

Nudging: Neither a Novelty, nor a Promising Lead – Unless in Context

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Let me begin with a few preliminary remarks. In their comment entitled "Nudges Polarize!", Emanuel Towfigh and Christian Traxler state that this polarisation is mainly owed to the different ways of thinking prevalent among German legal scholars with their strong belief in the state, Anglo-Saxon legal scholars and their scepticism of the state, and laypersons. However, this statement does not really get us anywhere. It may well be the case that the German guild of legal scholars – a traditionally rather conservative group – tends to initially struggle with new terms, as has been seen before in the case of the term "governance". But to claim that legal scholars cannot help but think in ways that idolise the state, due to their education and the exams they sit, seems to me to be fairly farfetched. The term "Neue Verwaltungsrechtswissenschaft", as stressed by Towfigh and Traxler, illustrates this. A bashing of disciplines is therefore, in my view, neither expedient nor called for.

It is by the way not as a legal dogmatist that I make the following critical comments, but as an administrative scientist who is versed in social sciences, and has engaged himself with controlling and governance for a long time. If we take a look through the lens of administrative science – like I do – we see two things: firstly, that the concept of nudging cannot rightfully claim to have any news value, and secondly, that it needs to be placed within the context of contemporary insights from the fields of controlling science and communication theory.

1. If we have a closer look, we will find that there is much more to government control than the handling of commands and prohibitions we find in classical regulatory law. However, this is a fact which social scientists with their tendency to identify the state with hierarchy and "command and control" like to overlook.

Different regulatory tools have always been distinguished within administrative science, just as Werner Jann suggested in the following way, in a comment that was published as early as 1981:

Regulatory Tools	Financial Tools	Informational Tools
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<i>Norms of command and prohibition</i> , whose fulfilment is monitored and whose violation is punished	<i>Financial transfers</i> , i.e. the transfer of financial means to authorised recipients, for example social benefits and housing allowance	<i>Information and publicity campaigns</i> , for example through appeals and recommendations via mass media
<i>Permission restrictions</i>	<i>Financial incentives</i> through subsidies, funding, and grants	<i>Indicative and informative plans and programmes</i> , for example through governmental declarations and declarations of intent, as well as the announcement of reference points
Ways of enforcement:	<i>Negative incentives</i> through duties, taxes and fees	<i>Symbolic rewards</i> , for example through titles, awards and public commendation
Compulsory execution		
Compulsory sanctions		
Laws and legislative decrees	<i>Creation of artificial markets</i> , for example through education vouchers	
Administrative act		<i>Procedural regulations</i> , for example the determination of codes of practice

What we can learn from this is that around the beginning of the 1980ies the reduction of governmental and administrative acts of the command-and-control-type had already long been surpassed. The following remarks by Klaus König and Nicolai Dose from the year 1993 confirm this:

- Given a set of values, *information programmes* merely convey information that is perceived to be essential in order to be able to act in accordance with the respective attitude. For instance, when customers are thus warned to refrain from eating foods that have gone off, it is to be expected that nobody would eat foods on purpose that would be detrimental to their health.
- *Persuasion programmes*, however, are often related to an interference with sets of values which in many cases begins to be effective only in the long run, for instance when a careful use of the natural resources is being advocated. Here, we can fall back either onto a *persuasion strategy* which is *oriented towards the emotional sphere*, and which ties into moral categories and builds upon emotions, or onto a *persuasion strategy* which is *oriented towards the rational sphere*. The former type of persuasion strategy is suited to the realisation of relatively short-term goals, since it bears reference to existing value sets that need to be activated emotionally, and potentially need modification. In contrast, the latter type of persuasion strategy is only suited to bring about long-term changes in behaviour.

We can thus summarise that both information and persuasion programmes are cases of nudging in a generalised form.

2. In terms of the necessary contextualisation of the concept of nudging, we must differentiate between two related but separate contexts:

The first context is that of the theory of regulation, and can be labelled with the term "ruling through signals". The function logic of this mode of governance has been characterised by Claus Offe as follows (2010, p.2):

The third family of policies [besides coercion and material incentives, G. F. S.] is designed to affect courses of action through the *sending of signals*, defined as the dissemination of information which, if accepted as valid and incorporated into the beliefs of target actors, will modify their course of action. "Signals are suggestions from the government. It encourages or recommends certain choices [...] and discourages others. With signals, in contrast to regulations, *there is no enforcement and no compulsory compliance.*" [...] The role of signals and signalling has been widely studied in economics, such as the signalling activity of central banks (concerning the development of interest rates), prospective employees (concerning their productivity) or business partners (concerning their trustworthiness). Public policies of the third type [...] operate by *instilling motivating beliefs* in diffuse audiences with the expectations that courses of action will as a result be modified in intended ways. The considerable attraction of the practice of *ruling through signals* is that it appears less costly compared to the use (or ultimate and credible threat) of coercion as well as the promise of costs and rewards attached to (un)desired courses of action.

If we let this paragraph sink in, we will quickly realise that what we just read was in fact a short profile of libertarian paternalism.

The second context is one of communication theory and could be entitled "Governance as and by Communication". In his inspiring discussion paper with the title "The Powerlessness of Powerful Government", Stein Ringen (2005) describes in more detail what is meant by this: Ringen establishes – and we agree with him – a tendency from power towards authority, and breaks down their relation to the following and simple formula: the less governance is able to rely solely on power, the more important authority as a resource of public policy will become:

Power explains a government's ability to get decisions made. But power is not what regulates its ability to get cooperation from its bureaucracies and compliance from its citizenry. For this, it does not help governments to be able to give orders, at least not very much: *they need to be able to persuade. Persuasiveness is not contained in the weight of power; it depends on the strength of authority.* Power is a necessary condition for a government to be able to rule, but not a sufficient one. Once it is in power, its ability to rule depends on *authority*. Weak governments struggle for power. Powerful governments are beyond that but not beyond struggling. *They need to find the authority that can enable them to translate power into rule.*

This performance of translation, however, can only work when those in government manage to *convince* the recipients of their policies of the necessity of their voluntary cooperation, but only he who disposes of authority can convince:

A government depends, for what is not under its control, on the obedience and compliance of others. Legitimacy, power and so on may oblige and incline others to obey but cannot enforce obedience, at least obedience in the form of willing and active co-operation. [...] Governments that want to rule must [...] give them [their citizens, G. F. S.] reasons to obey. That they can only do by persuasion, never by use of power.

We take these considerations of Steiner's as a plea in favour of the strategy of nudging. However, we do believe that taken by itself, without a double contextualisation (ruling through signals, governance by communication), the concept of nudging is not meaningful.

Translation from German: Karima Laborenz

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