

Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy

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ABSTRACT

The global expansion of human rights has shifted modes of political engagement in significant ways. This article analyzes this shift as one towards “judicial agency,” where an increasingly dense web of legal rights mediated by judicial and administrative bodies enables the individual to bypass traditional democratic forms of political mobilization. Through this new mode of political engagement, litigants challenge legislative and executive authority as they cross organizational and even national boundaries through a “nesting process,” seeking judicial ways through which they can restructure rules and norms over a range of issues. This development is particularly marked in the European Union.

I. INTRODUCTION

While our understandings of democracy have evolved within a particular conception of citizenship and nationhood, the emergence of new global

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structures, institutions, and modes of governance necessitate a recognition that democracy, as traditionally understood, is inadequate to conceptualize current modes of political engagement. The global expansion of human rights is often noted and, generally, is coupled with the assumption that this expansion is synonymous with the spread of democracy. The expansion of rights, domestically and internationally, however, is associated with a partial, but significant, shift in the mode of political engagement; from democracy, or republicanism, to the principle of the individual as “agent.” The “decline” of the nation-state is symptomatic of an even more dramatic but hidden revolution, the emergence of agency.

Indeed, issues of *agency* have supplemented, and in significant part supplanted, dedication to the *democratic* and *republican* process. Agency implies the ability of the individual to act as an “initiator” and “self-reliant” actor, and to be an active participant in determining his or her life, including the determination of social, political, cultural, ethnic, religious, and economic ends.¹ The foundational mechanism of agency is the dense web of legal rights and restraints, which are mediated or adjudicated by judicial, quasi-judicial, and administrative bodies of different kinds. In contrast to the past, no area of life today is beyond the potential reach of the law—its tentacles, for good and bad, reach into every sphere of life; from families to corporations to nation-states. Individual access to the dense web of judicially mediated legal rights and restraints has become the primary mechanism of individual “self-determination,” rather than the traditional democratic route of voting, civic participation, and political mobilization.

The notion of collective “authorship,” or deliberation, through the republican model fails to capture the force of the individual, as “agent,” as a primary form of political engagement in current patterns of governance. The politics of rights is not about the politics of consent as such, and “agency,” centered on the individual, is distinct from collective notions of national self-determination. Judicial and administrative mechanisms, as opposed to the legislature, become central in this process. Agency, in this context, rests in the implicit or explicit philosophical belief that individuals can shape the circumstances in which they live. Government and civil liberties are, or should be, in place to enable the individual’s private “pursuit of happiness.” Law, in this sense, is “enabling.” In contrast, “collective authorship” rests in republican concepts of freedom, lying in the public and civic realm, where citizens come together (through civic

1. We draw the quoted terms, used in a different context, from JAMES E. BLOCK, *A NATION OF AGENTS: THE AMERICAN PATH TO A MODERN SELF AND SOCIETY* (2001).

participation, including but not limited to, voting) to shape and form their commonwealth. Law, in the republican vein, is “constitutive.”²

In the debate over the future of the European Union, Euroskeptics seem to have stumbled upon agency. Instead of recognizing it as a distinct mode of political engagement or studying it directly, however, they have cast it as yet another thorn in the decline of democratic legitimacy. Thus, they discuss the “democratic deficit,” and complain about the lack of accountability; but, in fact, the nature of accountability has shifted (or become twofold)—from popular forms to one based on the rule of law or, more broadly, the “rule of rules.” While popular accountability relies on things such as elections, national parliaments for the enactment of legislation, and a direct relationship between the people and government, the mechanism of accountability through “rule of rules” is more subtle, and has not yet been fully explored. Indeed, the unpacking of “rule of rules” as a form of legitimate accountability challenges the deeply ingrained notion that courts function, and must be defended, within a democracy as a “counter-majoritarian” branch. “Rule of rules” differs, however, in that, as accountability is transferred to the legal realm with the individual as agent, states are increasingly held accountable for their actions through human rights norms and rules (The European Union is of particular interest in this discussion as it is an acute representation of the movement away from republicanism towards judicial agency.).

Joseph Weiler has taken important steps in recasting the question of democracy in the debate regarding the European Union (EU).³ According to Weiler, democratic deficit implies a given definition of democracy, which needs to be stated explicitly. He points out that it would be incorrect to judge the operation of the EU by the same normative criteria that are

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2. The use of the term “agency” here is different from the use of the term in the extensive literature on agency in social theory. One could also argue that republicanism is a form of agency, though distinct from the judicialized form of agency we speak of here. One can even trace the different philosophical traditions such that judicially-mediated forms of agency has its roots in the writings of Locke, Adam Smith, Bentham, and John Stuart Mill, who in different ways rejected tradition, grounded society in the social contract between individuals, and saw individuals as calculating actors determining their own interests and, in more present-day terms, their own lifestyles. Collective, republican-like “agency” instead views the individual as less driven by material and self-directed interest, but rather “realized” through his or her interactions with other humans in legislating a shared morality—more akin to Rousseau. Here we refer to agency in the restricted “judicial” sense, as described above. See Mustafa Emirbayer & Ann Mische, *What is Agency?*, 103 *Am. J. Soc.* 4, 962 (1998). See also HANNAH ARENDT, *ON REVOLUTION* (1990).
 3. J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999).

applied to ordinary nation-states.⁴ He emphasized that it is important to recognize that different aspects of the EU may best reflect entirely new modes of governance.⁵ Similarly, to ground our current understandings of “rule of rules” within traditional understandings of democracy, political engagement, and governance may prove counterproductive.

