Leiden Journal of International Law (2021), **34**, 777–782
doi:10.1017/S0922156521000261

BOOK REVIEW

Gaëtan Cliquennois, *European Human Rights Justice and Privatisation: The Growing Influence of Foreign Private Funds*, Cambridge University Press, 2020, 263 pp., ISBN 9781108497053, £85.00
doi:10.1017/S0922156521000261

Following the decline of public funding, foreign private donors and foundations have had a growing influence on European human rights justice. In his book, *European Human Rights Justice and Privatisation*, Gaëtan Cliquennois traces this influence. He aims to demonstrate how private donors and foundations have captured and privatized European human rights justice, with a focus on the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Cliquennois also critically analyses the normative and political effects of such privatization.

To demonstrate this process of capturing and privatizing European human rights justice, Cliquennois adopts a socio-legal approach. He not only considers the case law of both courts as a given and fixed output but also considers the role of inputs in the form of the petitions. These are brought by repetitive players, in the making of the case law. With this method, Cliquennois studied the landmark judgments litigated by private foundations, or where these foundations acted as third-party interveners. The execution process, especially where the foundations may play a crucial role, is also covered.[1] He examined the empirical data on the litigation of the CJEU and ECtHR and the mobilization of transnational NGOs and private foundations. He used qualitative and quantitative data on litigation funding for the landmark cases. Cliquennois also explored internal litigation documents, annual, and financial reports of private foundations and NGOs. As a complement, he also conducted informal interviews with heads of NGOs and officials working for the Council of Europe (CoE) and the European Union (EU).[2]

Applying this method, the book first reveals why European human rights justice has become an attractive investment for foreign private donors. According to Cliquennois, the key reason is that both Courts have become powerful actors for the member states and for the international legal order.[3] This growing importance is a result of the significant developments of new structures and new powers. These developments have also led these courts to create an internal structural incentive where repetitive and well-funded litigators might succeed better than litigations with no external financial support.[4] In this respect, especially before the ECtHR, certain NGOs have been repetitive players both through litigation and third-party intervention.[5] The global economic crisis

[1]Especially under Rule 9 Procedure; see Rule 9, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, as amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies.

[2]G. Cliquennois, *European Human Rights Justice and Privatisation: The Growing Influence of Foreign Private Funds* (2020), at 4–5.

[3]Ibid., at 15–32.

[4]Ibid., at 16–19.

[5]Ibid., at 29–30.

of 2007, however, triggered budgetary cuts in public funding of a significant number of these NGOs. As a result, they became increasingly dependent on private funding.[6]

Cliquennois demonstrates how private donors capture the inputs of the two courts. The first strategy is by means of establishing a litigation team. This can be seen in the example of the Open Society Justice Initiative established by the Open Society Foundations (OSF).[7] The second strategy is through funding and supporting a limited number of NGOs.[8] In this respect, Cliquennois examines the activities and funding of the European Human Rights Advocacy Centre, the Memorial Human Rights Centre, the Centre for Support of International Protection, the Stichting Russian Justice Initiative, the Advice on Individual Rights in Europe (AIRE Centre), and the Helsinki Committees as crucial examples.[9] Cliquennois argues that these NGOs have been able to play a crucial role before these Courts. This can be credited to the continuous funding they receive from private donors. Although these donors may vary, a small number of them fund the NGOs mentioned above in an extensive manner. These donors are the OSF, the Ford Foundation, the MacArthur Foundation, the Oak Foundation, and the Sigrid Rausing Trust. Cliquennois analysed their profile and funding activities.[10]

Following his discussion on the inputs, Cliquennois examines the private influence on the outputs. These outputs being the case law. According to him, the litigation strategy of these NGOs not only aims at obtaining individual redress but also at achieving a broader effect. Their litigation strategy aims at setting a crucial legal precedent or reforming the existing legal practice. NGOs exert this strategy through large-scale repeat litigation. NGOs feed this strategy with judicial achievements on pilot cases, Article 46 judgments, and key cases they litigate. Cliquennois supports this argument by demonstrating the great extent to which both courts have embodied the main legal arguments raised by these NGOs.[11] In addition to legal argument, NGOs can also influence the case law through their participation in evidence submission. The ECtHR, in particular, has been using documents and reports produced by these NGOs.[12] Lastly, one can further see NGO influence at the execution stage. Private foundations have been investing and increasing their participation in the monitoring of the supervision of judgments.[13]

