

# **HONESTY AND TRUST IN OLD AND NEW DEMOCRACIES: CHALLENGES AND DISAPPOINTMENTS**

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In 2002, János Kornai and the author organized a project that sought to confront distrust, corruption, and dishonesty in the transition economies of Eastern Europe. In reflecting on that project, this essay highlights present-day weaknesses in the region's transition and stresses equally troubling developments in the United States that could make government less open to input from civil society groups and low-income individuals. Building a trustworthy state and creating social trust remain challenges for committed democrats in both developed and developing societies.

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## INTRODUCTION

In 2002 János Kornai and I collaborated on a project at Collegium Budapest to study “Honesty and Trust: Theory and Experience in the Light of Post-Socialist Transformation”.<sup>1</sup> Today, one might organize a follow-up project titled “Dishonesty and Distrust: Challenges to Democracy in Europe and the United States”.

Our project focused on the process of rapid change in Eastern Europe and the former Soviet Union. That process produced certain pathologies resulting from the weakness of democratic and social institutions and the speed of the transition. Dysfunctional practices risked building on dysfunctional practices in a vicious cycle. The early libertarian triumphalists, who believed that it was enough to introduce electoral democracy and the free market in Eastern Europe, were facing the complex reality of “rebuilding the ship at sea” (Elster et al. 1998). My participation in the Budapest project built on my long-standing research on corruption that highlights the risks of weak institutions and unstable rules (Rose-Ackerman 1978, 1999).<sup>2</sup> That work complemented Kornai’s early critiques of the socialist economic system. He pointed out its contradictions, in practice, even as he applauded the goal of a fair system of economic production and distribution (Kornai 1980, 1986). We shared the hope of a transition toward liberal democracy and a regulatory, social-welfare state in Eastern Europe that could produce widely shared prosperity and limit poverty.

The workshops at Collegium Budapest and the two volumes that we edited were both a warning about the problematic aspects of the transition and an expression of hope for a more inclusive and fair way forward in Eastern Europe. Unfortunately, our worries have proved prescient. Hungary has moved in the direction of ever more consolidated one-party rule, and Poland shows similar trends, in spite of its more powerful institutional checks. With both countries now inside the European Union, the options for the EU are limited, especially given its preoccupation with managing the voluntary exit of the United Kingdom. Furthermore, especially distressing for those who value both democratic legitimacy and technocratic competence, the United States may be moving away from both. The issues that we studied in 2002 remain salient and have a broader application than we imagined at that time.

<sup>1</sup> The project produced two books: Kornai – Rose-Ackerman (2004) and Kornai et al. (2004).

<sup>2</sup> See also Rose-Ackerman – Palifka (2016), the second edition of Rose-Ackerman (1999).

### ADMINISTRATIVE LAW “REFORM” IN THE UNITED STATES

Just as a number of European legal systems and public law scholars are beginning to accept the democratic legitimacy of public participation in executive rulemaking and to consider a role for judicial oversight,<sup>3</sup> the Trump Administration and Congressional Republicans want to repudiate many past regulatory accomplishments and to undermine the basic principles of the US Administrative Procedure Act [APA]. In the first instance, President Trump and his appointees are using executive action to cut back the regulatory welfare state.<sup>4</sup> Proposals before the US Congress would have a more long-term impact if enacted into law.<sup>5</sup> Notice and comment rulemaking under the APA presently requires public notice of proposed rules (that is, secondary norms), open-ended participation in hearings, followed by reasoned justification of publicly issued rules. Judicial review concentrates on procedural irregularities and on the consistency of executive norms with underlying statutory authority. These procedures seek to balance public input with technical competence in executive branch policymaking; actual practice reflects that balance, however imperfectly.

Proposed amendments to the APA now before the Congress would move agencies toward heavily judicialized procedures that misunderstand the nature of executive branch policymaking or, more cynically, seek to stymie regulatory activities. The proposed statutes would remake the statutory basis of the US administrative state by delivering deregulation to aggrieved economic sectors at the expense not only of lower substantive benefits for the public, but also of weaker state capacity to carry out any kind of democratically legitimate policymaking inside the executive and the independent agencies. The purported “reforms” now before the Congress would shift agencies toward a more formal judicialized process that casts rulemaking as an adversarial exercise, not an effort to seek a reasonable policy outcome that balances interests, principled claims, and facts.