One can begin to unpack the logic of agency based in “rule of rules” by recognizing that certain political divisions are better categorized as disputes between claims for democracy, or republicanism, versus claims for agency, rather than a dispute over the general content of the rights at stake. Simply put, the advent of “rule of rules” has been challenging executive and legislative power. Agency places a strain upon executive and legislative power because individuals increasingly possess the capacity to assert their rights by accessing laws outside of the national structure and bringing them before the European Court of Justice (or, in the Council of Europe, before the European Court of Human Rights), or through new “cross-border” principles, such as direct effect, subsidiarity, harmonization, and proportionality.⁶

The threat agency poses to executive power became all too apparent as the United States and other governments throughout Europe quickly turned to extra-legal measures, outside of the web of laws, in reaction to the terrorist attacks of 11 September 2001, such as, notably, the establishment of military tribunals, “closed” removal proceedings, and interviews of 5,000 foreign nationals. Such measures are best characterized as strikes against agency. In the aftermath of 9/11, there was a perception among government officials and the general public that the Al Qaeda terrorist network had appropriated civil freedoms in forming their devastating attack.⁷ The significance of the assertion of executive power is not its curtailment of the

4. J.H.H. WEILER, *THE EUROPEAN UNION: ENLARGEMENT, CONSTITUTIONALISM AND DEMOCRACY*, available at <http://www.rewi.hu-berlin.de/WHI/deutsch/fce/fce799.weiler.htm>.

5. *Id.*

6. “Direct effect” refers to the European Court of Justice’s determination in the case *Van Gend En Loos* (1962) that European Community law constitutes a new legal order directly applicable in the Member-States. “Subsidiarity” embodies the principle that the EU can act only in areas where it has explicit power to do so, and that the region, as a whole, should act only when an objective can be better achieved at the supranational level. “Proportionality” is defined within the context of subsidiarity as the qualification that European action must not go beyond what is necessary to achieve the objectives of the Treaty of Rome. “Harmonization” is a phrase used to describe the overall process of coordination and legal integration of the Member-States, with particular regard to the internal market.

7. For example, the use of a credit card and the Internet to purchase airline tickets, the freedom of movement between the U.S. and Canada, freedom of religion and charitable contributions, and the right to privacy were all cited by the American administration as ways the terrorists exploited democracy. See generally Sokia Sassen, *Global Cities and Diasporic Networks: Microsites in Global Civil Society*, in *GLOBAL CIVIL SOCIETY YEARBOOK 2002*, 217 (Center for the Study of Global Governance ed., 2002).

rights of those subject to government suspicion, but rather, the stop it put on agency as a mechanism by taking security measures out of the realm of law altogether. In Germany, and other EU member-states, entrenched rights, such as the right of privacy, were not questioned so much as bypassed by executive power. Thus, for example, Berlin's Humbolt University gave information on twenty-three Arab students to the German government.⁸ What we see is not a questioning of the right of privacy per se, but rather a questioning of agency and a reassertion of executive power.

While the generally accepted principle of, for example, a state's right of immigration control is not at issue (and is not subject to frontal challenge), the secondary "web of laws," such as rules of non-discrimination, empowers the individual, as agent, to affect how that immigration control is achieved. Thus, political divisions are played out, in important part, between claims for democracy, or republicanism, versus claims for agency. This creates interesting conjunctions on a policy level. Returning to the example of immigration control of asylees and refugees: the legal instruments of rights, specifically human rights, do not prohibit immigration control, just the form of regulation; that is immigration control should be based on recognized universal, non-discriminatory criteria as defined by international human rights instruments. In principle, the flow of migrants, restrictive or liberal, is independent of human rights issues per se. Government authorities can interpret asylum laws in ways that meet the strict letter of international human rights law, while still severely limiting the flow of potential asylees.

Thus, we witness this interesting conjunction in border controls: In practical terms, because of internal pressures or because "host" societies feel asylum laws are being unfairly exploited, states may become more restrictive. But the question remains: are those restrictions within the criteria of international human rights standards, as defined by the European Court of Human Rights, the European Court of Justice, and the like? Restrictive practices—*based on non-discriminatory criteria*—reflect the intersection of these different forms of political practices, of the executive or legislative branches on the one hand, *vis-à-vis* the judiciary on the other.

We see these conflicting forces between the judiciary and the executive in relatively recent decisions. For example, the European Court of Human Rights condemned the French government for trying to keep asylum seekers in "international zones."⁹ These zones, though physically in France, were

8. Steven Erlanger, *A Nation Challenged: Berlin; Shocked Germany Weakens Cherished Protections*, N.Y. TIMES, 1 Oct. 2002.

