form of a socially isolated human being. Public law rights have developed beyond that primitive approach. As soon as they comprise rights to political participation, they also presuppose a connected subject. Developing political demands through freedom to express an opinion, through forming associations together with others, and through taking direct political action through assembling presuppose interactions of human beings. Further on, rights such as academic freedom, freedom of association and freedom of the press (and other communication media) have a clear institutional and thus collective dimension. Therefore, individual rights can be used to demand institutional manifestations such as publicly funded universities, space and time for associating, or structures, including funded structures, for media outlets.

EU derived rights were never mainly aimed at the public law arena and could even be viewed as predominantly private-law oriented. Since the EU's explicit aim is to create an ever closer Union of the peoples of Europe, the Union can hardly be presented as a society or community of states alone, although that concept has recently been revived as the basis of the European Society (Von Bogdandy, 2024). From the 1950s, EEC Treaty provisions enforceable by individuals were meant to ensure that markets, the home of private law interactions, became transnational. The very concept of direct effect emerged from the strategic use the Treaty, crafted in the realm of international public law by a closely-knit group of lawyers whose professional life initially developed in the realm of contract and trade law, i.e. the sphere of private law in the continental tradition (Cohen & Vauchez, 2007; Vauchez, 2015). EEC market-making law could usefully be conceived as private law. Private law institutions such as contracts are traditionally viewed as instruments allowing the protection of interests of individuals in the private sphere against the public power, at times referring to their existence "since antiquity" as a justification of their enduring relevance (Basedow, 2021, p. 15). In that understanding, the private sphere must be free from any public law demands other than protecting autonomy, which is why it cannot "make society" (Basedow, 2021). Rights in private law remain an anathema from that perspective, neatly captured by a rejection of anti-discrimination rights especially in any precontractual phase (Basedow, 2021, pp. 452–456, 463–476).

Many EU-derived rights were instead aimed at shaping markets in a fairer way, overcoming that stale conception of private autonomy. Rights generated by EU regulations, directives and case law in consumer law, employment law, data protection law and general contract law have thus been identified as the basis of a new European private law (Micklitz, 2018, 2022). For this new European private law, rights constitute a defining category: returning to rights as claims, which are matched by obligations, it is easy to see that rights can be created by contracts and private associations agreements. In relation to social media, these create contractual networks complete with access rights and platform-based adjudication structures beyond any public

control (De Gregorio, 2022, pp. 33–35). The claiming of privileges of private autonomy by multinational corporations surpassing many states in terms of economic might is one of the roots of critiquing the distinction between public and private law (Law, Shaw, Havercroft, Kang, & Wiener, 2024).

More mundanely, the different traditions within the EU render the public/private divide artificial. For example, employment law and consumer law may be viewed as private law in Scandinavian and Germanic countries, while the common law tradition categorises employment law as public law, and some French jurists may view consumer law in the same vein.

For developing the concept of rights, the distinction between public and private law seems less than useful. If the strongest rights are claim-rights, rights derived from contract and tort are among the strongest, while public law rights may often constitute mere liberties (privileges). The question to be asked is whether rights are suitable for pursuing societal justice instead. This brings us to the substance of rights.

1.4 Substance of Rights: from right to property to the right to be forgotten

Rights (in general and in EU Law) certainly encompass liberal rights, and in particular the right to property and the freedom to conduct a business. Yet, as presented for example in Marshall's seminal work, there are more generations of rights. Civil and political rights are based on the interaction of citizens, and social rights ensure the preconditions of utilising freedoms as well as political rights. Marshall envisaged all those rights as mainly vertically directed against the state (Marshall, 1950). Since the Webb's seminal work even before Marshall, the idea that social insurance and protection through industrial relations engenders autonomy both from the state legal system and the risks of industrial working life has been established (Polanyi, 1947; Webb & Webb, 1902). Social rights, interpreted through a Weberian lens, have been viewed a resource of empowerment for individuals, ranging from direct granting of resources from public budgets to inclusion in market-based interactions with other individuals. Overall, this is summarised as "allowing them to obtain conformity to their intent" both vertically and horizontally (Ferrera, Corti, & Keune, 2023). When social rights are constitutionalised, the relationships enabled by them are to be "channelled in the Constitution through the principle of constitutional solidarity" (Lucherini, 2024, p. 6). The relational dimension of social rights, as stressed by constitutional courts in Italy, Portugal and Germany, has at times led to exclusion of those deemed not to belong to the community bounded by nationality. Yet these ideas also indicate a link between social rights and societal integration, potentially also at the level of global society (Hollenbach, 2021). If solidarity is a "structural principle of constitutional law" could "integrate societies at the same time as it transforms their consciousness" (Linden-Retek, 2023, p. 49)

Further, the digitalisation of economy and society gives rise to yet a new generation of as yet inchoate digital rights. Since the digital economy and communication technology are largely privately owned, digital rights if they are to be functional cannot simply protect private property from interference by others or the state (Waldron, 2014). The reality of what is at times called the algorithmic society, is firmly based on private rule, which until the recent EU legislation went largely unregulated. Those private powers regulate access to information and creation of content, complete with contractually established (or sometimes imposed) adjudication. The required rights response has long developed beyond data protection, and potentially

encompasses a wide array of rights (De Gregorio, 2022). Digital rights demonstrate how an individual's interactions with a public entity and a private entity become more similar, further validating the conclusion to transcend the public/private law distinction in the conceptualisation of rights (Taylor, 2017). But this does not impact the one commonality identified across all categories of rights: a right bearer (individual or group), a duty bearer (public or private), and the content of the right/duty.