<sup>3</sup> See for example, Hoffmann – Schneider (2017) (discussing the ReNUAL initiative, which includes proposals for the reform of the EU’s rulemaking procedures to involve more public input).

<sup>4</sup> Executive Order 13777 [<https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda> (accessed August 2, 2017)] (instructing agencies to submit plans to repeal, replace, and modify existing regulations “to make them less burdensome”). See also Dabba (2017).

<sup>5</sup> The most important acts are: Regulations in Need of Scrutiny [REINS], <https://www.govtrack.us/congress/bills/115/s21/text> (accessed August 8, 2017); the Regulatory Accountability Act [RAA] <https://www.govtrack.us/congress/bills/115/s951/text> (accessed August 8, 2017), and the Regulatory Integrity Act [RIA], <https://www.congress.gov/bill/115th-congress/house-bill/1004> (accessed August 8, 2017).

The proposed statutes invoke science as a check on policymaking, not as a tool for crafting sensible policies that acknowledges the uncertainty of many results and the importance of acting to control risks even in the face of incomplete information. Cost/benefit analysis, mandated by some of the bills' statutory language, is taken as an unproblematic benchmark rather than as a useful but limited tool that relies on a number of contested premises familiar to all economists.<sup>6</sup> Combined with placing the burden of proof on regulatory agencies, the proposed statutes would reverse of the "precautionary principle".

By mandating the model of a court case as the format for policymaking, the proposed amendments to the APA will predictably lead agencies to avoid rule-making. Instead, if they continue to implement regulatory statutes, they will likely proceed by case-by-case adjudication – a less transparent way to make policy and one that may be unclear and unpredictable as applied to forthcoming cases. If rulemakings do occur, the court-like procedures, with cross-examination, a high burden of proof on agencies, and an emphasis on cost/benefit analysis, will tend to favor wealthy interests, especially regulated industries. Thus, heavy business representation at agency hearings will continue, but will be harder to resist. The impact of well-financed groups may also strengthen if judicial review concentrates on the judicial character of the hearings with the burden of proof and persuasion on less well-financed and less well-lawyered civil society groups.

## DEMOCRACY AND POLICYMAKING

I came to the Collegium Budapest project not only with an interest in the pathology of corruption but also with the view that an accountable public administration is a key source of democratic legitimacy. Corrupt officials lack public respect, but so too do honest officials who are secretive, non-transparent, incompetent, or wasteful.

After the conclusion of the Collegium Budapest project, I published a study of Hungary and Poland in 2005, titled *From Elections to Democracy*. I argued that the transition had not gone far enough in reforming the bureaucracy and introducing mechanisms of public accountability. Regime change did not go much beyond introducing the free market and the ballot box. My concerns about the fragility of efforts to establish competent, democratically legitimate governments that respects rights seem prescient today. However, fifteen years after our project

<sup>6</sup> In particular, there are long-running debates over the appropriate discount rate and over using money as an imperfect metric for utility. Potential global disasters raise special questions (Rose-Ackerman 2016).

in Budapest, one cannot blame missteps during the transition for all current developments, especially because similar pressures on liberal, democratic values have arisen in Western Europe and in the United States. The problems are endemic to efforts to combine democracy with technocratic logic, not just during transitions. However, they are not insuperable.

Part of the problem is the limits of a theory that some take for reality. In an idealized free market democracy, self-interest is compatible with the public interest. Everyone is a price taker in markets for inputs and outputs, and no one can skew public choices in his or her favor. Similarly, pure majoritarian democracy treats all citizens equally under the principle of one-person-one-vote. In practice, both the market and democracy are vulnerable to self-seeking behavior that leaves some citizens deeply disadvantaged and demoralized. These difficulties may be exacerbated in periods of transition because laws and norms are unclear and in flux. The project that Kornai and I organized focused on the way the transition itself affected honesty and trust in society.

By the time of the transition, the socialist ideal had lost most of its normative force – undermined by a mismatch between the ideal and the reality of self-seeking politicians and a dysfunctional economic system. However, in the United States, the economic transition to a post-industrial economy has created some of the same pressures on those left behind by the decline of heavy manufacturing and industrial labor unions. Nevertheless, the rapidity and depth of the change in Eastern Europe was particularly acute. However dysfunctional the status quo under socialism, people had adapted to it and found ways to cope. The rapid change toward the market and democracy was disruptive. In a short span of time, the old rules and practical workarounds were no longer valid, and new ones were not yet in place or remained vague and under-enforced. Norms had not caught up with and adjusted to new rules. There were, at least, four fundamental problems in the transition from socialism: uncertain rules, poor program design, monopoly rents, and a deeply contested political space. At the time of our project, the prospect of European Union membership dominated the legislative agenda, creating its own problems. Those whom I interviewed described a “flood of legislation” that was often rapidly drafted and incapable of being well implemented, given the states’ lack of bureaucratic capacity and expertise (Rose-Ackerman 2005: 55–99).