9. *Ammur v. France*, 22 Eur. Ct. H.R. 533 (1996). See discussion on *Ammur* and following ECHR cases in Hugo Storey, *Implications of Incorporation of the European Convention of Human Rights in the Immigration and Asylum Context*, 4 EUR. HUM. RTS. L. REV. 452 (1998).

considered not to be in France for the purposes of the European Convention of Human Rights, which, in effect, placed people in indefinite detention.¹⁰ Similarly, the United Kingdom was similarly unsuccessful in persuading the Court that a man, who was not formally admitted to the country but had been a resident for five years, was not, legally-speaking, within the country.¹¹ Additionally, the Court has upheld the right of an individual not to be returned to a country where he would face degrading treatment.¹²

Conversely, the member-states have a “common visa list,” maintained by the EU, that requires potential visitors of a specified list of countries to obtain visas from member state consular officers in their country of origin before entering an EU member state.¹³ The list, which can change as countries are added or dropped from the list, catalogs countries that have a record of “sending” individuals seeking asylum. This is designed to bar individuals from ever reaching the European Union in order to request asylum. (It should be stressed that whether this actually violates international human rights law—which sanctions the right to leave a country, but not a right, as such, to enter a country—is certainly open to question.) Thus the struggle between the judicial arms, which has the effect (in this regard) of promoting agency, and the state, which seeks to promote republican national self-determination, is evident in this process. Part of the contention here, however, is that the increasing density of the law, which promotes rights and prerogatives (and thus agency), is central to the growing role of the judiciary. It is the judiciary, at both national and regional levels, concerning both domestic and international law, which mediates and adjudicates this web of law. For example, the role of the judiciary in the newly emerging democracies, such as South Africa, differs significantly from that of the older liberal democracies, such as the United States or Germany. In the newer democracies, there is not just the acceptance of, but the proactive vesting of power in the judiciary as a political body with a political function.

In the continuing evolution of the EU, there is an increasing shift of power towards formal commitment to human rights as well as mechanisms to enforce those rights within the member states. The Treaty of Amsterdam formalized measures to extend the rights of citizens, and sought to improve accountability and participation in the institutions of the EU.¹⁴ In a

10. *Id.*

11. *D. v. United Kingdom*, 2 Eur. Ct. H.R. 273 (1997).

12. See *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1996); *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep 439 (1989).

13. Treaty Establishing the European Community, 10 Nov. 1997, O.J. (C 340) 3 (1997) [hereinafter EC Treaty] art. 6a (as in effect 1994) (now art. 13).

14. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 Oct. 1997, O.J. (C 340) arts. 1, 2, 6 (1997) [hereinafter Treaty of Amsterdam].

significant departure from the past, the Treaty called for enforcement of non-discrimination principles within member states, and opened the channels of communication not just to address issues such as gender inequality, discrimination, public health, and consumer protection, but to enforce these rights through the European Court of Justice.¹⁵ In yet another significant departure, coordination of an immigration policy was transferred from the third pillar, where it was handled as part of justice and home affairs, to the first pillar.¹⁶ Whereas legal provisions emanating from the third pillar are not part of community law, but rather, are norms regulated by public international law, legal instruments emanating from the first pillar become part of European Community law and are binding on each member state. Moreover, given that individuals have the legal capacity to invoke first pillar laws and bring them to bear against member states, the changes of the Amsterdam Treaty may give the judiciary, here the European Court of Justice, more control over immigration policy. Similarly, the now formal commitment under Amsterdam of the EU to human rights may enhance the ECJ's authority in such matters over member states.

The extensive attention placed on the "democratic deficit" of the EU bespeaks a fundamental misunderstanding of the shift taking place in the very modality of politics. We need to turn more of our attention to changes in the institutional and organizational environments (within and across states), which facilitate "agency," in order to elicit more fully this relatively novel form of political engagement and governance.

II. THE LONG ARM OF THE LAW

One of the most remarkable developments of recent decades is the growing "density" of the legal milieu internationally, regionally, and nationally. Law is becoming more dense, not just in terms of the sheer number of laws created through the proliferation of administrative rules, legal institutions, and arbitration mechanisms internationally and, specifically, in Europe, through the EU, the Council of Europe, the Organization for Security and Cooperation in Europe, but also on a national level, through the incorporation, or tacit recognition, of the international human rights instruments into national legal systems. In 2000, in the most recent case of note, the United Kingdom incorporated the bulk of the European Convention of Human

15. *Id.*

16. The European Union is made up of three pillars. The first pillar represents the European Communities, the second pillar Common Foreign and Security Policy, and the third Cooperation in the Fields of Justice and Home Affairs. Treaty of Amsterdam, *id.* at art. 1.

Rights into domestic law.¹⁷ Internationally, there is a growing multiplication of multilateral international treaties. Although the sheer increase in legal webbing, as a result of these developments, is significant in and of itself, more important are the qualitative shifts.

International human rights law has relocated the individual, as opposed to states, as the object of the law. This has affected national citizenship status in the Euro-Atlantic arena as well as in other countries. We also witness the growing specialization of law in areas from intellectual property to the environment. In addition, there is the growth in importance of tribunals, arbitration mechanisms, regulatory mechanisms, and other legal entities that deliberate independently of states and allow nonstate actors to arrive at agreements and arrangements independently of states, yet whose decisions carry the force of law in many states. The rising importance and salience of international private law—akin to the increasing importance of civil law in industrializing countries since the nineteenth century—is also of note. How has this proliferation of legal forms and mechanisms shifted or altered the nature and location of political engagement? It is through posing this question that the emergence of agency comes to the fore.

The growing number of cross-border actors of different kinds, including international nongovernmental organizations or corporations, also reinforces and emerges from this growing density and specialization of law. Administrative and judicial rules grow through arbitrating the kaleidoscope-like complexity of a social world with an almost geometric increase in the number of actors with disparate social, economic, and political concerns. This parallels the evolution of domestic law within nation-states where legal mechanisms of control became tighter and denser with growing economic and social differentiation, specialization, and complexity.