1.5 Taming the paradox?

To conclude this section, we can offer a working notion of rights. Rights encompass claims as well as liberties, which can also be phrased as claims not to be hindered from engaging in an activity. A right as a claim can relate to a single duty-bearer or a collective of them, while liberties are always directed against an unlimited number of duty bearers or a collective, such as the state or the EU. Next to individual rights, there are collective rights. Collective rights as claims enable a group to demand a good (e.g. a just wage) or a service (e.g. access to a social media platform). Collective rights as liberties can be construed as rights for groups to be respected in some form of identity, e.g. in relation to retain conduct in line with their ethical orientations in a larger society which does not share these.

Section 2: Rights in societal reality

2.1 Using rights: litigation, institutions and culture

The existence of a (legal) right may be merely symbolic if it cannot be used in practice. For rights to be experienced in societal reality, material and immaterial resources to wield rights are needed, by a variety of actors (Ferrera et al., 2023). The way in which rights are utilised impacts on whether and how they initiate interactions within societies, as well as whether the goals of rights are achieved. Accordingly, both the process and the outcomes of utilising rights matter.

Legal rights may be used in legal proceedings, whether before judicial authorities, human right bodies or other rights enforcement agencies. Depending on the national culture, **litigation** may be highly adversarial and costly, or conversely efficient and easy to access. Strategic litigation has been dubbed *legal liberalism* in the context of court-based litigation for social change in the US, in the 70s and 80s. In the social movements of the 2000s, courts and lawyers are presented as a transmission belt of social demands, rather than actors of it, thus maintaining sufficient distance from the political arenas to have an impact (Cummings, 2017). Others doubted the potential of strategic litigation in the US context to bring about real social change. For Scheingold, the "myth of rights" did not end the "politics of rights", and rights advocacy before courts often failed to result in meaningful social progress (Scheingold, 2004). Indeed, courts are, by nature, not equipped to turn legal reality, including legal change and rights, into social reality: neither directly (due to a lack of true power of coercive enforcement) or indirectly (through normative power, legitimacy and persuasion) (Rosenberg, 2023). Conversely, in a continental context, where legal costs are less prohibitive, strategic litigation has been recognised as a potential tool of the subaltern for pushback against existing patterns of power, and for emancipation (Buckel, Pichl, & Vestena, 2024).

The difficulties of litigating for rights, especially for social and anti-discrimination rights, has resulted in a variety of **procedural solutions involving commissions and other bodies** . The EU

requires its Member States to establish antidiscrimination bodies,[2] and institutions to support the rights of migrant EU workers for example[3]. Similarly consumer ombudsmen, rental tenant boards and data protection authorities have been established in a variety of states, easing access to justice –albeit in more informal ways that judicial protection.

Such procedures are not always state-f(o)unded and publicly controlled. Edelman et al found that private business may respond to legal rights by establishing **internal grievance procedures**, especially for workplace matters, which may subsequently be validated by courts (Edelman, Erlanger, & Lande, 1993). Far from internalising legal rights (Etzioni, 2000), this may simply be a rational choice for companies to shield themselves from legal liability, often supported by judicial findings that the mere existence of such procedures indicate compliance with the law (Edelman, Uggen, & Erlanger, 1999). At times, manager-led enforcement of rights may be bolstered by such institutional changes motivated by the *possibility* of litigation, (Epp, 2010). However, the effectivity of such approaches on the ground is uncertain. A worst-case-scenario is that of a privatisation of rights dispute resolutions which collectively brings down the standards of protection, as courts simply rubber-stamp them. Alternative Dispute Resolution (ADR) used by HIV carriers in China, for example, has been dubbed as a "quiet way to solve a conflict", thereby preventing real media coverage and public awareness of a potentially large-scale or systemic issue as well as consistency of dispute resolution (Wilson, 2012).

While **rights** are legal concepts, they are also **socio-cultural institutions** . "Rights" have made their ways into the common language. They can be used to frame social claims or present a specific social struggle, without the goal or even the possibility to *claim* them in a juridical sense. Rights are thus conceptually invoked with the hope of effecting change in a broader manner than through sheer claiming from right holder toward duty bearer. Such activities may accompany litigation, which need to be backed by a wider social movement outside the courtroom to have any influence. Furthermore, rights may leave the courtroom to become an independent object part of the legal consciousness, even as myths incorporated in the structure of organisations. **"Rights talk"** does not require litigation, and neither does **rights advocacy**. Actors can shape the societal discourse itself around rights, even when litigation is not successful. As using courts is, all in all, a rare occurrence, most of the ways to put "rights at work" (McCann, 1994) is thought the "constitutive capacity of the law", the ability to frame a particular claim as a *matter of rights* in the public consciousness (McCann, 1992). This also highlights the importance of informal institutions, in ensuring that rights can actually be enjoyed by the right-bearers (Cousins, 1997).

[2] Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU, OJ L, 2024/1500; 29.5.2024; Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC, OJ L, 2024/1499, 29.5.2024

[3] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers Text with EEA relevance, *OJ L 128, 30.4.2014, p. 8–14 (Article 4)*

Rights can become mere **cultural concepts** where law is only in the background, but the concept of rights still may gradually change with time and shape how individuals and institutions use their resources (Nash, 2015) Engel and Munger, in an extensive legal biography of two disabled women navigating their personal and professional life after the adoption of the Americans with Disabilities Act (1990), find that none of them ever willingly "claimed" any ADA-guaranteed rights, especially through litigation, finding it to be othering, and setting them apart from others in a negative manner (Engel & Munger, 1996, p. 43). Instead, they found that the ADA put disability rights on the cultural map, and positively shaped interactions and discussions with others, employment opportunities and conditions, due to transformed consciousness rather than "implementation" (Engel & Munger, 1996, p. 21). This moves yet again one step further from a legal understanding of rights. The concepts of "rights" becomes a beacon around which a discursive space can be created. Its content can be altered over time by collective action (Nash, 2015). A successful human rights culture depends on avoiding a perceived opposition of individual rights with majority interests. Instead rights are "understood as concerned with relationships, both personal and public, and as open to compromise" (Nash, 2005, p. 346). Rights consciousness and rights discourse form a common language though which people articulate claims against others, how to treat others and they want to be treated (Minow, 1987).

