Part I

1

Introduction

> *A Judge cannot but lament when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own, exist and are thoroughly understood. The struggle, too, in the Judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible.*
>
> Thomas Ruffin

For a reader from a less cynical age, the elegance of such words may have been proof enough of a genuine sentiment. Today, however, actions are usually measured by their effects and their impact, to mention two of the concepts that will follow us throughout this book. Thomas Ruffin, a highly respected judge at the Supreme Court of North Carolina, would go on to suggest that it 'is useless. . . to complain of things inherent in our political state' and reach the relentless conclusion that, 'while slavery exists amongst us in its present state. . . it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave'.[1] For all its cruelty, it is difficult to deny the sense of inevitability expressed by Ruffin. Living in the US south in 1829, could he really have decided differently? Even if he had, would it have made a *real* difference if one judge had broken rank and challenged the institutions that demanded the loyalty of many others? It would be left to history to render the verdict on the 'institution' of slavery, though at the price of hundreds of thousands of lives in the US Civil War.

Fast-forward to Europe today. Questions about the function of the judiciary and the 'duty of the magistrate' remain as topical as ever. The context, however, is a different one. An impressive legal edifice seeking to protect the human rights of every person towers over the realm of laws, now offering domestic and European judges the opportunity to pronounce themselves in favour of the marginalised and vulnerable. History, however, seems to point in a different direction as voices opposing these norms and institutions seem to grow louder. Various types of courts and tribunals are affected differently. Ironically, Ruffin's words are today more likely to be uttered by a domestic judge bemoaning the lack of autonomy of the domestic legal order and of the sovereign decision of parliament in the face of international human rights instruments. In contrast, judges at the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) – the focus of this work – may, like Judge Ruffin but for different reasons, feel a 'strong temptation' to set aside demanding questions. When the idea of Europe seems in doubt and supranational

[1] *North Carolina* v. *Mann*, 13 N.C. 263 (1830), December 1829, Judge Thomas Ruffin.

institutions, including regional courts, are facing a backlash, it may be wiser to avoid issues that are sensitive in society.

This last proposition is the starting point of this work, which focuses on the demands that immigration poses to human rights protection systems in Europe. Politically, there has hardly been a more pressing issue in recent years. In 2015 a record number of migrants entered European Union (EU) territory through Greece to move on to other Western European countries via the 'Balkan route'. A year later, European heads of states came to an agreement with the Turkish government, which promised to close its borders and retain Syrian refugees in exchange for payments and visa liberalisation. States such as Hungary, Croatia and Slovenia have reinforced their borders with walls and fences. Generally, fears of immigration from within and outside Europe remain the main driver of populist sentiments in many countries including Italy, where populists were voted into power in 2018. This story, however, reflects only a part of the truth: across the continent, human rights defenders including migrants themselves mobilize to demand a better protection of the rights of vulnerable migrants. They also continue to bring claims on their behalf before administrative and constitutional courts and, where these turn out to be of limited use for immigrants, before the ECtHR and the CJEU. As a consequence, these two supranational courts have come to deliver a respectable number of decisions in this area.

1.1 The Demanding Character of Migrant Rights

What, however, has been the impact of all these rulings on the scope, applicability and enforcement of human rights of vulnerable migrants throughout Europe? The first impression may well be described as devastating. Yearly losses of thousands of lives in the Mediterranean, mass detention and the denial of even rudimentary social services continue to characterise the reality for many migrants who, at least in principle, should be protected under multiple international regimes and treaties. Significant problems also seem to exist in accessing justice, with only a fraction of vulnerable migrants relying on domestic courts, let alone on international protection instruments. For them, demanding rights represents either a futile or a fundamentally frustrating experience. Any serious attempt to evaluate the impact of judgments of the two European courts must therefore consider not only the legal but also this empirical dimension, with the immense problems that they reveal. Indeed, dealing with social realities is indispensable both from practical and – as will become clear towards the end of this work – theoretical angles if human rights scholarship is to remain relevant. This book seeks to contribute to developing such a grounded perspective and inform our understanding of the actual relevance of the involvement of the ECtHR and the CJEU in this domain.