This growing legal density promotes, reinforces, and facilitates the phenomenon of agency. Indeed, agency itself presumes, by definition, universal and individualistic values as well as the concept of human rights. Agency is embedded in this dense legal web, and the institutions that arbitrate this legal framework—the judiciary and other administrative mechanisms—grow in significance as a result. We see a growing density of law, including law that “enables” agency, in issues that “cross borders,” legally or in practice (for example, migration), where the courts are, in many cases, drawn into transnational and international issues. Agency, in turn, reinforces that legal framework.

Alongside the denser web of law is a related phenomenon, namely escalating litigation, nationally and in the European regional institutions.

17. The British Parliament adopted the Human Rights Act of 1998 in November of that year. The Human Rights Act became effective in the U.K. on 2 October 2000.

Litigation activities are of interest because they reveal the extent of agency as well as how the law is facilitating that agency. This is revealed because litigation concerns arguments over rights and prerogatives. Growing litigation reflects a growing legal and social readiness and “recognition” of rights that inhere in, or are presumed to inhere in, the individual as well as other entities. Litigation reflects growing agency.

The growing legal density needs little elaboration, especially in the European context. The scope, case-load, number of member countries, rise in the role of nongovernmental organizations (NGOs), and influence of the European Court of Human Rights has grown substantially and to an extent undreamed of at its founding. The scope, caseload, and influence of the European Court of Justice (as well as the “legal presence” of the EU generally) likewise has grown significantly, and needs little elaboration. In terms of international law, we witness a similar picture. At the end of World War I, there was a steady accumulation in the number of multilateral international legal treaties, but a dramatic increase after World War II. Evidencing an increasingly dense global legal environment, the number of “significant” multilateral treaties in force rose from 187 in 1950 to almost 800 by 1988.¹⁸

But in a certain sense, more striking is the evidence of litigation in its different forms which, as we noted, is evidence of “agency” at work. Even in a country with an impressive history of judicial review, such as the US, we see a marked upturn in this regard.¹⁹ The increase in the caseload in the European Court of Human Rights and the European Court of Justice is widely noted, but there are other notable indicators: references under Article 177 of the EEC Treaty have increased as well.²⁰ Article 177 allows, and sometimes requires, judges in national courts to request an authoritative

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18. See David Jacobson, *New Border Customs: Migration and the Changing Role of the State*, 3 *UCLA J. INT'L L. & FOR. AFF.* 443, 443 (1998–1999); Figures compiled from M.J. HARRIS & D.J. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* (9th Cum. Supp. 1993). Thanks to David John Frank for making this data available.
 19. The increase in the salience of the judiciary since roughly the 1970s and 1980s are illustrated in the following stark figures: The case loads of the federal courts on all three levels—Supreme Court, Court of Appeals, and US District Court—jumped in most cases dramatically between 1970 and 1995. In the Supreme Court from over 4,000 cases in 1970 to over 7,500 cases in 1995 and in the Circuit Court from over 11,500 in 1970 to almost 50,000 in 1995. In the district courts the picture is a little more complex: “commenced” civil cases increased massively from 87,000 to 240,000 in that time period but only a small and declining percentage of cases reached trial. The number of criminal cases increased from 1970 to 1995 more modestly—about 15 percent. DAVID JACOBSON, *PLACE AND BELONGING IN AMERICA* 173 (2002).
 20. See ALEC STONE SWEET & THOMAS L. BRUNELL, *THE EUROPEAN COURT AND THE NATIONAL COURTS: A STATISTICAL ANALYSIS OF PRELIMINARY REFERENCES* (Jean Monnet Program, Working Paper, 1997) available at <http://www.jeanmonnetprogram.org/papers/97/97-14-.html> (last visited 9 Nov. 2002).

interpretation of the laws within the ambit of the European Community. In 1970, there were roughly forty references of this kind, and by 1990, almost 200 references. (United Kingdom judges refer more cases to the European Court of Justice under Article 177 than any other member-state.²¹ This is significant, for reasons discussed below.) This is notable because it illustrates the growing role of the judiciary in a dual sense—it shows the extent to which national judiciaries are acting, so to speak, “extraterritorially,” as well as how the judicial arm of government is strengthened as a consequence. Migration is one of the more significant topics to generate references.²² The proportion of litigation, at least in the UK, tends to be under-reported because areas where European Union law has been most heavily invoked—immigration, taxes, social security, and labor—are areas in which quasi-judicial entities are dominant, such as immigration adjudicators, whose decisions are rarely reported.²³

The growing web of judicial rights in all kinds of organizational contexts makes agency possible.²⁴ Agency, involving all kinds of individual actors, generates adjudication of rights, interests, and the like. Thus, agency reinforces the process of judicial rights that made it possible in the first place. The democratic process, on the other hand, is not removed so much as it is contained. The density of the legal process is not only on the public level—domestic or international—but has progressively filtered into private organizations and corporations, where individuals can “litigate” internally, for example, over race discrimination. Thus, the containment of the republican, or democratic, process is not only taking place in the political arena, but in “everyday life,” notably the workplace. Patterns of litigation are growing across Europe (not just in the United States) with reference to the workplace, especially regarding racial and sexual discrimination. Sexual and racial lawsuits filed in Employment Tribunals in the UK rose 76 percent in the year ending in June 2000 compared to the five previous years.²⁵

Within the European Union, individual litigation is likely to be encouraged further by Article 13 of the Amsterdam Treaty.²⁶ Article 13 (formerly Article 6a), originally adopted as part of the Treaty Establishing the European

21. *Id.*

22. *Id.*

23. Damian Chalmers, *The Much Ado about Judicial Politics in the United Kingdom: A Statistical Analysis of Reported Decisions of United Kingdom Courts Invoking EU Law 1973–1998* (Harvard Law School, Working Paper 1/00, 2000).