2.2 Rights in a complex world: everything, everywhere, all at once?

Traditionally, rights have been conceptualised within a single domestic (or national) legal order, assuming that there is authority at the centre in principle to enforce rights. Some authors perceive a societal community of shared values as a preconception for guaranteeing rights effectively, and accordingly are sceptical of constitutionalism and rights beyond that level (Grimm, 2019). Yet, once we accept the potential of developing societal integration on the basis of law against the background of a diverse society (Schiek, 2012, pp. 31–35), multilevel systems of rights protection can be conceptualised.

At a formal legal level, the Kelsenian tradition places a Basic Norm (*Grundnorm)* at the apex of the pyramid of norms, where each subsequent level cannot contradict the one above it (Kelsen, 1967). Conflicts of rights derived from different levels are solved by prioritising higher levels. Hart used a different basic principle, the primary and secondary law, to help structure the entire legal order. Secondary rules include the *rule of recognition*, a socially grounded rule "setting out the criteria for legal validity" (Shapiro, 2009), and the *rule of adjudication*, determining who is able to solve legal disputes and how (Hart, 1961). But today, sources of rights multiply, and new frameworks are necessary to truly account for the phenomenon. Broadly speaking, these new frameworks for multilevel systems of rights revolve either around notions pluralism, or of multilevel governance.

The European context offers an interesting case to explore **legal pluralism** of rights, as is made of "incomplete pyramids" and "strange loops" (Delmas-Marty, 2002) involving the European Union legal order (encompassing 27 Member States) and the Council of Europe's human rights regime with the attached European Court of Human Rights (ECtHR, encompassing 46 State Signatories). In both instances, many of the Member States or State Signatories are federal states. Krisch argues that these legal orders, all dealing with rights one way or another, exist in heterarchy, without "a common legal frame of reference" (Krisch, 2008). This multiplies the sources of rights that one person can claim, but also the potential for uncertainty and

contradictory interpretation of rights. Some researchers consider "integration through rights" only from a human rights basis, concluding that the lack of an ultimate organising principle of human rights between the EU and the Council of Europe allow for the constant evolution of European rights at large (Morano-Foadi & Andreadakis, 2020).

The **governance-based approach** highlights not only the multi-level structure of legal orders today, but also the diversity of actors involved in establishing and implementing rights, and their varying competences at each level. Dawson defines this model as being characterised by both normative dispersion and capacity dispersion, involving both public and private actors in the development and/or enforcement of rules and norms. He identifies that actors involved in EU fundamental rights in particular, are dispersed regarding decision-making and execution/implementation (Dawson, 2017). This makes for a polycentric system of rights, both regarding sources and forum where one can claim said rights, not only vertically but also horizontally, where regimes risk collisions without a hierarchical authority to coordinate them coherently (Fischer-Lescano & Teubner, 2004).

Even if we focus on the European Union with its supranational law model, the division of competences between governments and courts at EU and national level is complex. While there is a clear case for economic rights at EU level overriding those at national level, social rights are partly reserved for Member States, and mainly a shared competence between levels. That inconsistency, combined with the tendency to create tensions between economic and social rights, implies conflicts between levels (Barbier & Colomb, 2012). Moreover, social and economic interests at the centre of the EU are said to differ from those at its periphery, and by simply relying on a proportionality assessment, the CJEU "discursively silences the centre-periphery problem. Its generalized discussion of rights to strike or freedom of movement takes the claims of the structurally privileged as the relevant interest to be balanced. This sidesteps a crucial discussion of transnational redistributive consequences and political economy" (Linden-Retek, 2023, p. 170).

Conflicts of rights, and therefore conflicts *through rights*, are unavoidable. While there exist legal and judicial tools and methods of interpretation to resolve these conflicts and articulate rights to ensure societal coherence, these tools' relevance and even existence are questioned once one consider the structure of the global legal actor that individuals evolve in today. Economic, social and digital rights push and pull in potentially different directions – and yet, they are still fundamentally interactive, a way to frame interpersonal relations that may contribute to societalization processes (see Section 3.3).

2.3 Critique of Rights

Rights are not without critique, which again is relevant for the extent to which they may usefully contribute to societal integration.

Marx's critique of rights related to a global system in which guarantees of first level rights (protection of property and liberty) were well established, while political rights (freedom of opinion, voting rights, democratic rights) were still inchoate, and social rights were starting to develop. "The Jewish Question" is directed against the 18th century Declaration of the Rights of Man boils down to two elements; aptly summarised by Nash (2019, pp. 491–492): first, the 19th century human rights analysed by Marx protect private property and thus the main tool of exploitation of workers under capitalism. Second, human rights establish an illusion of equality

and justice, while also supporting the ideology of isolated subjects who are not connected through social conflict. Nowadays, while the international human rights system has developed to encompass social rights, the protection of property rights and liberty (including freedom to conduct a business) remain dominant, prompting the conclusion that rights discourse is irrevocably linked to protecting imperialism (D'Souza, 2018) or capitalism (Nicol, 2010).

Current Marxist theories captures yet another rights paradox: on the one hand, claim rights (whether constitutional, public or private law based) promote individualism, converting individuals in abstract right-bearers, who negotiate and agree on claim-rights on the fictional basis of equality abstracting from socio-economic inequality (Buckel, 2020). On the other hand, rights and rights discourse also has the potential of lending agency and empowerment to the subaltern, who can use the formal fiction of equality in order to showcase and articulate oppression (Buckel et al., 2024).

