Nudges polarize!

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The idea that governments may resort to nudges to influence citizens' choices polarizes, especially among lawyers. One group considers this behavioral science approach a fascinating and attractive avenue for policy making. The promise of cheap, self-enforcing regulatory tools sounds alluring during times of financial distress and renders the non-intrusive interventions a compelling alternative to conventional regulations. Another group, however, conjures up the notion of a nanny state that employs 'psycho tricks' for manipulating its citizens. As compared to traditional policy tools – say, taxes– nudges are more 'hidden' governmental activities which are hard to be controlled by democratic processes and thus likely to get out of hand. Although such stark polarization is not unusual these days, it seems worthwhile to understand the triggers for the emphatic and passionate controversy.

Anglo-Saxons nudged first

The first prominent cases of governments working with behavioral approaches were Anglo-Saxon: both, UK's Prime Minister Cameron as well as US President Obama supported the idea of nudging. Continental European governments are adopting behavioral public policy approaches, too – but later and more hesitantly. In line with the delay, one observes a remarkably pronounced opposition to nudging in "Old Europe": Germany's recent (and cautious) move towards behaviorally informed policy making was accompanied by strong criticism in the press and skepticism among the lawyers in Berlin's administration. These patterns give raise to two questions: Why did Anglo-Saxon societies, with strong suspicion vis-à-vis the state, pioneer behavioral policy making? And what is the origin of continental Europe's nudging skepticism?

Societal predispositions and legal debate

Skepticism of state interventions is characteristic for the Anglo-Saxon debate, making regulation a difficult venture as any intervention is considered an infringement of individual freedom and state paternalism. Focusing on individual or group interests and rights, the prevailing mode of governance might be described as *competitive democracy* (*Konkurrenzdemokratie*). Raising taxes or introducing new ones is virtually impossible. Nudges and the notion of 'soft' or 'libertarian' paternalism can then be understood as a way to create latitude for policy-making, to gain common grounds that the political forces can negotiate about, or more bluntly a (naïve?) appeasement strategy to make regulation savory for Republicans and Libertarians.

In continental Europe, and especially in the German constitutional law discourse, the State is not so much considered an independent entity of its own right, but a mechanism of collective self-binding, thus departing from a somewhat different notion of freedom. Regulation is not predominantly an encroachment of individual rights but can be justified under the constitution as furthering the public good. This may be a result of what US lawyers call *consociational democracy* (*Konkordanzdemokratie*). With it comes, among other peculiarities of continental European law, the importance of balancing individual and social interests. When these interests are balanced, raising or introducing taxes is not a problem per se. The notion of paternalism, be it hard or soft, is alien to the public and legal debate.

From this point of view, the idea of nudges is orthogonal to categories of German law. First of all, the concept is widely considered a rhetoric game, giving rise to skepticism. If mechanisms as diverse as GPS routing, energy efficiency labels and default rules for organ donation are on the table — then, in legal terms, we're talking about a mixed bag of regulatory approaches. Here it would seem more reasonable to talk about one measure a time.

Second, many of the instruments subsumed as nudges have been discussed and resolved by the courts (e.g., information provision and labels) – and the question of the appropriateness of means (mandatory laws vs. choice-preserving interventions) only played a subaltern role. Other instruments – such as changing the default rule for organ donation – are controversial but the controversy is a political and not a legal one.

Third, existing legal concerns against randomized controlled trials (RCTs), a method that builds on the random assignment of individuals to different policy conditions – in other words, the "unequal treatment of equals" which appears to conflict with principles of equality – echo concern about a method which is *related* but not *specific* to nudging. RCTs are a powerful tool for causal policy evaluation more generally, and the refusal of this method should be seen independently from the behavioral policy approach.

Law, Politics and Legal Education

Beyond different societal backgrounds, the legal debate in Anglo-Saxon and continental European countries varies according to their political embeddedness. Many US law professors are active policy advisors, some directly work for the government (as did Cass Sunstein). Legal scholarship is strongly policy-oriented and addresses the law-maker rather than administration or the judiciary. In central Europe, it is typically the reverse. Scholarship on law-making is rare and behavioral impact assessments are barely discussed by lawyers. However, this does not mean that lawyers refrain from politics. In contrast to their US colleagues, German lawyers speak predominantly to courts (especially to the Constitutional Court) or to executive (i.e., non-political) administrators; and they phrase their political arguments as questions of the "right interpretation" of the law, using hermeneutics and doctrine as their language.

These differences in the role of lawyers are reflected in, and reinforced by, legal education. To date, the normative ideal of legal education in Germany is the judge (therefore, lawyers take State Exams, not bar exams). Judges are meant to apply the law, not to shape it. The judicial branch's job is to understand, to interpret the law — hermeneutics; steering behavior is the legislature's business. Moreover, law schools are not graduate schools in Germany. Lawyers in the US have gone through undergraduate training in a different discipline (often economics or political science) and thus come to law school with a predisposition. In contrast, German law students are rarely confronted with other disciplines and, if any at all, then mostly with arguments close to hermeneutics and suitable for doctrine, such as philosophy or history of law. As a consequence, many German lawyers are ill-equipped to discuss questions of behavioral intervention; they often (have to) rely on common sense arguments rather than on empirical evidence. Behavioral control has somewhat been a blind spot.

And this blind spot does enter politics. Most leading positions in the German ministries are held by lawyers. And these politician-lawyers are heavily influenced by their training of course — matters of constitutionality, systematic arguments and prevailing legal doctrine therefore play a more important role than behavioral aspects. It is thus not surprising that the lawyers in the German administration did not welcome nudges with enthusiasm.

Why, then, is nudging gaining ground among legal scholars?

German legal scholarship and legal education is currently undergoing substantial changes. It is internationalizing; some universities have replaced state exam programs by Bachelor/Master degrees or added programs in, for instance, Law and Economics; projects such as the *German Law Journal* gain importance in the discourse; and the Max Planck Society has added Economics departments to a number of its formerly law-centered institutes. The *Wissenschaftsrat* has recently recommended strengthening an international and interdisciplinary perspective in German legal education.

These developments connect to a long tradition of Law & Society scholarship (*Rechtssoziologie*), to discourses on administrative law and public management (*Neue Verwaltungs[rechts]wissenschaft*), and

to long-standing demands of the Constitutional Court to assess the behavioral impact of state interventions. The functional perspective on the law becomes more prominent, and with it a focus on the empirical, behavioral dimension of the law.

These developments present an open invitation for interdisciplinary insights that gain importance in the legal discourse. In a sense, the nudging debate is one of the early discussions along these new lines of discourse. Behavioral arguments prove to be particularly effective in the German legal debate, ironically *because* of its focus on doctrine: There are well-defined “watergate terms” where behavioral insights can be infused into the law such as indeterminate terms, the assessment of discretion and margins of appreciation, the principle of proportionality and so on. And empirically grounded behavioral arguments are more convincing than conventional common sense.

Our impression is that much of the polarization of the nudging debate in Germany is not about its contents — most of which are either non-controversial or well-understood — but rather on methods. The polarization is the result of labor pains of this perspective. Probably, nudging, due to its fuzzy notion, is not the best concept for this methodological debate. There will be many more debates of this kind — Pandorra’s box has been opened. Our hunch is that at the end an empirically grounded, behavioral perspective will be firmly established in German law and legal scholarship.

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