24. Consider the proliferation of NGOs as “pollinators,” so to speak, of this process.

25. See Suzanne Kapner, *Britain’s Legal Barriers Start to Fall: Discrimination Lawsuits Are Becoming More Commonplace*, N.Y. TIMES, 4 Oct. 2000, at W1.

26. The Amsterdam Treaty of 1999 amended and renumbered the Treaty on European Union and the Treaty Establishing the European Community. See art. 6a (as in effect 1994) (now art. 13).

Community²⁷ and revised through the Amsterdam Treaty, includes stronger wording, which seems to encourage, or allow, positive enforcement by the EU directly against the member states.²⁸ It was enacted in response to the recognition that, although the Maastricht Treaty on European Union (TEU) provided a specific competence to adopt general measures in the sphere of human rights and to combat discrimination, there was no positive mechanism through which the Union could take effective measures against racism, xenophobia, and other forms of discrimination.²⁹

Such developments have implications for notions of “multicultural” and immigrant populations. The growth of “agency” enables different forms of cultural expression, which the courts facilitate. Conversely, “parliamentary sovereignty” restricts (but does not completely preclude) majoritarian and collective national expression.

The changed nature of political engagement, reflected in the shifting balance between agency, empowered by legal rights and obligations, and more traditional “democratic” consent modes of “voice” or politics, is illustrated in the following examples regarding sexual equality and discrimination. Political demands for greater protection of women in the workforce led to public service experimentation with various quota systems at the state level in Germany. There seemed to be a political consensus throughout Germany, which led to the enactment of sixteen separate statutes at the state level establishing various forms of quota systems.³⁰ But through Article 177 references to the ECJ, however, certain of these German provisions have been placed famously in doubt.³¹ The ECJ determined in *Kalanke* and *Marschall* that EU law, specifically the equal treatment principle embodied in Articles 2(1) and 2(4) of the Equal Treatment Directive, distinguishes between equality of opportunity and that of result, and foreclosed any positive action going beyond that necessary to ensure individual equality of

27. The Treaty of Rome that established the European Economic Community in 1957 remains the penultimate source of EU law. In November 1993, the Treaty of Rome was officially renamed the Treaty establishing the European Community. At the same time, the Maastricht Treaty on European Union (TEU) was superimposed over the Treaty of Rome. The resulting document is titled the “Treaty on European Union together with the Treaty establishing the European Community.”

28. The Council has authority (although limited in that it must act unanimously on a proposal from the Commission and with consultation of the European Parliament) to “take appropriate action to combat discrimination.” Treaty of Amsterdam, *supra* note 14, art. 13.

29. See Alexander Somek, *A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law*, 5 EUR. L. J. 3 (1999).

30. Dagmar Schiek, *Sex Equality Law After Kalanke and Marschall*, 4 EUR. L. J. 148, 152 (1998).

31. *Id.* at 152.

opportunity.³² The new sex equality provisions in the Amsterdam Treaty, Articles 137 and 141 (ex Articles 118, 119) have strengthened the EU position regarding the under representation of women in the workforce, while setting the guidelines within which the ECJ will determine whether the measures comply with EU law.³³ More recently, the EU has provided for stronger measures to eradicate sexual harassment, which will place additional burdens on member state employers.³⁴

These and other legal provisions and directives at the EU level provide individuals with a forum through which sensitive issues, traditionally worked out through political channels at the national level, can be revisited and redefined in the ECJ. In one important respect, certain employment rights and protections are being severed from national citizenship. For example, in a number of cases, the ECJ determined that sexual orientation is not a protected category under EU law.³⁵ In forming its decisions, the Court ignored the general political trend among the member states toward providing protection for sexual orientation discrimination in employment and equal treatment for same-sex couples.³⁶

32. *Id.* The decisions in *Kalanake* (ECJ 17/10/1995—Case C 450/93, 1995 ECR I-3051); *Marschall* (ECJ 11/10/1997—Case C 409/95 nyr) were both initiated by individual men seeking protection through EC law.

33. Treaty of Amsterdam, *supra* note 14, at 118–19.

34. The European Commission has proposed laws to outlaw sexual harassment in the workplace and other measures to promote equality between the sexes. See Barry James, *EU Drafts Measure to Outlaw Sexual Harassment*, INT'L HERALD TRIB., available at <http://www.iht.com/IHT/Bj/00/bj060800.html> (last visited 9 Nov. 2002).