To be sure, strong arguments can also be advanced in favour of an involvement of international courts. With most legislatives and the executives seeking to restrict immigration, courts may indeed be the best hope for migrants. Indeed, claims have been made that 'of all state institutions, courts' insulation from democratic pressures makes them structurally the friendliest to immigrants'.[2] The counter-majoritarian argument is as likely to be applicable to the ECtHR and the CJEU as to domestic judiciaries given that these two courts

[2] Joppke and Marzal, 'Courts, the New Constitutionalism and Immigrant Rights', p. 824.

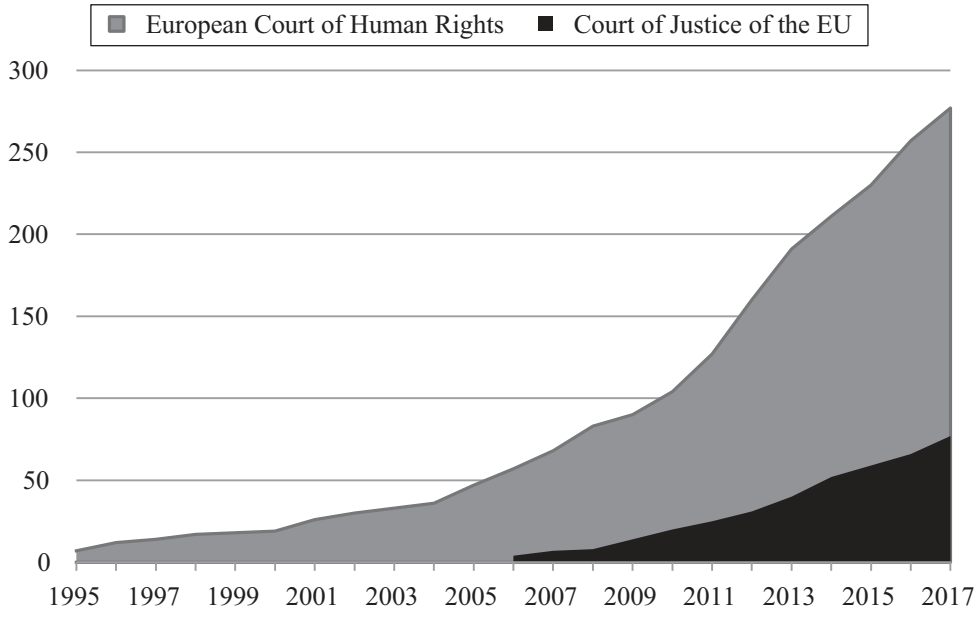

Figure 1.1 Case law of the European courts related to 'asylum' (by year)

hold extensive authority and a high degree of influence.[3] Even more telling, however, may be the simple fact that both courts continue to be addressed by migrants and their lawyers. Figure 1.1 illustrates the steady growth of the body of decisions of Europe's supranational courts in this domain,[4] with the mid-2000s the point in which their involvement gathered momentum. Legal scholars, in turn, analyse decisions in a serious but seemingly routine fashion, almost subconsciously treating any identified legal change as necessarily translating into changed realities on the ground. Such high expectations are held even by the critical commentator Marie-Bénédicte Dembour, who expresses her disappointment with the arguably restrained approach taken by the ECtHR towards the protection of the rights of vulnerable migrants.[5]

With Europe's courts being used and needed but seemingly also underperforming, this work addresses the following questions: in practice, how effective have Europe's two regional courts been in the protection of the rights of vulnerable migrants? And what could be done to improve their performance in this regard? As will become clear, there are no straightforward answers to these questions. The effects of adjudication, even more so at the

[3] Alter, Helfer and Madsen, 'How Context Shapes the Authority of International Courts', p. 34.