Critique of rights has been the focus of a series of research projects based on Luhmann's and Teubner's ideas of **autopoietic law** (Fischer-Lescano, Franzki, & Horst, 2018; Menke, 2020). That critique refers to Marx as referenced above, but instead of relating to individualism and power relations, it portrays legal rights (subjective Rechte) as fundamentally incapable of relating to social reality, because the legal system will only ever be self-referential (Luhmann, 2008) or autopoietic (Teubner, 1993). Overall, the autopoiesis and self-referential framework to the institution of law has limited value in capturing the concept of rights. There is some affinity to Foucauldian thought as well, though Foucault can be read as providing a limited constructive approach to using rights claims tactically or even politically (Aitchison, 2019).

The isolated abstract subject of rights is also at the core of **feminist critique** of human rights, according to which the unconnected individuum is a patriarchal illusion (Fineman, 2005; Okin, 2004) which again leads authors to question the suitability of anti-discrimination law to promote substantive equality, for example (Thornton, 2021), either to modify its content (Mulder, 2021) or fully abandon the idea of human rights and anti-discrimination law in favour of vulnerability (Fineman, 2019). Radical feminist critique has much in common with **ecological** critiques of rights and the quest for after-rights transcending anthropocentrism of classical human rights (Petersmann, 2023), an aspect which is beyond this paper and RTU's research.

Some of this critique lead to the question whether **rights are the best way to pursue interests in the name of societal justice** : rights require individualisation and an adversarial process, which may inhibit solidarization as well as negotiation for aligning antagonistic interest. Industrial relations and employment rights constitute but one example of how this may play out. Most labour law systems distinguish between conflicts of interests and conflicts of rights, often limiting legitimate industrial conflict and interest representation by trade unions and other workers' representatives to the former. There are overlaps, resulting in strategic choices between pursuing interests through litigation or through the industrial relations process (Roach, 2022). For example, the right to equal pay irrespective of gender has been asserted through industrial action in some European countries and through litigation in others (Deakin, Fraser Butlin, MacLoughlin, & Polanska, 2015; Hoskyns, 1996, pp. 60–78). With the increasing capture of rights-discourses and simultaneous decline of trade union strength, juridical pursuit of labour rights becomes more common (Bondy & Preminger, 2022). Beyond labour law, similar processes can be found in relation to social fights of tenants or small farmers, all illustrating the Janus-faced character of rights regimes.

In conclusion, there is potential to using rights in the real world, even moving beyond national levels. However, rights must contend with critique from several quarters, which may impact negatively on their relevance, or even effectiveness, for societal integration.

Section 3. Integration and disintegration of societies

3.1. Integrating or disintegrating societies?

The idea of integration through rights questions the focus of European integration theory on the coming together of (nation) states into a larger post-national or transnational entity such as the European Union. Instead, focusing on rights as claims (that lend individuals agency) facilitates a focus on integration (and disintegration) of societies, including the emerging European society. Accordingly, the question of what constitutes integration and disintegration of societies needs to be considered.

Answers can be negotiated by considering what holds societies together, always keeping in mind that this should not only or even mainly be asked for national societies. The question of the "glue" for societies, or the medium of social cohesion, is a quintessential sociological question. It is traditional to distinguish three different **mediums of social cohesion**: ideational (Comte), derived from the division of labour and resulting exchange/interaction (Durkheim), and based on power and domination (Weber) (Heidenreich, 2019, p. 23). The first approach is reflected in works that consider common perception of the common good or shared values as the basis for social cohesion (Delhey & Dragolov, 2016), though value convergence is deemed to decline with larger entities emerging as a basis for social integration. Unsurprisingly, very general values such as acceptance of diversity and benevolence towards others emerge as relevant (Moustakas, 2023).

Durkheim (1893/1964), for his part, considered that social integration depended on solidarity, which in complex societies could no longer emerge mechanically from ties experienced as given (e.g. to the family or tribe), but instead would be derived organically from exchanges between mutually interdependent individuals. Durkheim himself viewed his model as capable of explaining solidarity across borders, if a new larger reference point for identification could be found (Pernicka & Hefler, 2022). The idea is reflected in Parson's concept of social integration through interaction and can be expanded to encompass "unity in diversity" (Trenz, 2011).

Finally, in a Weberian perspective social integration is but one element of establishing legitimacy of a social order and the voluntary adaptation to its norms by individuals. As social integration corresponds to a voluntary commitment of being governed, the Weberian perspective also aligns with approaches that identify social integration with hegemony (Gramsci, 1971).

Rights guarantees can have a role in any of these approaches: they embody values, and are part of the hegemonial legal project, while also (more indirectly) giving a basis for stable exchange relationships.

3.2 Societal (dis)integration in early European integration studies

Political science theories of European integration, despite their focus on States' cooperation in the realm of public institutions, are not oblivious to integration of societies through interaction between individuals and groups (Azoulai, 2016; Cappalletti et al., 1986),

starting with classical approaches to European integration such as transactionalism and neo-functionalism.

Karl Deutsch used sociological approaches to interpersonal communication as a basis of his **transactionalism**, observing how the shift from agrarian economy to one based on differentiation required the development of transport grids, communication devices and mobility of persons, which again fostered social integration. In this approach, legal guarantees did play a role in this fundamentally Durkheimian approach (Deutsch, 1953).