35. For example, the ECJ had determined that sexual orientation was not a protected category under EU law. See Case C-249/96, *Grant v. Southwest Trains Ltd.*, 3 BHRC 578 (1998). In that decision the Court referred to the new Article 13 which had not yet come into force. Thus, although the Court held that Article 119 (now Article 141 of the Consolidated Version of the Treaty Establishing the European Community) of the EC Treaty did not encompass sexual orientation, it noted that the Community now had the power to take appropriate action to include sexual orientation within its scope. Since that case, the European Parliament has adopted resolutions calling for an end to discrimination based on sexual orientation (see Resolution on Equal Rights for Gays and Lesbians in the EC, Minutes of 17/09/1998—Provisional Edition; Minutes of 20/02/1997, based on Document No. C4-0565/96—Final Edition; and Minutes of 20/02/1997, based on Document No. A4-0046/97—Final) and the Council of Europe has, in a series of opinions, backed equal treatment for all EU citizens irrespective of sexual orientation (Opinion No. 216 [2000]; Report on the Draft Protocol No. 12 to the European Convention on Human Rights Doc. 8614; Opinion of the European Court of Human Rights on Draft Protocol 12 to the European Convention of Human Rights [adopted at the plenary administrative session of the Court on 6 Dec. 1999]; Debate on the Opinion on Draft Protocol No. 12 to the European Convention on Human Rights; *Situation of Gays and Lesbians and Their Partners in Respect to Asylum and Immigration in the Member-States of the Council of Europe*, Doc. 8654, available at <http://stars.coe.fr>). These developments have essentially removed the issue of sexual orientation from member states authority and have placed them within the rubric of EC law.

36. See Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v. SWT*, 5 EUR. L. J. 63, 72 (1999).

In another work, Ruffer has attempted to characterize the nature of the set of organizationally-based rights and protections as a “virtual citizenship” which is, in important respects, independent of national citizenship.³⁷ Thus, the rights and protections that accrue to an employee on, say, gender discrimination in a corporation, public or private, are not a function of formal citizenship status (though, of course, the presumption is that the employee is at least a legal resident).³⁸ In this regard, the expansion of rights has diluted national citizenship, at least in its traditional republican sense.

III. THE NESTING OF ORGANIZATIONS AND AGENCY

A critical question remains, namely, what are the institutional mechanisms of agency and how do they operate? That is, how is agency regulated, realized, and woven into social and political organizations, and patterns of governance? How is agency institutionally “mediated,” and what are the key institutions in that regard? This is an issue, which we commence addressing here, that has not been sufficiently addressed in the debates on globalization or, for that matter, on human rights. It is an issue that is all the more crucial to attend to as we are increasingly unable to limit such questions to the traditional, relatively bounded institutions of the nation-state. Furthermore, the salience and role of different institutions *within* the state shift as global, legal, political, and social relations grow more “dense.”

Agency, and the associated human rights claims, is not expressed *primarily* at the international, regional, or even the national level. Rather, the dense legal webbing enables the “acting out” of human rights (for example, on gender issues) at the lower-order organizational level—such as, prominently, the workplace. In recent decades, in order to generate change at “lower level” organizations, appeals have been made to the “higher level” organizations to change institutional patterns at the original organization. This results in a nesting effect, where people will go to a higher nested organization to appeal, judicially, for recourse; but only so far as they have to go (for example, the province is preferred over the state; or the state over a regional organization).

Once a change is generated, however, internal mechanisms are introduced within the “local” organization to implement the change. “Internal mechanisms” include appeals boards or arbitration committees, such as in universities and corporations, on discrimination or harassment. These

37. Galya Benarieh Ruffer, *Virtual Citizenship: Migrants and the Constitutional Polity* (2002) (unpublished dissertation, Univ. of Pennsylvania) (on file with author).

38. *Id.*

mechanisms are set up within the organization in order to bring it into line with legal mandates and judicial rulings. Appeals to “higher level” organizations (be it, say, state or regional judicial bodies) are less likely on issues where such intra-organizational mechanisms are available for redress of grievances; the grievance may be remedied internally and thus not necessitate any external appeals. In this way, much of the activity on salient civic and human rights issues are acted upon (in terms of claims and institutional responses), “locally,” that is within the organizations in which people actually work and live.

This nesting effect, however, also works in reverse: higher nested organizations—such as the European Court of Human Rights—will have wide-ranging effects. Effectively, they close off certain options for lower organizations. For example, a ruling by the European Court of Human Rights has, for example, “closed-off” the gender of a spouse as a criterion in determining immigration status; “gender” in this context ceased to be a category that states could turn to in determining who could enter or not enter their country.³⁹ More broadly, court rulings on significant civic or human rights issues create constraints for a broad range of organizations under their respective jurisdictions. Once such rulings have been legally integrated and adopted by states and by private and public organizations, the human rights issue once in question is less likely to be played out at the national or regional level.

This nesting phenomenon is, in a sense, another radically different form of the global-local nexus. Certain issues, such as judicially-determined values regarding gender discrimination, filter down to the point where they become so embedded—legally, politically, and in everyday life—that they are normatively presumed, almost outside the discourse on human rights. “Global” norms are expressed most readily in “local” foci—local, here, being from workplaces and other organizations, to cities and counties, to provinces and the like. This just points to the remarkable extent to which human rights has become, in the long term, the armature, the frame, and the skeleton girding the social and political architecture of society. It is like the syntax of language; it is presumed, not thought about. The “present” discourse of human rights shifts then to new frontiers, with different parties trying to broaden their reach to new social categories, such as female genital mutilation in asylum laws. And because new frontiers involve contested issues, and thus frame the issue of “human rights” in the public consciousness, the embedded nature of the larger scaffold of human rights and the degree to which it has closed off options, is often overlooked. The

39. The European Court of Human Rights ruling referred to here is that of: *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, 7 EUR. HUM. RTS. REP. 471 (1998).

institutional mechanisms, in this context, are primarily judicial and administrative.