[4] For Figure 1.1, a search was performed using the HUDOC database and covering all ECtHR judgments (excluding decisions only in English to avoid doubles) mentioning 'asylum' and with EU Member States as defendants, yielding 309 hits for the period between 1989 and 2017. A similar search was performed on EUR-LEX for rulings of the CJEU, yielding 101 hits. This search was limited to judgments in English that mentioned 'asylum', with the subject matter criterion covering only the area of freedom, security and justice.

[5] Dembour, *When Humans Become Migrants.*

supranational level, are complex and dependent upon various factors ranging from legal and judicial strategies to the reception that judgments receive in domestic judiciaries, parliaments, and even in society. The first part of this book elaborates on these aspects in a detailed sociolegal analysis of eight key judgments, five of the CJEU and three of the ECtHR. Accordingly, many aspects need to be considered if the goal is to optimise the functioning of the two courts. The thread tying these insights together – the central proposition of this book – is that the human rights of migrants are challenging, even straining in character. Seemingly obvious at first, this insight becomes more consequential the more seriously one is willing to take it. Demanding the rights of vulnerable migrants means to make claims that are demanding: demanding for the courts in Strasbourg and Luxembourg that have to go out of their way to establish a consistent but progressive line when faced by hundreds of migration-related cases; demanding for migrant rights defenders, who have to navigate a multitude of constraints to achieve positive outcomes but avoid counterproductive ones; and demanding for and even *of* European societies and the premises upon which they are based. These issues will be elaborated in the second part of this book.

1.2 Theoretical Underpinnings

Two clarifications are necessary here. The first concerns the definitional question of 'vulnerability', which, in short, applies to any migrant who faces a denial of human rights *because of* his or her migratory status. As such, the concept serves two functions in this work. First, it defines its scope by bringing together a number of statuses which are legally distinct: refugees, asylum seekers, persons with an exceptional leave to remain, and spouses or parents whose residence permits are dependent on the presence of their family members (and their degree of affiliation). Other migrant groups are by contrast excluded: persons using their free movement rights under EU law, for instance, benefit from an incomparably stronger legal status. Crucially, the distinction between 'vulnerable' and 'non-vulnerable' migrants is *not* meant to conflate or to erase legal categories; indeed, these will be fully accounted for in the analyses of the selected rulings. Rather, the distinction is used to enable the adoption of an *additional* empirical aspect that captures the exclusionary social and political processes at play. The second function of vulnerability relates to this last point as it will also be proposed as a means to connect the legal and the social elements of being a vulnerable migrant before the ECtHR and the CJEU. Chapter 7 thus outlines in detail a social-contextual conception of vulnerability that is suitable for this purpose while also avoiding the essentialisation and stigmatisation of migrants.

The normative standpoint taken in this book is another aspect that requires explication. What is the basis for the arguable claim that the functioning of the two European courts, both trusted institutions with a respectable track record of ensuring fundamental rights protection, could be optimised? Furthermore, what justifies an assessment of the 'performance' of the courts that takes as its narrow frame of reference the lived realities of vulnerable migrants? The only convincing answer to the first question can be specific shortcomings as revealed in substantive analysis, which is precisely what the first part of this book aims to provide. Finding a response to the second objection is more challenging. After all, like other international courts, the ECtHR and the CJEU are based on much broader mandates, suggesting that evaluations of organizational performance should be tied to the reactions

of their mandate providers, most notably states.[6] As plausible as this may sound, such an approach is not very helpful when applied to the domain of human rights with its vertical, and thus much more demanding, character. Should not an 'effective' human rights court protect the interests of individuals and groups of persons rather than states? Where self-binding obligations such as human rights are at stake, states' delegation of authority to international courts inevitably expands their functions to include the enforcement of laws and even constitutional review.[7]