Haas's **neofunctionalism** linked this type of communication-based integration to individuals and groups being active and interest-seeking in the process, stating that regional integration occurred "when societal actors in calculation of their interests decided to rely on the supranational institutions rather than their own government" (Haas, 1958). His ideas echo David Mitrany's functionalism, who proposed practical arrangements for satisfying specific needs as an alternative to the United Nations (Mitrany, 1944). The "functional way", in his view, was exemplified by installing an international government for a specific sector, such as shipping goods on the Rhine, which he hoped would enable "international social community", building a "common legal order" (Mitrany, 1965, pp. 135, 137). Mitrany's functionalism harkens back to sociological functionalism of Emile Durkheim (1893/1964) and Talcott Parson (1951).

Building on and refining Haas, Hagland offered a more detailed model of (political) integration with four essential components to the process: formalization, institutionalisation, transnationalization and **societalization**. The latter is of particular interest, as it represents a subjective assessment of whether one recognizes the contribution of the supranational entity to their welfare and security. It epitomizes "the expansion of supranational organizations' societal base", ultimately resulting in the "construction of a new and enlarged society" (Hagland, 1995). But contrary to Haas', Hagland's approach allows for a more complex identity- and loyalty-building process, allowing for split simultaneous loyalties. The touch stone for successful societalization, for Hagland, is the degree to which the citizens recognise the supranational entity as contributing to their welfare and security, which will result in their identification with it.

3.3 Societalization as current notion for integration of European society/societies

We argue that the notion of "societalization", already introduced by Hagland, can be utilised more broadly to capture processes of integration and disintegration in and of societies. The notion of societalization has been suggested as the correct translation of the German term "Vergesellschaftung" as used by theoreticians such as Weber, Marx and Habermas (Schmidt, 2020), instead of terms such as "socialisation", "association" or "associative relationship". Vergesellschaftung used by these authors refers to the process of establishing society, be that the market-based society of modernity (Weber), the societalization of labour in capitalism (Marx) or the societalization through communication (Habermas). The notion allows analysing processes of society-formation, including complex societies based on structured interactions and exchanges. Accordingly, societalization can be conceived as an ongoing and in principle never-ending process. This holds true in relation to interactions between smaller and larger congregations of people, such as local, national, regional, European and global entities.

The very openness of the term motivates Walby (2003, 2021) to use this concept (without explicitly referencing Weber of Marx) to describe the **transnational integration of societies**.

Societalization in her view denotes the process of creating larger spaces of interaction. Societalization takes place through repeated interactions and institution-building at ever-wider levels beyond nation states. These developments are path-dependent and contradictory, facilitating and discouraging transactions at different levels and of different types. Societalization does not (necessarily) encompass homogenization, as contemporary transnational societies accommodate persistence of diversity in the interactions, identities and culture. (Büttner & Eigmüller, 2022) Using the term "sociation" (p. 169), Pernicka and Hefler (2022) point to the contradictory dynamics of the EU's market-driven integration processes, which on the one hand creates opportunities of transnational expansion of social fields and on the other hand limits opportunities for those remaining within former national borders (p 181-184), positioning the horizontal and transnational societalization processes on a continuum of "cooperation, competition and conflict" (p. 173). With limited reference to the Europeanisation literature, Schwinn uses the term "societization" in order to capture processes resulting in social integration and disintegration across different levels of society. He is decidedly sceptical of the idea that there can be any EU level societization, relying exclusively on the dynamics of EU citizenship, but disregarding other elements of EU-led societalization (Schwinn, 2023).

Processes of EU politics (and law) impacting on Member States' societies are also the subject of **sociological Europeanization** studies. They are "characterised by openness and conflict as well as different territorial ranges and multiple territorial references, with the European level playing a particularly important role" (Heidenreich, 2019, p. 24). These processes include the creation of cognitive-cultural and transnational rules and norms, bargaining processes and exchange relations generating competition for scarce resources. As such, diversification across fields and "winners" as well as "losers" appear, without necessarily resulting in socio-economic destabilisation. (Fligstein, 2009; Heidenreich, 2019; Trenz, 2022).

For theorising integration and disintegration of European societies/society through the EU itself, the term societalization can be usefully applied. It should refer to the practices leading to structured interaction in diverse and differentiated socio-economic entities encompassed by local, national, regional and European levels. Societalization in this sense does not imply merging of societies, but instead captures the simultaneous top down and bottom-up interaction, practice and behaviours at and between those levels. As such EU societalization captures processes which some sociologists class as a "value-neutral" transformation of society through the impact of EU politics and law (Delanty & Rumford, 2005; Trenz, 2022), as well as the impact of local and national societies on the EUropean level (Mau & Verwiebe, 2010, p. 14). In other words, societalization comprises positively reinforcing circles of integration resulting in positive experiences with Europeanisation, as well as social de-classification or exclusion fired by EU law and politics.

3.4 Rights, societal (dis)integration and societalization

What could then be the role of the law and rights for societalization? Rights can have material/economic effect, and impact "subjective Europeanisation": the "cognitive and affective perceptions of Europe and of European belonging" (Mau & Verwiebe, 2010, p. 329), contributing to the "Europeanization of everyday life" (Trenz, 2022). As a subsection of law, rights can be considered an interesting tool of daily practice of Europeanization, imbued with legitimation and promoting a shared identity (Frerichs & Losada, 2022). Relating to the ideational element of social integration, McNamara argues that the law can make the EU a social

fact, symbolically embedded in very facets of citizen's lives to create true "shared communities" (Anderson, 1991; McNamara, 2010).

