

Reply to Bogdan Iancu's *Verfassungsblog* review of 'Transnational Networks and Elite Self-Empowerment: The Making of the Judiciary in Contemporary Europe and Beyond' by Cristina E. Parau (OUP, 2018)

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This is a rebuttal to Bogdan Iancu's review so that readers may form a balanced view of my book.

My monograph is not about the beliefs that Iancu attributes to me, none of which I hold: '(Parau and Wilkinson) question what the authors believe to be liberal internationalism gone awry.' I never conceived my book as being about liberalism, gone awry or no; nor about 'evolving judicial organization standards and patterns'. The patterns I found did not 'evolve'; they were crafted by identifiable agents, many of whom I interviewed. I expounded my thesis over several chapters, and am surprised to be interpreted in terms of hoary stereotypes. I simply unearthed where Judicial Supremacy, a non-majoritarian mode of government, originated, and how it spread across a Europe none of whose judiciary traditions remotely resembled it, puzzlingly. I discovered an *institutional template* behind which stood a transnational community of well-networked self-interested political and socio-economic elites. Their template is simple (if not simplistic) and invariable; tripartite, it comprises a Constitutional Court monopolizing constitutional interpretation; a Judiciary Council accountable to neither nation nor democracy, described as 'a state within the state'; and an Academy to monopolize judicial training. The International Relations and Law and Politics literatures addressing sundry aspects of my topic are very fragmentary but when collated, corroborate my thesis of elite self-empowerment (see Chapter 1). I couldn't have cared less if they were liberal; I theorized them in the analytic framework of actor-centred institutionalism (Scharpf 1997), constructing my argument from the ground up from more than one hundred elite interviews. I never considered testing memes like liberalism or mission creep. Missions don't creep by themselves, either; the agency doing this one is a farther-flung community of higher-ranking actors than any national judicial corps. If Iancu animadverts my abundant evidence or my inferential reasoning, he still owes it to use reason to refute either one. It abdicates that responsibility and is an *ad hominem* fallacy, to boot, to mislabel a meticulously researched book, that he misunderstood on its own terms, a 'rant' because I was unable to be his own ideological bedfellow on Hungary or Poland.

My empirical inquiry never addressed ideology, unless it was the ideology of my informants. I did proceed normatively to critique their template, with its implicit ideology, but this vindicates England and early America, not Hungary or Poland; unless you prove the latter were emulating the former. Out of 336 pages, five sporadic paragraphs noted Hungary, totalling less than one page. Yet Iancu wasted a third of his review stringing together snippets of interview excerpts and commentary, confabulating a changeling context that I could not recognize. It certainly is not my own.

I largely ignored Hungary and Poland for two reasons. First, no East European nation played a role in the Juristocratic bloom; I aimed to inquire into a pan-European phenomenon seemingly hatched *ex nihilo*; particular reforms lay outside my scope. From my perspective, Hungary and Poland mattered only when they began acting as 'veto players' (Tsebelis 1995); whose *general*

'dormancy' or puzzling inaction I treated at some length in: Parau, C. (2013). 'The dormancy of parliaments: The invisible cause of judiciary empowerment in Central and Eastern Europe.' *Representation – The Journal of Representative Democracy* 49(3): 267-280. Second, at the time of writing, objective information on all relevant points was impossible to find, in time. Nowhere could I find 'chapter and verse' about *how exactly* either country went astray; only outcries, all frustratingly non-specific. The Commission's Rule of Law Reports were classic. The latest, 2021 Report accuses Hungary of little more than vetoing the template. No one who has not followed me down the rabbit hole of elite self-empowerment *via* transnational Juristocracy can imagine the anti-climax ('All that fuss about *this?*') of the 'need to formally reinforce the powers of the independent National [sc. transnational] Judicial Council to enable it to counter-balance the powers of the President of the National Office for the Judiciary' (European Commission 2021:1).

To find a circular-reasoning peer to the presumption that judicial independence is coterminous with the network template, one should have to look to the English common law's presumption that the King can do no wrong. At least the English could plead necessity: one cannot hale the Sovereign before his own courts without precipitating a constitutional crisis. If our elites are to be believed that their own template *is* judicial independence, then it never existed before them; for neither England, America, France, nor any others have ever countenanced a Judiciary state within the state. Had Iancu read my monograph carefully, he would have learned the network community 'programs' the European Commission stance on judiciary governance. No wonder appointing 'your' judges without 'our' consent is equated with violating 'European standards' (European Commission 2021:6) that make judiciaries independent of the nation but *not* of the network. Is that really unrecognizable as judiciary 'capture' (*cf.* Vibert 2020)? Corporations' low perceptions of judicial independence (European Commission 2021:2) hints multinationals may not be getting their way in Hungary every time.