The objective of the first part of this book is to assess the performance of these tasks, which are in themselves not controversial. The scope of the evaluation is hereby limited to the two European courts and the protection of vulnerable migrants. As an analytical undertaking, such a subject is both complex and theoretically relevant: the entitlements of non-citizens in the absence of a social contract is arguably what the idea of human rights is all about.[8] However, different views do exist about the extent of such rights, as the polarizing debates about immigration illustrate. Rather than measuring judicial outcomes against abstractly defined standards (the identification of which is an impossibility in my view), their evaluation will therefore be based on the specific parameters that are revealed in the eight selected cases. In other words, how have the rulings in question been received by those who defend the rights of migrants? What do their reactions and behaviour tell us about the import of these presumably important decisions? In this sense, this book adopts the perspective of migrant right defenders but primarily for methodological reasons. The normative questions concerning the role of migrant rights in society will once again be picked up in Chapter 7, where it is argued that the rights of vulnerable migrants *are* indeed entrenched in the demands that emanate from the self-image that prevails in European societies.

1.3 Methodology and Case Selection

The 'grounded' character of the evaluation of the key judgments places issues of methodology centre stage. The basis for the approach that underlies this work is the specific conceptualisation of the *effectiveness* of the European courts. As already mentioned, to appreciate their influence on the rights of migrants, one must explore various relevant effects including not only legal but also empirical outcomes. Throughout the first part, this broad orientation will be reflected in a comprehensive framework that probes each ruling on three interrelated dimensions of effectiveness: law development, case-specific, and strategic effectiveness.[9] *Law development effectiveness* refers to the contribution that international courts make from a legal-doctrinal standpoint whenever they clarify and offer interpretative guidance on provisions of international law. Both the ECtHR and the CJEU are not only highly authoritative but are also known for their ability and willingness to adopt teleological interpretations of their instruments. Analysis will focus on identifying precisely this kind of legal change. The

[6] Shany, *Assessing the Effectiveness of International Courts*.
[7] Alter, *The New Terrain of International Law*.
[8] For a recent theory of human rights based explicitly on the experience of migrants and specifically on boat persons, see Mann, *Humanity at Sea*.
[9] This division builds on, and adapts a taxonomy introduced by Laurence Helfer, taking the first two dimensions directly from his discussion. Helfer identifies four dimensions of the effectiveness of international courts: case-specific effectiveness, *erga omnes* effectiveness, embeddedness effectiveness and effectiveness in developing international law; Helfer, 'The Effectiveness of International Adjudicator'.

second notion, *case-specific effectiveness*, sheds light on the impact that a judgment has on the two parties to a case. These include, on the one hand, the claimants, in this case migrants seeking remedies of alleged human rights violations. On the other hand, insights will be offered on the influence that a ruling has had on the law and the policies of the state in question. Third and innovatively, the chapters examine the *strategic effectiveness* of European court rulings. This broader category includes both a relative and an absolute dimension. In 'relative' terms, comparisons will be made between the approaches pursued by the ECtHR and the CJEU to determine which court has, on a specific question, had the higher strategic value for migrant rights defendants. The 'absolute' strategic effectiveness is evaluated by looking at the wider impact of a ruling on the policies of the EU and 'non-involved' states as well as the reception that it has received from migrant rights defenders.[10]

The broad conception of effectiveness and the 'thick' description resulting from it required limiting the analysis to a few specific decisions. As the European courts have produced a substantive body of rulings in recent years, the choice was made to take a purposeful and methodical approach to case selection. The focus was specifically on finding the most pertinent rulings that, rather than being mere routine applications of certain provisions, are likely to have made a more systematic impact on the lives of vulnerable migrants. In other words, cases were selected to be suitable to inform an effectiveness analysis as conceived above.