This nesting process also is legally inscribed, as captured in the concept of subsidiary and layered legal authorities, and is characteristic of both the United States and the European Union (and for that matter, the European Convention of Human Rights). However, it makes sociological sense as well: absent internal rules on areas like gender or racial discrimination, endogenous change within an organization is very difficult to effect. So the actor will move to a “higher-level organization” to generate change exogenously, but that actor is unlikely to go to a point beyond that which is necessary to effect the change sought. Judicial and administrative change is also dramatic (and rapid) because often—especially in the US—the change will then affect a whole class of individuals and organizations, such as in gender and race discrimination. Judicial and administrative decisions can have, and have had, the effect of expanding agency extensively in this way. Once such rulings have filtered down and are institutionalized, “human rights” will be acted on endogenously to the affected organizations.

The case of the United Kingdom is particularly interesting in terms of the “nesting” of organizations and legal authorities. The British political system has been one where the sovereign Parliament was at the pinnacle, and the courts were secondary, possessing very limited powers of judicial review. The UK, though it has long recognized the jurisdiction of Strasbourg, in contrast to most other Council of Europe member states, only recently incorporated a bulk of the European Convention of Human Rights into domestic law. In this context, it is no surprise that—at least prior to the incorporation of the Convention—the United Kingdom received special scrutiny by Strasbourg, and that British judges have made so many references to the European Court of Justice.⁴⁰ The notion of the individual as agent was highly constrained in this circumstance of parliamentary sovereignty, and thus had to appeal to exogenous legal authorities—notably the European Convention of Human Rights and the European Court of Justice—to effect change. The European Union and the European Court of Human Rights have, in effect, required a fundamental shift in the relationship between the individual and the state. Instead of a majoritarian institution in Parliament representing a republican collective will in which individual rights were derivative, a more liberal vision has been instituted by the European Convention of Human Rights and the European Court of Justice around which individual freedoms are promoted and where “as much space is preserved for autonomous behavior by private individuals as possible.”⁴¹

40. Chalmers, *supra* note 23.

41. *Id.*

It was because of the European Convention of Human Rights and the European Court of Justice that judicial review became a significant factor in the UK since the 1980s. Clearly, the Human Rights Act, which recently took effect in the UK, will reinforce this process.⁴²

The legal developments in the UK also reveal how human rights become embedded institutionally (primarily through the courts), and no more so than in the immigration area. Both immigration and asylum legislation have been significantly affected by the European Court of Human Rights. The very creation of the immigration appeals system was rooted, in significant part, in the European Convention of Human Rights. Through the *Abdulaziz* case, which concerned Articles 6 and 8 of the European Court of Human Rights, sex discrimination was eliminated in United Kingdom laws.⁴³ The Asylum and Immigration Appeals Act of 1993, facilitating the rights of appeal of asylum seekers with respect to Article 13, was significantly furthered by the *N.K.* (1987) case in Strasbourg. *Chahal* (1996), concerning Article 3, most recently impacted the Special Immigration Appeals Commission Act of 1998. Home office policy guidelines have also had explicit reference to the European Convention of Human Rights.⁴⁴ Human rights issues become embedded such that, in the example noted previously, because of the *Abdulaziz* decision, the concept of sex discrimination on immigration becomes inconceivable and not even an issue on the regional or national level. Furthermore, other areas of rights now taken for granted, such as consumer rights, are no longer “debated” internationally, but simply become part of the broader social fabric.

Part of what accounts for the variation in the turn to international instruments—comparing the United States to the United Kingdom for example—is the extent to which the growing stress on “agency” can be

42. The British Parliament adopted the Human Rights Act of 1998 in November of that year. The Human Rights Act became effective in the U.K. on 2 October 2000.

43. See *Alam v. United Kingdom*, 10 Y.B. 478 (1967); *Abdulaziz, Cabales and Balkandali v. United Kingdom* 7 (1985). Article 6 of the ECHR concerns the right to a fair trial, and Article 8 the right to respect for private and family life.

44. *N.K. v. United Kingdom* (App. No. 9856/82) 52 D.R. 38 (1987); see Storey, *supra* note 9. Article 13 of the ECHR stipulates that everyone whose rights have been violated under the ECHR shall have an effective remedy. In the *Chahal* case, the individual of that name had been involved in terrorist acts in India where he had also been tortured. The European Court of Human Rights ruled that he could not be returned to India as there was a “real risk” he would be treated by Indian security services in a way that was incompatible with Article 3 (which prohibits torture). The Court thus overruled British claims that he should be returned as *Chahal*’s presence in the UK threatened national interests. The British Government reformed the asylum appeals process, as codified in the Special Immigration Appeals Commission Act of 1998, to account for the ruling in Strasbourg. See *Chahal*, *supra* note 12; COLIN WARBRICK, *THE PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RESPONSE OF STATES TO TERRORISM*, 3 EUR. HUM. RTS. L. REV. 287 (2002).

accommodated internally. If, as described above, actors will move “up” (for legal and sociological reasons) the layers of legal and organizational authority in order to effect change at “lower levels” of organization, then change can be generated before resorting to international instruments or even national instruments. In the context of the US constitutional framework, the dense net of rights and legal rules as well as the historical and ever-growing role of the judiciary (especially in recent decades) provides extensive possibilities to effect agency. Even in the case of the United States, however, four points should be noted: the legal (as well as social and political) discourse concerning “human rights” (not just “civil” rights) has expanded dramatically in the last three decades;⁴⁵ there is growing reference to international human rights instruments in that period, even in the United States, though modest and not nearly as marked as in Europe; presumptions about global human rights inform cases in the US even without explicit reference to international instruments (see, for example, *Nebraska v. Al-Hussaini*);⁴⁶ furthermore, one must remember that post-war human rights instruments, especially the Universal Declaration of Human Rights, were heavily informed by the United States Constitution, among other sources, indicating a certain affinity.