I flagged Hungary's and Poland's reforms as 'ethical alloys' with precisely the ethically alloyed elite network in view. It is good to veto their template (*e.g.* constitutional courts' out-of-control jurisdiction), but bad to pack the courts in the process. The network packs supranational courts with impunity, wanting them autonomous of member-nations but dependencies of itself. The Commission's feud with Hungary is a naked power struggle over who Hungary's judiciary shall answer to, Hungarians or Brussels: "The [non-binding] recommendation to strengthen judicial independence, *made in the context of the European Semester*, remains unaddressed" (European Commission 2021:1 [emphasis added]).

The decontextualization of Szajer likening the EP to Stalin, and the insinuation that I promoted that, presents another fallacy, a 'chain' of guilt by association (Pinker 2021); plus, Iancu fails to disprove him. My reason for quoting him was to prove the network's intolerance of alternatives to its consensus. Here is Szajer complete; let readers judge for themselves:

My big debate was in the European Parliament . . . even Stalin had given more time for the defence of the short trials for their own enemies than what I had. ... I do not say that everything we did was the best. I have my own criticism, there were difficult choices to make, it is not that everything is clear white, but I can defend every single decision: why we were doing it, how we were doing, and also can say that what we did is not even a little bit that different from what Germany, France, Italy, and Britain are doing. ... Orban spoke about 'illiberal democracy'. Maybe the choice of words was wrong but

what he meant by this is that democracy can be Christian Democracy, Social Democracy, and Liberal Democracy, and since he is a Christian Democrat he wants Hungary to be a Christian Democracy ... that was the essence, that's what he said. That we want some liberalism but that the under-regulation of the financial markets and other things failed in the front of our eyes. It collapsed. And they are still fighting for liberal lack of regulation over banks, bankers, and other things? (Jurist and MEP: Interviewee 35) (p. 115)

I interviewed Szajer in 2015. My book was with the publisher (2016-2018) before I saw reports of his private life. Inured as we all are to the politics of personal destruction, with its ideological bedfellowships, I took no note, nor thought (nor now think) I should have. Attacks *ad hominem* are impertinent to my topic. I would have proceeded no differently in 2015.

With the Croatian quotation, too, Iancu plays the blame game at the cost of fidelity to the work under review. Here is his snippet's context. *Note*: I did not bring up patriotism, I merely cinched what others were grappling with, – the mystery of the power of a handful of mere functionaries with no formal jurisdiction to casually cancel the ethnic solidarity of millions:

The Network Community rode to the rescue of this Court too, having already drawn together national and supranational legal professionals who collaboratively pressurized reluctant national governments to submit to the ICC jurisdiction. This is corroborated, for example, by an EC official:

Croatia must deliver results on the ground, which is not always the case and which evidences a lack of political will in some areas, like prosecution of war crimes; a patriotic government does not want to be seen to pick on its heroes in the homeland war. (EC official: Interviewee 39)

Elite self-empowerment by transnational networking and network consensus, plus a critical opportunity (EU accession), is again the key unlocking the mystery – in this case, how a few remote bureaucrats should be capable of overriding even so passionate and unifying a current as patriotism in war. (p.146)

Iancu concludes, 'If such are the components of "robustly justifiable" and "robustly democratic" "ethical alloys" and if this were the only option at hand, one would be better off trying one's luck with the Network.' And he knows this how? Why could he not prove it? Hobson's choice excluding a middle is one more fallacy. I never advocated any options, not knowing what they would be. I dedicated many a page to practices in historic Britain and early America. If I had a preference, it would be there. As my discourse implies, judicial independence can co-exist with domestic accountability:

The English Judiciary is the *locus classicus* of decisional independence without more, who have been exempt from undue influence for centuries. Yet ... judges are not even co-equal to Parliament or the Crown ... (Blackstone [1765] 1809). Nor has ... the Crown or Parliament to obey any or all judicial decisions, though [unelected] Executive officers of the Crown may be obligated to do so. ... Independent adjudication is thus a means to a specific end; it is the last ordinary chance for the accused ... to be acquitted (p.171).

Iancu's partisan review instantiates another of my observations: the unconscious ego-centrism of elite solidarity. With the pre-Copernican astronomers, they conceive the world as revolving around themselves.

References

European Commission (2021). "Rule of Law Report: Country Chapter on the rule of law situation in Hungary." Brussels, 20.7.2021.SWD(2021)714final.

Pinker, S. (2021). *Rationality: What It Is, Why It Seems Scarce, Why It Matters*. New York: Viking.

Scharpf, F. (1997) *Games real actors play. Actor-centered institutionalism in Policy Research*. New York: Routledge.

Tsebelis, G. (1995). "Decision making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartism", *British Journal of Political Science* 25(3): 289-325.

Vibert, F. (2020). 'Three ways of theorising "capture": when politics and business join together'. Democratic Audit. <https://www.democraticaudit.com/2020/01/14/three-ways-of-theorising-capture-when-politics-and-business-join-together/> .