For the purposes of case selection, a list of twenty-five judgments of the ECtHR and CJEU respectively were preselected, based on the attention that they have received in legal scholarship. As a next step, 'proxy' indicators were created to provide a preliminary analysis of the relative significance of these cases that was undertaken on 30 July 2015. Table 1 shows the eight selected cases with their proxy indicators (a more detailed overview of the scores of the non-selected cases are attached in Tables A.1 and A.2 in the Annex). In the case of the ECtHR, all three judgments were handed down by the Grand Chamber. *M.S.S.* and *Hirsi* in particular received extraordinary public coverage and in scholarship as reflected in their Google and Google Scholar scores.[11] *Tarakhel* (like *M.S.S.*) was included as it is related to the Dublin Regulation, thus offering the possibility of analysing a 'chain' of subsequent cases for their impact. In addition, it set a record for the number of third-party interveners.[12] By contrast, four relatively high-scoring cases were rejected in terms of relevance either because of the narrow scope of persons affected or because strong doubts

[10] As such, it incorporates what Helfer refers to as '*erga omnes* effectiveness', a perspective that looks at the wider systematic impact that judgments have on states other than those involved in a dispute. See also Helfer and Voeten, 'International Courts as Agents of Legal Change'.

[11] The search tag used in Google was the application number of the case and 'ECHR' (both in quotation marks). Similar results were not taken into consideration. On Google Scholar, the same search was performed with 'European Court' instead of 'ECHR' in order to prevent the showing of unrelated articles from disciplines. The results for G, GS, and E were standardized against expected hits because the amount of hits is correlated to the time that has passed since the judgment was delivered. Expected hits were computed based on the correlation between time and hits for all the preselected cases, with outliers removed. Values higher than 1 imply higher-than-usual relevance, whereas values below 1 denote lower-than usual relevance. The value can also be used to draw conclusions as to the degree of relevance. For example: *M.S.S.* received 7.51 more Google Scholar hits than expected, while *Darren Omoregie* counted 0.75 times the hits than were expected. These values are thus across cases and years.

[12] It thus warranted inclusion even if other indicators were not as precise. The reason for this was that the ruling was delivered only about half a year before the indicators were computed.

Table 1.1 Selected key cases and their proxy indicators' scores

Case Name	RS	C	YD	I	G	GS	CJ	AG	E
European Court of Human Rights									
M.S.S.	BE/GR	G	2011	4(2)	1.33	7.51	2	5	1.36
Hirsi Jamaa	IT	G	2012	1(0)	1.49	5.08	1	1	0.84
Tarakhel	CH	G	2014	9(5)	1.05	0.38	0	0	0.71
Court of Justice of the EU									
Elgafaji	NL	G	2009	8(7)	1.45	1.11	2	4	4
Zambrano	BE	G	2011	8(7)	3.29	5.06	7	8	4
N.S. and M.E.	UK/IE	G	2011	18(13)	2.46	3.72	5	10	5
X, Y and Z	NL	4	2013	6(4)	1.53	2.05	3	3	1
A, B and C	NL	G	2014	7(5)	1.40	1.08	0	0	0

RS = Respondent State, S = Section (G = Grand Chamber), YD = Year of Decision, I = Interveners (thereof Member States), G = Google prominence, GS = Google Scholar prominence, CJ = References in CJEU Judgments, AG = References in AG Opinions, E = Prominence in ECtHR decisions (for ECtHR) / References in ECtHR decisions (CJEU)
Search results as of 30 July 2015

existed about their value for vulnerable migrants.[13] For the CJEU, five rulings were selected. *Elgafaji*, *Zambrano* and *N.S. and M.E.* all display high numbers of third-party interveners, standardised search engine scores and references by both courts. Another two decisions from the Netherlands were added to that selection, both dealing with applications of homosexual asylum seekers. While the cases have received substantive interest from third-party interveners and score comfortably above average on the search engine indicators, they are especially interesting because they were closely related and decided by the Court in quick succession. The high importance of the five selected cases is also underscored by the fact that four of them were handed down by the Grand Chamber. As in in the case of the ECtHR, one high-scoring case was not selected because the legal outcome did not appear valuable from the standpoint of migrant rights protection.[14] Looking at the entire range of judgments by both courts, they involve seven states: the Netherlands (three times), Belgium (twice), Greece, the United Kingdom, Ireland, Switzerland, and Italy (one case each).[15] The 'sample' of cases ends up being representative as the countries also feature prominently in the list of preselected rulings.[16]

[13] More specifically, *Saadi* v. *Italy* and *Chahal* were concerned specifically with persons suspected of terrorist activities. The high scores for *Mamatkulov* can be explained by the Court's finding that the non-compliance with interim measures amounted to a violation of Article 34 of the ECHR. While constituting an important general precedent, its practical effect is limited to persons such as migrants who have applied to the Court. Finally, in *Saadi* v. *the United Kingdom*, the Grand Chamber tackled the question of immigration detention but did not find a violation of the Convention.

