Introduction

This book aims to contribute to the analysis of European human rights justice, and in particular of the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), from what seems to me an unexplored perspective. In a nutshell, I not only consider the case law of the ECtHR and the CJEU as a given and fixed output but also pay attention to the role played by inputs in the form of petitions brought before the Strasbourg and Luxembourg judges by repeated players (and the litigation strategies that underpin them) in making the case law of the ECtHR and the CJEU.

To put it differently, instead of a narrow reconstruction of this or that ruling of the ECtHR and the CJEU, or an analysis of the techniques and methods of interpretation of the court, I consider how the case law of the European Courts comes to be made, both in terms of inputs (complaints and applications) and outputs (execution and politicisation of judgments) and in terms of the process and architecture of the Courts. The repeated players on which I focus are a set of private foundations and non-governmental organisations (NGOs) that have become specialists in bringing cases before the ECtHR and the CJEU. For a long time, their role has been neglected in the literature and in public discussion, although NGOs have integrated litigation into their strategy along with advocacy (McCrudden 2015). The relatively ample public funding for such NGOs in the past might have led to the conclusion that they play a merely facilitating role in individual petitions. Nevertheless, it has been the case since the 2000s that a considerable source of funding for many of these NGOs was a relatively small set of private donors.

Furthermore, austerity policies have made it impossible to ignore the clout that donors have over NGOs. Budgetary cuts have resulted in declining levels of public funding, precisely at a time when the number of potential complaints before the ECtHR and the CJEU has increased, given the proliferation of alleged breaches of fundamental rights resulting from 'austerity policies' justified in the name of 'fiscal emergencies'. But

less public funding for NGOs translates into more room for private donors to turn funding into influence. This phenomenon renders it imperative to consider the relationship between output, input and process in the making of the jurisprudence of the ECtHR and the CJEU, and in particular, the structural and substantive political agendas of private donors, or what amounts to the same thing, the ways in which they try to influence the ECtHR and the CJEU through both strategic litigation and strategic funding of NGOs litigating before them. To put it in more scientific terms: by taking seriously the extent to which private donors litigate in the European Courts and fund NGOs, and how they can make use of that funding to shape the agenda behind NGOs' litigation strategies, we can consider how the origin of the financial resources that make it possible to bring cases before the European Courts influence and even capture the structure and the substance of the jurisprudence of the ECtHR and the CJEU.

In this regard, and drawing on economic theories of regulatory and state capture (Hellman et al. 2003; Levine and Forrence 1990; Stigler 1971), movement capture can be used to analyse how private funders operate like interest groups or private firms to buy influence over the goals and strategies pursued by civil servants (Devaux 2019), activists and cause lawyers. The concept of movement capture refers to the process by which private funders leverage their financial resources to exert pressure on cause lawyers and influence the decision-making processes of civil rights organisations (Francis 2018).

The book thus analyses the creeping influence of private funds on European human rights justice in Europe while administration and decision-making stay in the hands of public institutions. The relevance and accuracy of this topic is confirmed by the very recent public debates in Russia, Hungary and Azerbaijan on the role played in the human rights sector by private foundations.[1] While this phenomenon affects 820 million Europeans in forty-seven member states of the Council of Europe (CoE), until now the topic has been neglected in the academic literature. The trend has indeed been overlooked by legal and socio-legal scholars, who have paid attention mainly to alternative dispute resolution in the human rights sector (Mc Gregor 2015; Samuel 2004) and to the

[1] See for instance http://budapestbeacon.com/featured-articles/breaking-and-bad-hungarian-parliament-passes-controversial-ngo-law/, www.businessinsider.com/afp-russia-bans-undesirable-khodorkovsky-ngos-2017-4?IR=T and www.theguardian.com/world/2015/nov/30/russia-bans-two-george-soros-foundations-from-giving-grants.

privatisation of public sector services (such as water, education, healthcare, security and prisons) achieved by international and regional human rights jurisdictions (de Feyter and Gómez Isa 2005; de Wolf 2011; Nowak 2017). Although some international research studies have analysed the strategies pursued by US conservative groups (including faith-based NGOs) to promote their convictions by engaging in transnational advocacy and litigation (McCrudden 2015), scant attention has been paid until now to the potential capture and even privatisation of the European Courts through the influence of private foundations. This trend is reported here for the first time, and the impacts of this potential privatisation on justice and society deserve to be analysed.

In this regard, the book addresses the way foreign and private money affects European justice and thus European states. Irish justice, along with the UK, France, Germany, Italy, Spain, Hungary and Poland,[2] could constitute the first national case in point to be influenced by foreign private interests. Nevertheless, this process of foreign private influence on justice seems to be more developed at the European level, although such complaints must first exhaust domestic remedies unless it can be demonstrated that these are unavailable or ineffective. In this respect, the European Courts may be at the forefront of the trend, as their rulings affect and impact a larger number of people than those of a domestic tribunal.