In Habermasian philosophy, social integration presupposes a sufficient degree of identification with society to engage in discursive practices which stabilise societies. To this end, social rights were a central precondition for achieving the integrative capacity of the law (Habermas, 1998; Queiroz, 2021). Relating to the Marxist critique of rights, integration of societies can be defined as the creation of cohesion on the basis of hegemony [for example Buckel (2020, pp. 227–246)]. Rights, defined as claims derived from contract, tort or other private law institutions, as well as public law rights, gain central relevance because they structure the relationality of natural persons in the process of recreating the material preconditions of living every day. While societal integration may be achieved without the law, (Ferrera et al., 2023, 2023) rights as an element of the legal form plays an important role: it engenders the cohesion of societies on the basis of hegemony, reproducing the existing power relations, while also offering opportunities of challenging them.

Section 4 Relating rights and integration

4.1. Integrative effect of rights: societal integration through rights-based interaction

How does our updated understanding of rights help us develop a framework of integration and disintegration *through* rights? As mentioned, rights can contribute to all aspects of soc(iet)al integration through enhancing common values, exchange on the basis of shared labour and legitimation of powers. All this is based on their interactive nature. Figure 1 presents an overview of how a rights-based interaction can contribute to societal integration. Societalization can there be approached as virtuous circles where, through repeated interactions, the values and practices/behaviours of individuals and groups influence each other to become a true commonality across both groups.

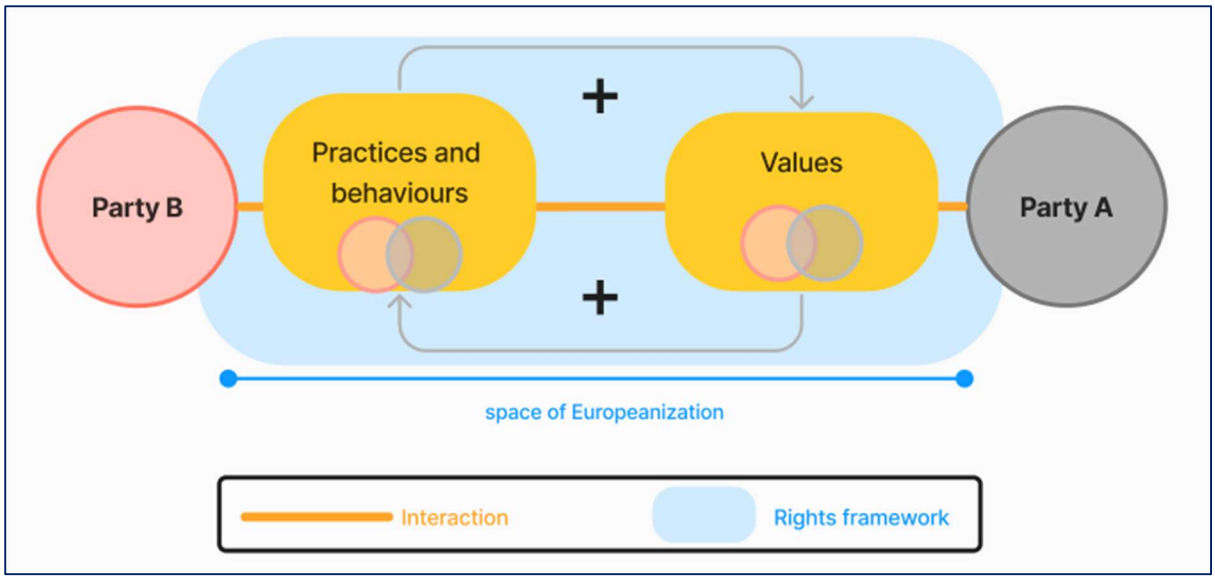

Figure 1: Societal integration through a right-based framework

This model does not require a harmony of interests on both sides of the interaction, but it does mean leaving both sides with an expectation of stable and essentially fruitful future interaction. The oppositional character of rights or interest antagonism between right-holder and duty-bearer (Raz, 1984) do not necessarily lead to rights becoming disintegrative, as long as the one(s) who claim them and the one(s) who have to abide by them do not end up in a cycle of negative expectations and disruptive behaviour.

This approach of rights as being integrative through shifts in behaviours and values is also illustrated by previously mentioned works exploring rights as culture, as opposed to a specific entitlement of a benefit which needs to be claimed. Rights can become the vocabulary through which common values emerge for a particular interaction, rallying both sides around mutually understood and accepted concepts (Heyer, 2002; Nash, 2005, 2015). Societal integration happens as interactions are facilitated and repeated through new standards of behaviour.

This seems to point toward an integrative aspect of rights regardless of their substance (social, economic, digital), and regardless of the repartition of public goods that they organise (although the next section will nuance this analysis). The important is that they foster gradual shifts in values and behaviours, rather than having to relying on oppositional or litigious approaches. It also validates sociolegal approaches highlighting how socially embedded the concept of "rights" is. In order to have an integrative impact, rights need to become part of daily practice and everyday consciousness. They would need to be the mundane, rather than the exceptional.

An illustration of a socially integrative set of rights can be, for example, the right to data protection embedded in the GDPR, the successor of the former Data Protection Directive of 1994. These rights-based instruments establish a framework for the interaction of subjects operating within contractual frameworks usually protected by private autonomy, which are now imbued with privacy rights, further enhanced by secondary principles such as transparency and reasonable use, and potentially disabled by consent (Strycharz, Ausloos, & Helberger, 2020).

4.2 Disintegrative effect of rights: points of failures in right-based interactions

While integration is furthered by interaction, conviction of the legitimacy of the order or shared values, disintegration can be expected when the use of rights leads to one of the following:

- Unwillingness/Impossibility to engage in the interaction again
- Limitation of willingness to comply with the envisaged order, diminishing of shared values or shift practices/behaviours

The various points of failures are summed up in Figure 2; a total of four potential points of failures have been identified at this stage. The RIGHTS TO UNITE project will constantly review, refine and update this framework, based on empirical findings.