[14] The Dutch case of *O and B* is not particularly rights-affirming as it required third-country nationals wishing to settle in the country of their EU national spouse to show that the former had been 'genuinely' resident in the EU country of which they were not a national, but in which they had lived previously. The key case favouring the rights of migrants is *Zambrano* that, having higher scores on the proxy indicators, was selected for a detailed analysis.

[15] Indeed, Italy also played a central role in *Tarakhel* where the ECtHR was confronted with the question of whether a family of asylum seekers could be returned from Switzerland to Italy under the Dublin regulation.

[16] See Tables A.1 and A.2 in the Annex.

Combining legal analysis with empirical perspectives upon the impact of the judgments, the evaluation provided in the first part of this book represents a sociolegal study that combines methodologies of different disciplines. Legal analyses of the import of rulings forms the basis for the assessment of law development effectiveness. Here, discussions also notably include those relevant cases that emerged later than the selected rulings but which could not, for practical reasons, be included in the detailed effectiveness analyses.[17] The second and third dimensions of case-specific and strategic effectiveness required the processing of empirical information, including statistical data,[18] grey literature such as policy and NGO reports, media sources, as well as submissions to and conclusions of monitoring bodies such as the Council of Ministers of the Council of Europe (CoE). Furthermore, twenty-five qualitative interviews were conducted across Europe between July 2014 and January 2016, featuring twenty-eight persons who were either directly involved in the selected cases or engaged in devising and coordinating legal strategies to promote migrant rights. Using a snowball technique, the list of interviewees included six legal representatives of migrants, eight government officials, three judges from one of the European courts, eight NGO representatives and two persons working for a relevant international organisation. Interviews were semi-structured, using interview guides, and lasted between thirty to a hundred minutes.

1.4 Outline of the Book

As stated, this work is divided into two parts, each of which is concerned with a specific aspect of the demanding character of migrant rights. In the first part covering Chapters 1–4, the word 'demanding' represents a gerund as we explore how and to what effect claims can be made before the two European courts on behalf of vulnerable migrants. The basis for this analysis is the assessment of the eight key judgments mentioned above. The second part, which encompasses Chapters 5–8, builds on the first part and discusses in more conceptual terms the consequences that arise from migrant rights being invoked. The word 'demanding' here takes the form of an adjective, drawing attention to the challenges that such demands create for the two European courts, migrant rights litigators and society in general.

Chapter 2 analyses whether the European courts have been able to ensure the protection of vulnerable migrants who struggle to legitimate their claim to residency, arguably the most important precondition for accessing a whole range of other rights. The focus will be on four high-profile rulings, all of which have been delivered by the CJEU. The first case, *Elgafaji*, dealing with claim of persons originating from countries characterised by high degrees of generalised violence, reveals how the Court's approach, if not fully committal,

[17] More specifically, practical effects (on policy and actors) often become clearly identifiable only after some time has passed. The inclusion of later cases could have also caused methodological problems given the resources and time intensity of the three-pronged effectiveness evaluation. For the legal analysis, all rulings were taken into account that were delivered before July 2018.

[18] Quantitative data concerning the numbers of migrants coming into and moving across Europe were taken from Eurostat, the European Commission's office for statistical information. Data points were also extracted from the HUDOC and EUR-Lex databases that give access to the decisions of the ECtHR and the CJEU. The HUDOC database can be accessed at http://hudoc.echr.coe.int/eng, while the EUR-Lex database can be found at http://eur-lex.europa.eu/homepage.html?locale=en.