But the shifting modality of politics to the politics of agency, with its presumption of universal individualism and human rights, is revealed in the remarkable convergence of law on agency, such as in the area of migration. Across the Euro-Atlantic arena and in much of the democratic world, almost across the board, family unification, economic, and humanitarian criteria are the touchstones of migration policy (albeit with different definitions in each category cross-nationally).⁴⁷ As this law converges, so it trickles down to sub-state jurisdictions and organizations (and the word “trickles” does not, perhaps, reveal the rapidity of this process). This novel isomorphism reveals, on the one hand, growing legal density on a global level and, on the other, the “nesting” effect described above. We would suggest that growing transnational activities (or “globalization”), “judicialization,” and agency as the modality of politics are interrelated phenomena, and, as such, would have this effect of generating isomorphism of legal norms.

45. The growing reference to “human rights” in US federal court cases is evident in the following figures: From 1945 to 1960 the term “human rights” appears in only sixty-eight cases, and from 1961 to 1970 the figure is 159 cases. Then we witness a surge: from 1971 to 1980, 861 cases; from 1981 to 1990, 2,224 cases make reference to human rights; and from 1991 to 2000, over 6,300 human rights cases are noted. Figures are derived from a search of the universe of all federal court cases for the years noted from the *Westlaw* database.

46. *State of Nebraska v. Latif Al-Hussaini*, 579 N.W. 2d 561 (Neb. Ct. App. 1998).

47. See Kathleen Newland & Demetrios Papademetriou, *Managing International Migration*, 3 UCLA J. INT'L L. & FOR. AFFAIRS 637 (1998–1999).

Issues such as “gender” and “race” are legally *closed off* as options for discrimination to a remarkable extent across these countries. When we step back and comprehend the extent to which human rights institutions and idiom have closed off such policy options, the remarkable impact of human rights begins to dawn on us.

The nesting process is legally and institutionally inscribed: legal sources, terminology, and institutional structures have shifted in response to the changing modes of political engagement and demands of agency such that they allow for the nesting process to flow quite naturally. For example, legal principles have been created to provide mechanisms whereby the differing legal systems and laws of member states in the European Union can successfully integrate with emerging European Union law. In order to coordinate the competing legal competency of the EU and national authorities, Article 5 of the Treaty of the European Union formalized “subsidiarity” and “proportionality” principles.⁴⁸ In 1999, the Amsterdam Treaty added Protocol Number 30 on the application of these principles.⁴⁹

The principle of subsidiarity derives from the first paragraph of Article 5, which dictates that the EU can act only when it possesses the legal power to do so, that the EU should act only when an objective can be better achieved at the supranational level, and that the means employed by the EU when it does act, should be proportional to the desired objective. The TEU further strengthened the notion of subsidiarity by making it a fundamental Community law limitation and stating, in Article 53b, that Community action “shall not go beyond what is necessary to achieve the objectives of this Treaty.” National powers, according to subsidiarity, remain the norm, with European Union action the exception. On the other hand, the TEU enlarged the realm of Community competence to include the areas traditionally within the exclusive authority of member states, namely industrial policy, health, education, culture, and the particularly sensitive areas of immigration and social policy.

Although in practice subsidiarity remains ambiguous, it does appear to enhance the kind of “nesting” activity discussed in this paper, while at the same time contributing to the evolution of European Union integration. For example, in the area of immigration, although the EU has moved in the direction of greater competence over the question of immigration by moving it to the first pillar and, more recently, forming a special Committee

48. Article 5 (ex Article 3b) is part of the Treaty establishing the European Community which together with the Maastricht Treaty on European Union (TEU) form the “Treaty on European Union together with the Treaty establishing the European Community” of 1993. In this article, we refer to the 1993 treaty jointly as the “TEU.”

49. Protocol 30 is part of the Treaty Establishing the European Community (as amended and renumbered by the Amsterdam Treaty of 1999).

to draft one policy for the EU, the fundamental determination of “nationality” still remains with the member states. Such divisions of legal competence provide the “cross-border” spaces within which nesting occurs.

The purpose of subsidiarity, from the perspective of a country such as Germany, which had urged its introduction, is to protect areas, such as environmental policy, where national governments might have taken great strides in formulating effective policies. The German fear was that “harmonization” might result in a lowering of national environmental standards. Thus, even harmonization has been interpreted as a regulatory floor, not a ceiling. Since it remains unclear which areas are within the Community’s exclusive competence, there is much room for maneuver. The effect of these principles, therefore, is that the ambiguity they introduce opens up a number of “nests” where litigation to enforce and affect policy (for example, environmental policy) can occur.

IV. CONCLUSION

As relations, both regionally and globally become more multifaceted, and the legal frameworks that institutionalize such relations become more extensive, we are likely to see the growing importance of judicial and administrative mechanisms to mediate these legally embedded relations. This will remain the case insofar as executive and legislative bodies are absent, or relatively weak, on the regional or even global level. The globalization and regionalization of law has a certain affinity with judicial and administrative institutions. Thus, the clash between agency and democracy—as in the acute example of the executive orders following the 11 September 2001 terrorist attacks—will be reinforced through the current structure of human rights or European Union law, which promotes the agency of the individual.