With their influence on the case law, Cliquennois sheds light on these NGOs' involvement in the structure and reforming process of the ECHR mechanism. He argues that the reforming process was a result of the ECtHR backlog, to which the large-scale litigation strategy of these NGOs partly contributed.[14] The ECtHR reforming process, moreover, resulted in adopting private sector management techniques that benefit professional, repetitive, and well-funded litigants (i.e., NGOs). This feature encourages further involvement of the NGOs in ECtHR litigation.[15] Cliquennois observes NGOs' other involvements as well. These NGOs advocate for the ECtHR by conducting research activities on various procedural topics, including the fact-finding process, pilot judgments, disclosure of classified documents, and the election of ECtHR judges.[16] While the OSF makes voluntary contributions to the CoE's budget, some NGOs lobby for a budgetary increase at the CoE.[17] Certain NGOs also take part in the ongoing reform process of the

[6]Ibid., at 30–2.
[7]Ibid., at 33–6.
[8]Ibid., at 36.
[9]Ibid., at 37–61.
[10]Ibid., at 61–4, 182–7, 242–55.
[11]Ibid., at 67–136.
[12]Ibid., at 136–9.
[13]Ibid., at 140–3.
[14]Ibid., at 164.
[15]Ibid., at 163–9.
[16]Ibid., at 155–7.
[17]Ibid., at 145.

https://doi.org/10.1017/S0922156521000261 Published online by Cambridge University Press

ECtHR.[18] Lastly, the previous working experience of some ECtHR judges in these foundations is another indicator showing this involvement.[19]

After analysing the contours of NGOs' influence, the author explores its substantive and problematic consequences.

The first negative consequence is a normative one. The private influence causes blind spots on human rights protection. These NGOs do not bring any litigations on socio-economic rights and inequalities caused by national austerity policies. Litigations in these areas are mainly conducted by individuals, trade unions or small NGOs.[20] Cliquennois evokes different reasons for this ignorance. These foundations may be reluctant to oppose these austerity measures because such opposition could mean challenging the EU's policies. Litigating against austerity measures, furthermore, may affect the NGOs' reputation because such litigation could potentially fail.[21]

While ignoring socio-economic rights, these NGOs undertake large-scale litigation against certain Eastern European countries and Russia. Their litigations are limited to specific human rights areas, which include national policies on discrimination, immigration, counterterrorism, judicial structure, and detention conditions. He further mentions the punishment of, or political violence against, political opponents, watchdogs, human rights activists, whistle-blowers, and the LGBTI community. Lastly, he discusses the right to a healthy environment and the right to legal abortion.[22] The author accepts the existence of severe problems with human rights protection in these countries. Most ECtHR rulings can only be welcomed when considered in isolation. Still, he calls the reader to consider that these countries are subjected to excessive focus and monitoring by these NGOs.[23]

Cliquennois also explores why these foundations singled out certain Eastern countries for specific types of violations. He argues that the main objective is to spur judicial, political, and social changes connected with the private economic interests of these foundations.[24] The Eastern countries under the radar can be considered as political and economic enemies of free trade private markets and borderless capitalism.[25] Through CJEU and ECtHR judgments, these 'nationalist', 'populist', and 'closed' societies can transform into 'open societies' without any barriers to economic exchange.[26] Accordingly, the composition of the founders and the boards of these private foundations are dominated by American capitalists with a clear neoliberal orientation.[27]

Finally, according to Cliquennois, this political agenda and the policies underlying the litigation strategies also have political consequences. ECtHR litigation has become one of the fields in which a 'new Cold War' is developing between Russia and other Eastern countries (especially Hungary and Poland) on one side and the EU and the United States (US) on the other.[28] With a combination of litigation and advocacy, NGOs stigmatize these Eastern European countries as aggressive, oppressive, authoritarian, corruptive, racist, and unreliable.[29] The response of these states is to increase their control over these NGOs and consider them as 'foreign agents'.[30] The political tensions have also spread to international relations. Following the annexation of Crimea, the EU and

