

Simplification, Efficient Governance*

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*Cass Robert Sunstein:
Simple(r) – The Future of Government
Simon & Schuster, New York, 2013, p. 260
ISBN: 978-1-4767-2659-5*

American professor of jurisprudence Cass Robert Sunstein was involved in research at a university before being requested for an assignment that he had always desired: he gets a chance to develop legal norms. Sunstein was head of OIRA (White House Office of Information and Regulatory Affairs) between 2009 and 2012, during the most difficult period since the Great Depression. However, periods of crisis always result in creating new values the hard way, or returning to tried and tested but forgotten old ones.

This book is about how things can be made more simple. Important things are simple, and the entire complicated world rests on these simple truisms. If we manage to identify these simple but important things, they will answer many of our seemingly complicated questions. Sunstein also explores these fundamental issues, and in his book he presents the essence of his experiences gained in the simplification of the work of government, legislation.

How can governments improve, how can they manage their affairs more efficiently? Is efficient governance better governance as well? It is beyond doubt that as a result of efficient governance the intentions of decision-makers are implemented almost without obstructions, but this is still only a technique. Substance, the object of regulation is an equally important, what is more, a determining factor. There is a choice of values underlying the intention of improving governance. We must decide what is it that we want to do and what is it that we do not. Efficiency expresses the intermediary tools that we apply in order to implement our choice of values. The choice of values by the regulators must be formulated, it must be communicated to the target group of regulation in such a manner that the intention should be clear, and the norm should be understandable and possible to be observed. This could be the basis of efficient governance.

* The views expressed in this paper are those of the author(s) and do not necessarily reflect the official view of the Magyar Nemzeti Bank.

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The government is responsible for managing social and economic challenges. Some of these come from outside the scope of control of the government, i.e. they must be considered as given factors, to which responses must be given. On the other hand, some of these factors are within our scope of control, and concerning these we must be proactive. If we respond to a challenge by overregulation, we could lose the power of simplicity. Sometimes too much is less and weaker.

Does the reduction and simplification of rules mean a less regulated status? Naturally, the rule that the right middle ground must be found applies to this matter as well. Not every life situation requires rules of the same depth and level of detail. The essence must be captured, and if we can pinpoint it, then many related questions will be resolved almost by themselves. The major rule will automatically settle the consequential and related issues as well. A case in point is the Ten Commandments. It is a set of a small number of rules that are highly accessible and cover many areas that need to be regulated. They are efficient because they capture the substantial issues, and they are value-principled, because there is a definite choice of values. They settle the fundamental issues, the details follow from this. Naturally, sophisticated social and economic systems require an appropriately detailed system of norms, at the same time, it is also necessary to maintain structural accessibility, so that the fundamental values can be still captured in any system of relations however complex they may seem.

During times of crisis one must concentrate on the essential matters. This intention is also embodied in legislation. We need a regulatory system that mitigates the burdens on society, maintains flexibility and the freedom of choice for the citizens. No one likes living in a jungle of rules, especially when the problems and burdens imposed by the crisis encompass and weigh on our lives anyhow. We need to establish order in the sea of problems. And of course, order should not be created, but rather maintained. But situations can also occur where the maintenance of order is upset, resulting in disruption, and we must accept the difficulty that comes with putting things in order.

Sunstein supports a simple approach that incurs low costs and maintains freedom. He considers governance based on the knowledge of realities as a governance capable of significantly improving the quality of human life. He takes into account the results of behavioural economics. Behavioural economics takes a complex approach to the exploration of the factors influencing the economic, social processes, studies the social, cognitive and emotional factors and their implement on economic decisions, at the level of both the individual and institutions. It integrates the psychological and neo-classical economic theories and establishes behavioural models. It analyses the factors that influence people when they make their choice from alternative options and is mindful of how people actually act, and not only of what action could be assumed, modelled according to economic

theories. Creating a foundation of experiential facts for decisions is at least as important as paying attention to common sense when making decisions.

