Recht im Kontext 6

Kemmerer/Möllers/Steinbeis/Wagner (eds.)

Choice Architecture in Democracies

Exploring the Legitimacy of Nudging

Nomos

Supported by the Institutional Strategy "Educating Enquiring Minds. Individuality – Openness – Guidance" at Humboldt-Universität zu Berlin as part of the Excellence Initiative of the German federal government and the states.

Generously funded by the Vodafone Stiftung Deutschland.

Illustrations: Maurice Weiss / Ostkreuz (©Verfassungsblog)

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at http://dnb.d-nb.de

ISBN 978-3-8487-2288-4 (Print)
978-3-8452-6393-9 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-1375-6

Library of Congress Cataloging-in-Publication Data
Kemmerer, Alexandra / Möllers, Christoph / Steinbeis, Maximilian / Wagner, Gerhard
Choice Architecture in Democracies
Exploring the Legitimacy of Nudging
Alexandra Kemmerer / Christoph Möllers / Maximilian Steinbeis / Gerhard Wagner (eds.)
387 p.
Includes bibliographic references and index.

ISBN 978-1-5099-1375-6 (hardcover Hart)

1. Edition 2016
© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2016. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, re-cording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the editor.

Gebhard Kirchgässner
Justification and Possibilities of Soft Paternalism 229

Sabino Cassese
Exploring the Legitimacy of Nudging 241

Gertrude Lübbe-Wolff
Constitutional Limits to Health-Related Nudging –
a Matter of Balancing 247

Johanna Wolff
'Partner Months' and the Fundamental Rights of Parents –
Considerations on the Legitimacy of Nudges and 'Nudgy Legislation' 255

Oren Bar-Gill
Information and Paternalism 267

Alberto Alemanno
Nudge and the European Union 271

Morag Goodwin
Architecture, Choice Architecture and Dignity 285

Part II: Illustrations – Maurice Weiss 309

Exploring the Legitimacy of Nudging

Sabino Cassese

I. Framing the Issue of Nudging

The topic of this paper is not nudging, but rather the legitimacy of it. However, much of the discussion on this last topic does involve nudging itself, and some general remarks on nudging are therefore necessary.

This paper will thus be divided in two parts, the first on nudging itself, and the second on its legitimacy.

In the first part I shall address five questions: where does nudging come from and how relevant is nudging in general? How can one relate it to regulation? What is its purpose? Lastly, how much choice does nudging leave?

Nudging is part of an American and British debate. As the 1946 Administrative Procedure Act was a reaction to the New Deal interventionism, nudging may be interpreted as a reaction to the environmental protection and welfare reforms carried out by Presidents Clinton and Obama. The way in which nudging is presented, too, namely as a third route between paternalism (why not interventionism?) and libertarianism (why not liberalism?) seems to particularly be part of the American political culture.

However, nudging also has British roots. Britain, a typical interventionist state, now boasts a strong component of Thatcherism or post-Thatcherism and is in search of a third route.

Given these American and British origins, what happens when one transposes or transplants nudging into a different environment, one that is less sensitive to the amount of state constraint on private parties? Can one say that the problematic aspects of nudging are foreign to other political and cultural environments? I think that in spite of its American and British origins the study and experimentation of nudging is important for the non-American and non-British contexts, for two reasons. The first is that the twentieth century revolution in government has put on the shoulders of the regulators a great burden, and it is difficult to increase mandatory regulation without bringing about dissatisfaction among the people and some kind of reaction to the increase. The second is that nudging calls the atten-

tion of the regulators (and of the administrative law scholarship) to the people targeted and to their behavior. This was once not relevant, only the obligations imposed by the state being important. Nudging presupposes that induced compliance is important and puts the regulated first.

Before I proceed, it is important to make two caveats. Firstly, I refer here to nudging by administrative agencies, not to administrative agencies regulating private parties' nudging. The latter is yet another side of the problem, as in the Microsoft and Google cases before the EU Commission. Here, third parties were affected by private nudging. These cases were reviewed according to antitrust standards. Secondly, we do not know enough about the effectiveness of nudging, as there are few studies on the performance of nudging.

If one does not want to get lost in the enthusiastic literature on nudging, and wishes to place nudging in the real world, made up mainly of state command and control by various means, from mandatory to persuasive, one must consider that modern governments cannot abandon coercive measures and rely only on nudging, because we cannot be governed by nudging. Nudging cannot replace the traditional regulation, as an alternative to it, but can only be complementary to traditional regulation.

Moreover, in many cases one cannot consider nudging as an alternative to the traditional, expensive and coercive government instruments because nudging is difficult to implement or because – as already noted - we do not know enough about its effectiveness, and therefore it is preferable to adopt more honest and direct instruments (command and control, incentives). Nudging – the easy way – can divert or distract from more efficient and more intrusive regulatory measures.

In other cases, nudging can only be complementary, and therefore it can neither be the dominant, nor the default approach.