[18]Ibid., at 146–55.
[19]Ibid., at 158–62.
[20]Ibid., at 189–97.
[21]Ibid., at 197–9.
[22]Ibid., at 68–139, 173–9.
[23]Ibid., at 220.
[24]Ibid., at 241.
[25]Ibid., at 252.
[26]Ibid., at 252–8.
[27]Ibid., at 242–51.
[28]Ibid., at 236.
[29]Ibid., at 201–20.
[30]Ibid., at 221–8.

https://doi.org/10.1017/S0922156521000261 Published online by Cambridge University Press

US took economic sanctions against Russia. While this was happening, the Parliamentary Assembly of the Council of Europe (PACE) took political sanctions against Russia. These sanctions included suspending its voting rights, participation in decision-making bodies of the PACE, and monitoring missions to observe elections. In return, Russia suspended payment of its contributions to the CoE. It finally decided to pay its contributions in 2019 after a PACE decision to maintain Russia's CoE membership.[31]

The book, in general, constitutes a significant contribution to the analyses of the ECtHR and the CJEU from a novel perspective. As Cliquennois urges, the 'normative aspirations may cloak the instrumental use of rights'.[32] With this perspective, the book refrains from accepting NGOs as mere facilitators of individual actions aimed at redressing injustices in individual cases. Instead, it sets the case law-making process in the context of the politics of NGO funding and of international relations. The author's political science background certainly helped him in going beyond a normative analysis and unveiling topical political and economic interests.

As Lisa Mcintosh Sundstrom stipulates in her foreword, the main argument by Cliquennois, the privatization of European human rights justice, is a provocative one.[33] It should, however, be noted that Cliquennois successively defends this claim. He supports his main argument with a very detailed and rigorous empirical analysis on the case law of both courts, the ECtHR structure, the activities of the NGOs, and the private funders. A comparison to an article he wrote with Brice Champetier also shows how his claim is further developed and further strengthened since 2016.[34] The empirical analysis in the book may even seem too detailed, especially in the first four chapters. This choice should, nevertheless, be seen as a prudent move by Cliquennois, who wants to explain each step using solid evidence.

Despite these strengths, the following questions have arisen. First of all, the reader may ask why the author included the CJEU in his research. Although the book demonstrates some examples of case law from the CJEU, most weight is given to ECtHR jurisprudence. This point is also relevant for the execution of judgments and the reform process of the Court. Cliquennois, furthermore, admits that the influence of private foundations on the CJEU seemed to be far less than that exerted on the ECtHR.[35] The private influence, therefore, stays vague for the CJEU.

Secondly, it would be interesting to read Cliquennois' reflections in relation to those examples that do not exactly fit his arguments. To put this into perspective, he claimed that the courts tend to embody the main arguments made by the NGOs. In *Lautsi* v. *Italy*, however, a case examined by the author, the Grand Chamber of the ECtHR did not embody the arguments raised by the third-party intervener NGOs.[36] Another point that needs further assessment is whether all of these NGOs limit their radar to certain states. A counter-example would be the litigation strategy of the AIRE Centre, an NGO that brings many cases against the United Kingdom. The author mentions this NGO, its activities, and its private funding in the first chapters.[37] In the second part of the book, when further analysing the policy behind the litigation strategy, the AIRE was not, however, mentioned as an exception.[38] This example could hint that the relationship between the funders and certain NGOs can be more complex than demonstrated.

[31]Ibid., at 235–6, 240.

[32]Ibid., at 263.

[33]Ibid., at xi.

[34]G.Cliquennois and B. Champetier, 'The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War?: The Economic, Judicial and Political Influence', (2016) 22 *European Law Journal* 92.

[35]Cliquennois, *supra* note 2, at 155.

[36]Ibid., at 107.

[37]Ibid., at 50–3.