The *first* and most obvious impact of the transition was great uncertainty about both the rules in place and their levels of enforcement. Under socialism, prices were not set to clear the market, so that scarcities and gluts developed. People waited in line for limited supplies of good quality meat and stylish shoes, but copies of Immanuel Kant’s *Perpetual Peace* were piled high in an East Berlin bookshop that I visited in the 1980s. Hence, the stage was set for corrupt under-the-table payoffs to access scarce goods. Rules were sometimes so rigid that a

bribe was the only way to get things done. Corruption facilitated both activities that would be criminal anywhere and those that would be routine in a free market. It helped to smooth over the rigidities of the planned economy (Montias – Rose-Ackerman 1981). After the transition, most old rules simply disappeared, leaving great uncertainty in their wake. If under socialism bribes were paid to get around rigid rules, now they were paid to buy some certainty because the system was in flux. But certainty was difficult to obtain. A corrupt official might come back for more payoffs, or another official might appear to demand a second payoff. A vicious cycle could develop where existing levels of corruption encouraged more and more officials to demand payoffs, making it harder and harder for honest reformers to intervene to change expectations and establish a functioning rule of law.

*Second*, even when the state reformed public programs, the results were sometimes poorly designed and implemented. A particularly striking example is the healthcare system where the values of socialism persisted in formal programs that did not accord with the reality on the ground. Kornai was particularly concerned with that sector where the commitment to a universal, single-payer system clashed with the lack of public resources and led to widespread under-the-table payoffs to doctors, hospitals, and other medical personnel by those with the ability to pay (Kornai – Eggleston 2001, 2001a). In my experience, many people in Hungary refused to view their payments as bribes, yet they were, in fact, illegal, even if widely tolerated. The response to this mismatch of supply and demand should not have been a crackdown on individual payoffs, but rather an overhaul of the entire system that required hard choices about the level of public subsidy for the needy and the development of an overall system funded by some mixture of public and private insurance. Hungary, at least in 2002, could not have afforded Germany's generous public healthcare system, but its policymakers seemed unable to make realistic tradeoffs to implement a workable policy.

*Third*, exacerbating the problems of vague or nonexistent rules and of dysfunctional policies, individuals and businesses obtained monopoly positions in some industries and service sectors both inside the state and in the newly developing private sector. Some were insiders in the socialist regimes; others were outside business interests with deep pockets and few scruples. Political and economic power became deeply intertwined, fueled by a naïve belief or a cynical claim that the private market would spread prosperity to all and fuel economic growth. Some sectors did thrive, but most transition countries experienced a fall in overall income, slow growth, and increased poverty – a harsh reality that some transition states are only now moving beyond.

*Fourth*, the political space was and is deeply contested. In 2002, it was not unusual to hear opponents of Hungary's newly elected social democratic govern-

ment say that “the Communists are back in power”. Conversely, the social democrats and liberals often characterized their right-of-center opponents as something close to fascists linked to the Arrow Cross. As the US is now experiencing under President Trump, a politics in which opponents are the “enemy” with no moral legitimacy is not a healthy democracy.

## CONCLUSIONS

Kornai’s disappointment in 2002 with developments in Eastern Europe is echoed today both by current weaknesses in that region and by efforts to make the United States government less open to input from civil society groups and individuals without extensive financial resources. On both sides of the Atlantic, *Building a Trustworthy State* and *Creating Social Trust*, the titles of our Collegium Budapest books, remain challenges for committed democrats seeking political-economic systems that are both fair and efficient. The key topics that Kornai identified to me in a 2000 e-mail remain salient: “[furthering] mutual trust and [overcoming] distrust among society members; corruption; tax-evasion and other ways of cheating the state; the reputation of contracts and breach of contract, state capture by privileged groups or by criminals.”<sup>7</sup>

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<sup>7</sup> Quoted from an e-mail sent to me by János Kornai in 2000 inviting me to help organize the project on Honesty and Trust at Collegium Budapest.

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