4.2.1. Limited renewal of interaction: winners/losers in rights-based framework

The existence of a right between two parties does not guarantee that the right-based interaction will lead to a society-wide integration. The framework we use for societal integration does not rely on the interaction materially taking place, but on parties normalising this

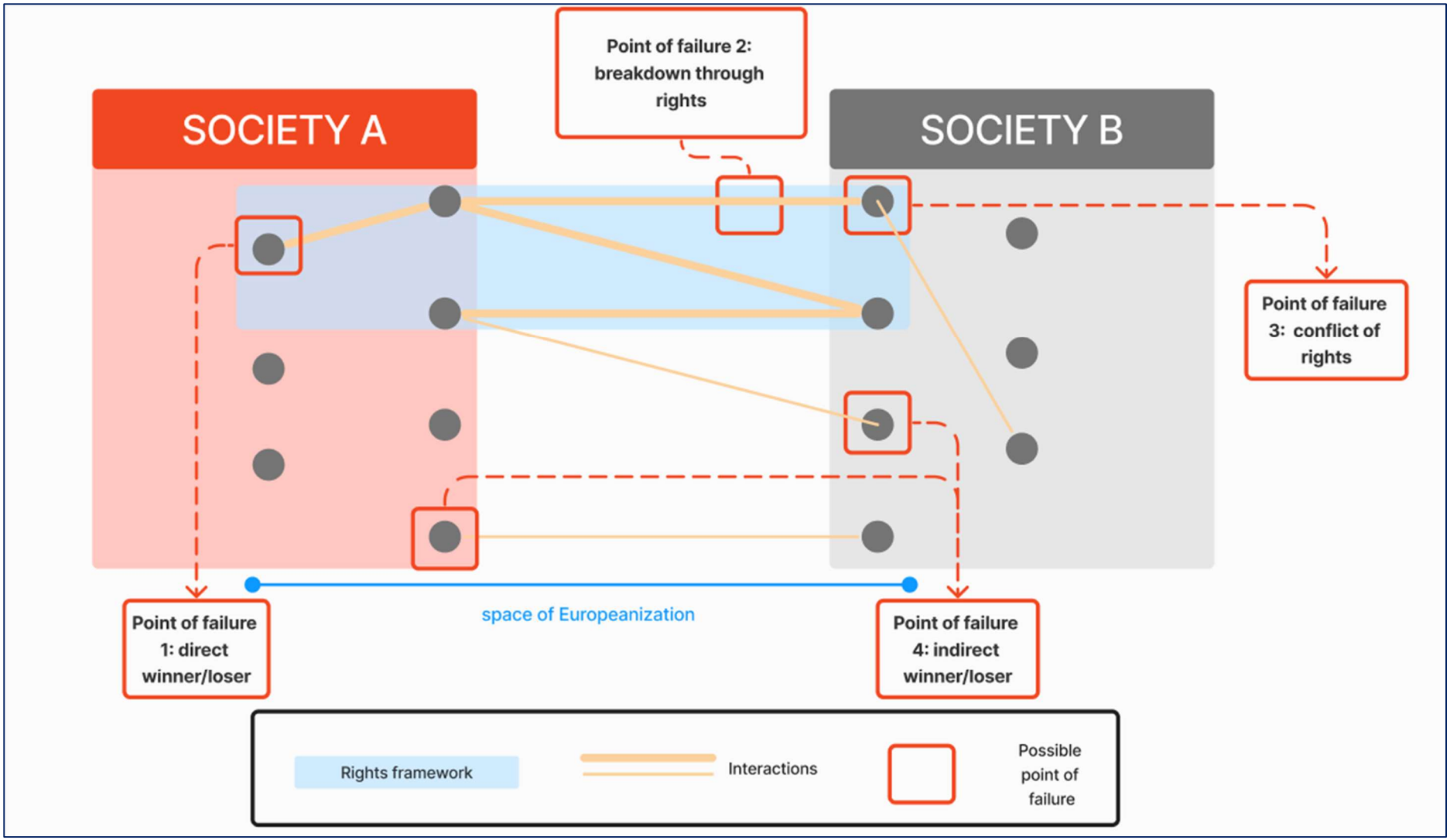

Figure 2: Societal disintegration through a rights-based framework

interaction by willingly engaging in it. This is jettisoned if the rights framework of the interaction creates either direct or indirect losers/winners.

A direct winner/loser dynamic **(point of failure 1)** means that due to the structure or content of the right, one of the parties loses more by engaging with this interaction than by not doing so; or loses comparatively to the gains made by the winner from that interaction. The loser (in all likelihood, the duty-bearer) is likely to be more interested in seeking different, more fruitful interactions, disengaging from this particular rights-based interaction. This may even lead to a side issue: depending on the right, the duty-bearer might still be locked in this right-based relationship, likely because it is *de facto* or *de jure* the only type of interaction now available. The interaction is therefore sustained, but is more likely to promote disintegration, than integration, as no common values emerge.

If this can be called a "direct" winner/loser failure, then the "population coverage" issue raised previously (Fligstein, 2009; Heidenreich, 2019; Trenz, 2022) also creates an "indirect" losers/winners asymmetries, based on who is or is not included in the rights-based relationship (**point of failure 4**). In other words, a type of right-based interaction can lead to successful integration, with the rise of common values and changes in behaviours, leading to more interactions in a path-dependant manner – but it will exclude from the circle of integration the ones who did not fit the requirements to enter this rights-based relationship, or were not able to claim entitlement to such relationship. This exclusion could be *de jure* (they are not bestowed the legal right in the first place) or *de facto* (they do not have the material or social resources to claim it one way or another).