[38]Ibid., at 175–9, 182–7.

https://doi.org/10.1017/S0922156521000261 Published online by Cambridge University Press

Another point should be made about his argument that the NGOs in question are mainly interested in particular types of violations but are, however, negligent to economic and social rights. While not disagreeing with this overall claim, it is clear that further reflection is still necessary. A classical counter-argument to this point is that social and economic rights are outside the ECtHR's protection sphere. In this respect, Cliquennois could have at least reminded the reader of the scholarship on the dynamic interpretation of the ECHR and the positive obligations of the states. This could demonstrate the possibility of a broader interpretation of the Convention that may result in the protection of social and economic rights. A similar question arises for the cases related to the discrimination based on Roma origin (e.g., CJEU, *Nikolova v. Romanian CEZ Electricity*[39]; *Horváth and Kiss v. Hungary*[40]) and for the cases that tackle the right to a healthy environment (e.g., *Fadeyeva v. Russia*[41]). While analysing these cases, Cliquennois could have included his reflection on whether these two areas indirectly have an essential dimension on social and economic rights.

Similarly, one can further reflect on the argument that the reasons for the structural problems in the ECHR protection is the limited competence of the eastern European countries' constitutional courts.[42] In this respect, it is questionable whether Cliquennois' analysis of the Russian Constitutional Court can automatically be relevant for other eastern European countries. The Constitutional Courts of certain eastern European countries have a broader normative mechanism than some Western counties. In this respect, some systems allow direct individual complaints to the Constitutional Courts with respect to violations of fundamental rights.[43]

Another point can be made on the vagueness of the ECtHR practice on awarding legal aid and reimbursement of costs and expenses.[44] The Court's practice remains vague, but this ambiguity does not mean that NGOs are automatically excluded from these mechanisms. The main problem with these two mechanisms is that the sums awarded are quite often derisory. An interesting question, therefore, would be if access to both these mechanisms would facilitate access to justice in reality.

In the last chapter, the author tackles the relation between private interests and the economic and political interest of specific Western states. He explains how these states fund the very same NGOs and why. One reason is to avoid being directly involved in inter-state cases. Another reason is diverting European Courts' attention away from in-house violations. An additional reason is that these Western states aim to obtain judicial condemnations against their political and economic enemies.[45] These insights are compelling and highly critical. It would add great value to see further empirical support for this analysis. Against this backdrop, the reasons for some of these states being opposed to the raise of the CoE's budget would be an interesting point to reflect on.[46]

Further theorizations of the empirical research results would also be interesting. The process of capture,[47] professional isomorphism and mimetic processes,[48] and the adoption of Karl Popper's understanding of 'open society' by these funders[49] should be welcomed as striking points. More

[39]*Nikolova v. Romanian CEZ Electricity*, C-83/14, 16 July 2015, CJEU; Cliquennois, ibid., at 103–4.

[40]*Horváth and Kiss v. Hungary*, no. 11146/11, 29 January 2013; Cliquennois, ibid., at 105.

[41]*Fadeyeva v. Russia*, no. 55723/00, ECHR 2005-IV; Cliquennois, ibid., at 100–1.

[42]Cliquennois, ibid., at 179–81.

[43]See, in general, the European Commission for Democracy through Law, Study on Individual Access to Constitutional Justice, Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010), CDL-AD(2010) 039rev.

[44]Cliquennois, *supra* note 2, at 31.

[45]Ibid., at 65, 258–9.

[46]See, in general, E. Lambert Abdelgawad,. 'The Economic Crisis and the Evolution of the System Based on the ECHR: Is There Any Correlation?', (2016) 22 *European Law Journal* 74, at 76–8.

[47]Cliquennois, *supra* note 2, at 11–14.

[48]Ibid., at 161.

[49]Ibid., at 256–7.

https://doi.org/10.1017/S0922156521000261 Published online by Cambridge University Press

reflections on Cliquennois' findings with more reference to political science theory and sociology would nonetheless be beneficial. That would have helped us to see even broader perspectives.

To tie up what has been said, Gaëtan Cliquennois' book critically and diligently advances the understanding of the role of private funders in European human rights litigation. The points of critique raised do not change the appreciation for this research. Perhaps some of these critiques go beyond what can be expected from one book. This point might be further relevant, considering the book's feature of establishing a novel perspective on the NGOs' role. We can only hope that his book inspires more research by scholars who follow in its footsteps.

*Ezgi Özlü**

*Department of International Law and Dispute Resolution, Max Planck Institute Luxembourg for Procedural Law. 4, Rue Alphonse Weicker, L-2721 Luxembourg [ezgi.ozlu@mpi.lu].

https://doi.org/10.1017/S0922156521000261 Published online by Cambridge University Press