We make decisions based on actual facts, instead of dogmas, hunches and anecdotic information. If by dogmas we mean such fixations whose connection with reality is at least unverified, then naturally, it is sometimes justified to reject them. But the question remains: can everything be changed? Why are dogmas considered unchangeable? There is no way to avoid the need to explore the content of the dogma as well. If we explore that, we may find ourselves facing values that should be preserved and carried on. Loyalty and creativity are two concepts that never exclude each other, indeed, if we are lucky, they could deliver the best results when applied together.

Sunstein intended to simplify regulation in an effort to counter unjustified complexity, accumulating burdens and costs. Whenever the law allowed it, in their work at the OIRA they always insisted on carrying out a thorough analysis of the expected costs and benefits arising from the new legislation. They focused on economic growth and job creation, ensuring that neither of these aims should be subordinated to the other.

The existing statutes also had to be reviewed from time to time, to check whether they still served their intended purpose. The basis of deregulation is to assess whether they are necessary, and if so, they are efficient in their existing form, or they should be amended while preserving the purpose of the regulator. The regulator must ask the questions of what will be the result of regulation, what do I want it to result in? Today, we have a constantly widening scientific toolset to answer these questions. Assessment must be made prior to creating the statutes and also after they have become law, and in this work we could use as a guideline the following principle that is simple but expresses the essence: what is good should be done, what is bad should be avoided. Naturally, both of these actions require lots of courage.

As presented by Sunstein, in the United States the OIRA is the regulatory arena. No federal executive legislation is allowed to be introduced without the participation of the OIRA. Executive orders on the implementation of laws and defining the detailed rules are often essential pieces of legislation in the American legal system, because several laws are almost inapplicable in themselves, they refer so many questions to the powers of the executive government agencies. Naturally, the legislator does not leave the task of creating the detailed rules to another body out of laziness, but rather because it knows that its fundamental task is the development of a strategy, to decide conceptual matters, and it also knows that the detailed rules should be defined at the level where the creator of the rules has access to the necessary information.

The OIRA reviews these draft executive pieces of legislation before they are issued. The professional staff of the OIRA reviews the drafts and sends them for assessment to the ministries and offices affected by their topic. This is a wide public administration alignment process, which ensures the involvement of the affected parties and the appropriate sharing of information.

However, we can ask the question of what is the use of all this? Why do we spend money on regulatory authorities? The citizens consider their expectations important. They need safe food, clean air, potable water, etc. But rules are also required for these to be available. Naturally, it makes a difference how many rules there are and what are their contents.

No society can function without rules. As Friedrich Hayek put it, the state cannot be passive in any social system. The state should be at least reflective, but often also proactive. The state should have an opinion on the things going on in the world, and it should also shape them by regulation wherever it is considered necessary. An efficient, competitive system also requires a reasonably designed and constantly maintained legal framework. A well-chosen regulatory framework also regulates and controls the regulators. Therefore, an architecture of choices is also necessary for the creators of the choices.

This book is not the first time where Sunstein has dealt with the world of motivating, influencing rules, also called nudges. Together with Richard Thaler they wrote a very successful book on the nudges promoting and motivating happiness and health.¹ A nudge does not enforce decisions, rather it preserves the freedom of choice, but offers you the opportunity to make the decision that best suits your own interests. These are rules that facilitate choosing, provide information, call attention to the choices and motivate to make a choice. Making things simple and transparent, so that everyone should find their choice among the offered opportunities.

Free market and personal freedom are the freedom of choice. This is the typical American life principle. The individual knows what they want, what is good for them. To let people take their own routes. This is also the freedom of error. This American feeling goes back to the initial “occupation” of the country, but since then the world has become more complex many times over, at least as far as the accomplishments of technical and technological developments in the world around us are concerned. People have always required assistance with making their own decisions, they requested advice from wise people and also relied on the experiences of others. Today, we need this more than ever before, and most of us take assistance from others for our decisions. The nudges also fulfil this function of assistance from the state, they provide information, but leave the choice to the individual. The world

¹ Richard H. Thaler, Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008).

of incentives is based on the accurate understanding of human thinking and action. The best incentives result in significant benefits at low cost.