4.2.2 Diminishing of shared values or lack of shift in behaviours

A third point of failure could be an inability for rights to properly foster the development of common values and/or coordinating behaviours. It is difficult, at this point, to ascertain what the causes of this would be, especially considering the previous section which had identifies rights as being very well-placed to normally do so. Yet, building on Sections 1 and 2 of this paper, we can put forward different scenario of failures of rights which will be further investigated in the RIGHTS TO UNITE project.

A first reason could be attributed to the **multiplication of the number of rights-based interactions** individuals or groups are engaged in (point of failure 3). While at the scale of one interaction, rights can promote societal integration, individuals are engaged in a multitude of interactions in their daily life: social, professional, personal, commercial, familial… A multiplication of rights-based frameworks can create a tension between the values and behaviours that would be expected or required to continue each of them through this rights-based framework. This calls back to the issue of conflict of rights, which can require mutually exclusive behaviours or rely on different values. This would explain the difficulty of effectively combining integration through economic rights and through social rights, as both rest of very different set of values. The multiplication of rights-based frameworks for interactions is then compounded by the multi-level and polycentric systems of governance which generate these frameworks. As this complex governance system is composed of polycentric sources of rights, they are not necessarily coordinated to promote compatible values or behaviours. Even if this can be solved judicially (Greene, 2018; Lenaerts, 2019), a solution found through litigation is not as effective as one that comes more organically from the right holder's practice. Worse, the solution found judicially may not match the lived experience or actual expectations of individuals caught in

these conflicting rights and be socially rejected even if it is legally sound. This does not mean that individuals will not engage in the interaction anymore – it might still align with their interest (for example in the case of cross-border trade) or simply be unavoidable (for example, in industrial/work relations), but the integration might then be economic only, rather than societal.

The last possible reason for a **breakdown through rights** rather integration through rights can come from a mismatch between the interactions and the rights framework itself (point of failure 2). It is true that rights can be used tactically (Golder, 2015) or at least be political in a manner that leaves them open for productive discussion (Aitchison, 2019). Yet, Nash recognises the individualism inherent even in progressive human rights politics, which may constitute a challenge to the group focus she reads into human rights. This chimes with the feminist critique of human rights mentioned above (2.3 Critique of Rights).

From yet a different perspective but reaching the same conclusion are studies arguing that the "rights revolution" was always less about courts-established rights, and more about the underlying political and economic incentives (Rosenberg, 2023; Scheingold, 2004). Rights may therefore fail to facilitate interactions and create new values and behaviours because a rights-based framework is not appropriate, or it may fail to take a hold of the discourse around this interaction. Once again, this does not necessarily negate the *existence* of the interaction, which can still take place; and one party may indeed attempt to rely on the rights framework – but the other is not willing to engage at the level of rights, and the integration remains economic rather than societal. Taken together, all these debates should generate fundamental doubts whether human rights can be expected to generate societal integration, or societalization.

An example of this could be the difficulty to develop effective social rights, recognized as rights on the same level as traditional liberal rights. Whether or not social rights are "real" is still an ongoing discourse both inside and outside academia, with a difficulty to reconcile their form as *individual* rights and their requirement of pre-existing community-based solidarity (van Gerven & Ossewaarde, 2012). This seeming tension between form and substance is also present in the discourse on the justiciability of social rights, where authors either attempt to confirm that social rights can be justiciable, with specific remedies (Lucherini, 2024; Roach, 2022) or instead argue over whether justiciability is what makes them *rights* in the first place (Alston, 2004; Langille, 2005). If the values required (and which can be in turn bolstered) and those of solidarity, it is not clear whether that solidarity is always sufficiently present; or what kind of change of behaviour would be expected to facilitate interactions; or whether the concept of "rights" is the one which resonates, on the ground, when carrying out an interaction which involves a social right, such a accessing healthcare or claiming a welfare benefit.

Conclusion

The RIGHTS-TO-UNITE project seeks to reframe European integration around societies rather than states. To do so, we argue in favour of focusing on the mundane, everyday aspects of European integration: the role of individuals, their practices and behaviours, and how the different facets of their lives interact with EU laws and policies. Beyond the framework itself, summarized in Figures 1 and 2, the main intellectual takeaways of this first working paper are

twofold. Both will guide the further research agenda of the Rights to Unite project, building on this working paper.

First, EU-derived rights, if they are to be taken seriously as vectors of societal integration and disintegration, cannot be approached from a theoretical or mono-disciplinary perspective. The reality of rights is found not only in the legal realm but also in the socio-cultural realm where individuals live their daily lives. They are both entitlements to be claimed in adversarial ways and cultural artifacts that frame local, national, and international discourse. Rights exist in complexity: their own complexity, that of their sources, and that of the ways they can be claimed. Exploring what rights mean for the transformation of societies requires accepting the many tempos and loci where they can effect change, even those that challenge traditional state- and formal institution-centered frameworks that legal studies are more accustomed to. We must also contend with the critique of rights that identifies the potential limits of what any rights framework can accomplish.

Second, the integration and disintegration of societies is a multifaceted process, evolving around exchange, legitimation and value convergence, none of which constitutes the only way to engender integration or disintegration. This reflects the diversity of society itself, where actors have different resources, different and at times antagonistic interests, and are situated in vastly different societal environments. The framework presented here, which will be refined in the years to come, is sufficiently flexible enough to account for the unequal coverage of EU rights, the varying levels of opposition between individuals and/or groups, and how the EU/EU neighborhood divide can compound these differences. Similarly, the Rights to Unite project will need to explore the diversity of rights themselves (economic, social, digital), and whether their nature or structure impacts the process of (dis)integration. The geographic and thematic diversity of empirical research to be conducted within the Rights to Unite project in the coming years will both reflect and feed into this novel approach to European societal integration.

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