With the decline of public funding (partly due to the economic crisis) and new strategies pursued by interest groups, foreign private foundations and donors have become growing contributors to European human rights justice. The creation of their own litigation teams, their increasing funding of NGOs and applications before the European Courts, and their contribution to the content, evidence and supervision of the judgments delivered by these Courts have direct effects on human rights. From this perspective, the book also analyses the impacts of private influence on European jurisprudence and on international relations between states, thus questioning the direct and non-direct threat this influence poses for the independence of European justice and for the protection of human and fundamental rights in Europe. Private influence on the inputs, outputs (non-direct threat) and structures (direct threat) of the European Courts could orient European jurisprudence towards certain countries (considered to be enemies of wealthy financiers) and

[2] Open Society Justice Initiative, *Litigation Report 2015*, pp. 11–12, 14, 50.

the promotion of private interests (such as free-market capitalism and the promotion of competition and free market in a liberal and international society) pursued by private foundations. Consequently, litigants which are not considered by private foundations to be a priority might end up with no real access to the European Courts or to judicial protection of their human rights. At any rate, for citizens not belonging to the countries involved or covered by the issues litigated by private foundations, access to justice and protection of their human rights could be made harder.

While administration and decision-making stay in the hands of public judicial institutions, this private influence also raises issues about the potential capture and privatisation of European human rights justice. Privatisation in this sense is the growing private ownership of European jurisprudence and judicial protection of human rights, as landmark judgments are mainly obtained and monitored by private foundations and NGOs supported by private foundations. As the judiciary contributes in a more significant way over time to the protection of human rights, we might wonder whether traditional judicial independence, notably characterised by free election of judges (Vauchez and Willemez 2006) and by public funding, is threatened by private interests and whether judicial protection of human rights is becoming partly privatised and owned by private foundations. Could human rights (the way their content and protection are interpreted by the European Courts) be considered to be fully under the influence of private foundations through these mechanisms? As this is a completely new field of research, this book will raise awareness and give a new perspective on the human rights justice system. It offers a different understanding of the issues at stake and of the relationships between litigation strategies, advocacy, private funding and European case law with a view to fostering a societal debate about the growing influence of private actors on European human rights justice.

To demonstrate this assumption, I apply a socio-legal method that considers European jurisprudence as partly the result of direct and third party litigation and its funding. In a nutshell, and as I said above, not only do I consider the case law of the ECtHR and the CJEU as a given and fixed output, I also pay attention to the role played by inputs, in the form of the petitions brought before the Strasbourg and Luxembourg judges by repeated players (and the litigation strategies that underpin them), in the making of the case law of the ECtHR and the CJEU. To this end, the book contains a socio-legal analysis of the landmark judgments

obtained by private foundations. It also draws on twenty years of empirical data on CJEU and ECtHR litigation and decision-making and the mobilisation of transnational NGOs and private foundations in the EU and the CoE. It uses qualitative and quantitative data on litigation funding and landmark cases delivered by the Courts and obtained by private foundations and NGOs (financed by private foundations) through litigation efforts. It also analyses internal litigation documents, annual and financial reports of private foundations and NGOs litigating in the European Courts and archives collected at the Rockefeller Archives Center (which hosts the Ford Foundation Archives) in New York and at the Open Society Foundation (OSF) in Budapest. Such documents are rarely applied and analysed by legal scholars or in the socio-legal literature, even though they tend to reveal why and how private foundations are interested and invested in matters of justice. As a complement to these archives and official documents, I have conducted informal interviews with heads of NGOs and officials working for the CoE and the EU.

My aim in this book is therefore to contribute to the analysis of the protection of human and fundamental rights in Europe from an unexplored perspective. The first objective of the book is to investigate the creeping influence exerted by foreign private funds on the main aspects (inputs and outputs, content of judgments and structures of the European Courts) of European and national human rights jurisprudence. The second aim of the book is to investigate the effects of this private influence on the protection of human and fundamental rights in Europe and to analyse the relationships between litigation activities carried out by private donors and their political and economic interests. In this regard, the book also raises the issue of how this private influence could have an impact on international relations between states. Finally, the book questions whether this private influence threatens the independence of European justice and may even lead to its potential privatisation. More precisely, Part I will study the procedural aspect of the creeping influence exerted by private foundations on European human and fundamental rights justice, analysing three main indicators of this private influence. Part II will analyse the substantive dimension of this increasing influence in terms of its impacts on the protection of human rights. In this respect, private funding tends to orient applications towards specific countries and domains and potentially contributes to the capture (by private foundations) and even the privatisation of the European human rights system.