Human thinking consists of two cognitive systems. The first is automatic, instinctive, intuitive, and the second is pondering, interpreting, capable of handling different relations and complex situations. When we perform a cost-benefit analysis, we slow down our fast, automatic decision-making, pondering the opportunities, evaluate the costs and the expected benefits.

People are prone to procrastinate their decisions. One of the elements of procrastination is that we only think for the short run, it is difficult to plan for the long run. The future seems incalculable. This also depends on whether we are capable of long-term thinking. Do we have a vision of the future? Do we place today's decisions in a wider perspective? Should we dare make a commitment? These questions apply both at individual level and the level of the society. We must make our decisions shaping our future in the present. The people of the modern era have lost the horizon. However, our present short-sightedness is dangerous. We must explore what it is that hides the perspective. We must identify these things blocking our view, we must assess whether they are really necessary or can be removed.

Concerning the automatic rule, the starting assumption is that the automatic rule serves the interests and protects the rights of the people. Such an automatic rule is, for example, when a service provider is not allowed to send advertisements or disclose our details to another service provider for marketing purposes, unless we specifically request that. If we do not request that, it may not do so under the automatically applied rule. In another example, in one European country the organ donation rate is 99 per cent, while in another it is only 12 per cent. The reason of the difference is that in one it is an automatically applied rule that the intact organs of every deceased person may be used for transplantation, unless that person expressly declared earlier that they excluded this option. In the other country the organs may only be used if the person expressly consented to that earlier. This is a significant difference in terms of the method and the outcome.

People are prone to laziness, which is one of the major inherent flaws of human nature. We are happy about a regulation if we do not have to do anything. It confirms our opinion that the regulation must be right, since this is the direction considered appropriate by the majority and by the leaders. This is the better choice, not the other one.

So what can we say about a good automatically applicable rule? It reflects the choice most well-informed persons. On the other hand, when the opinions are too diverse on a particular issue, we should not apply an automatic rule, i.e. when several, equally good competing alternative options exist.

An individual identifies better with the norms followed by society than with the regulations of the state. The state is far away, and no one has made a judgment on the adequacy, appropriateness of the statute of the state. However, if the social majority follows the norm of the state, then it is presumably a proper rule, and an individual is also a member of society, they feel this medium closer to themselves, they resonate more with it. The internal identification expected for observing the norms develops better if the majority of the society follows the norm. If the norm is followed because of fear of sanctions, as result of external coercion, then ultimately, the rule will be observed, but internal motivation will be lacking. Naturally, social pressure is also a kind of external coercion, but after all, people belonging to the same community as we have verified that the norm is appropriate.

Normative regulation also has a function expressing social expectation. Representing society, the legislator recognises the need for the rule, formulates the norm and makes sure it is implemented. This requires everyone to adapt, ultimately to one another.

Pieces of legislation are the way the social norms are expressed. On the one hand, they articulate the social consensus concerning the subject of the regulation, on the other hand, they have a role in conveying the choice of values of the government, in shaping the opinion of society on various things.

What does simplification in legislation mean? Less rules, more common sense. However, the Dodd-Frank Act, intended to reform Wall Street, is not known for its simplicity or brevity, although its main objectives are the prevention of financial abuse and aspects of consumer protection. The aim is not to suppress federal competences, but rather to make governance much more efficient, much less disorganised and counter-productive, to make it and simple, whenever possible, without a major reduction of the functions of the state. This can be quite a revolutionary aim in itself. Simplification may result in more freedom of choice in certain areas, while in other areas the result may even be more rules with more detail. Professionally competent public administration and politics conveying choices of value joint provide successful operation. The more there is consensus in society on the value system to be followed, the less the chance and the need for bureaucratic regulation. The United States of America is proud of its constitutional order, and the provisions and authority of the Constitution is never challenged. Naturally, it is not the letter that deserves respect, rather the legal culture of several centuries that carries the written rule and converts it to value.