Furthermore, nudging cannot be considered as a general regulatory instrument, because it is area sensitive (for example, it works better in the field of environmental regulation than in other areas), or context sensitive (it is more effective in Anglo-Saxon than in non-Anglo-Saxon countries, and therefore there is a problem of cultural dependency).

Another difficulty is that of the choice between mandatory regulation and nudging. In choosing one has to take into account not only the effectiveness towards the regulated, but also the impact on third parties that might become deprived of protection.

These difficulties lead me to conclude that one cannot achieve all that much with nudging alone, that it is not a miraculous instrument, and there-

fore expectations should not be too high. Nudging cannot play a leading role in the overall regulatory context. When placed in the context of government regulation of society and the economy, nudging will not amount to more than a fraction of the entire picture. Nudging works only as part of a complex package of regulatory and fiscal measures. Thence an important question: what are the implications of nudging for traditional state regulation?

The third problem, namely that of the purpose of nudging, has a simple solution. Nudging is not (only) in the best interest of the people affected, but (also) in the interest of the people affected *as interpreted* by the rulers, or in the interest of the public at large: to convince people that to quit smoking is not only beneficial for their health, but that it is beneficial also for society at large, since it enables a society to spend less money on health.

Finally, nudging allows us to reach collective goals with minimal interference with private choice, because it is, or appears to be, the least restrictive means for the government to reach social goals. But of course, different nudges leave different degrees of choice to the people.

II. Legitimizing Nudging

Should nudging be legitimized? There are three possible answers to this question.

The first is: nudging does not amount to law, does not impose but only suggests, is liberal, and does not involve the exercise of authority. As a persuasive and non-coercive instrument, it cannot raise problems of legitimacy, given that it leaves choice to those it regulates.

The second is: the use of nudging tools is marginal, peripheral, and interstitial. It has minimal impact on private parties and on the administrative agencies. Therefore, it does not pose any problem of legitimacy.

And the third answer is: influence and persuasion are no less restrictive than coercive regulation; they interfere with citizens' choice, manipulate individuals' behavior, and deprive them of freedom. Nudging is regulation

in a new form[1], and while it may be considered gentler, it basically is not different. Even if it does preserve choice, nudging needs a justification, and needs to be legitimized.

I think that nudging requires to be legitimized for two reasons. Firstly, nudging shapes choices and channels behaviors, interferes with self-determination and freedom, and does so in a stealthy manner. Even though they may be using a less restrictive instrument, the regulators are nonetheless interfering with free choice. Of course, this general remark has to be adjusted to the different kinds of nudges, because – as has been pointed out already - some of them are more preserving of freedom, while others steer people's decisions more strongly.

Secondly, nudging is based on and exploits bounded rationality and cognitive errors. But those it regulates do not equally share such imperfections. Industries and large associations are better equipped, have more resources to cope with nudging. This increases inequalities and produces new asymmetries.

But how can nudging be legitimized[2]? What are the means to reduce the risks of abuses? In responding to these questions, one can consider ex ante measures, parliamentary interventions and ex post measures.

An important ex ante measure that can be experimented with is transparency in order to avoid technocratic manipulation: making the choice of the regulatory instrument open to participation through the assessment of the regulatory impact is important, because publicity can reveal methods and motives. There should be no hidden nudge. But is transparency the only, or the best instrument to legitimize a nudge ex ante? Transparency may require a regulatory overseeing body to attract permanent attention that not only shapes public nudging policies, but also attracts public discussion on them.

Parliamentary authorization of nudging is quite difficult to attain. One can ask whether nudging should necessarily be prescribed by an act of parliament, whether it can be subjected to the principle of legality in the

---

1 DM Hausman and B Welch, 'Debate: To Nudge or Not to Nudge' (2010) 18 *Journal of Political Philosophy* 123–136 deny that »libertarian paternalism is both libertarian and paternalist«.

2 See A Alemanno and A Spina, 'Nudging legally: On the checks and balances of behavioral regulation' (2014) 12 *International Journal of Constitutional Law* 429–456.

same way as the »nullum crimen sine lege« principle in criminal matters, and how parliament can discuss the introduction of a nudge. Those who fear that nudging may loose its characteristics and turn into law give a negative answer. But without authorization by parliament, nudges necessarily become technocratic instruments.

As for ex post measures, one could ask the following questions: can courts control nudging? Which courts - constitutional or administrative ones? Are the courts equipped to review nudging? Which are the tools at their disposal to evaluate nudging (reasonableness, balancing, proportionality, suitability)? Can courts be empowered to review the »de facto« effects of informal administrative action?

Nudging can be constrained by other ex post means, like making it mandatory for the nudging unit to submit annual reports to parliament, or making the choices and the rationale behind them public.

Finally, there is a danger of overreach: if nudging leaves choice, why should it be subject to the same controls that were introduced for mandatory governmental instruments?

I shall finish with Anne van Aaken's words, suggesting that we »be careful with a Brave New World of Nudges«.