

## BUCHBESPRECHUNGEN / BOOK REVIEWS

*Mariana Mota Prado/Michael J. Trebilcock*, **Institutional Bypasses: A Strategy to Promote Reforms for Development**, Cambridge University Press, Cambridge, 2018, 147 pages, 28 Euros, ISBN 139781108462587

Medical metaphors are always powerful. They immediately convey the chief message to the audience. This may be one of the reasons why they are so widespread. For example, comparative legal studies have been using the metaphor of legal transplants for decades.<sup>1</sup> In social sciences, Economics Nobel Prize winner Elinor Ostrom launched the idea of institutional diagnostics.<sup>2</sup> Apart from communicative efficacy, medical metaphors might be appealing for another reason: they are linked to specific theoretical frameworks. This is what Mariana Mota Prado and Michael Trebilcock, both based at the University of Toronto and leading law and development scholars, aim to do with their latest book on institutional bypasses. The latter are defined as “alternative institutional regimes that provide citizens with a choice of service provider, potentially creating a form of competition between the dominant institution and the institutional bypass.” (p. xi). This concept is further clarified with the identification of six necessary features (p. 27-38). A careful definition is needed to distinguish institutional bypasses from other concepts employed to explain, and prescribe, pathways of institutional reform. Prado and Trebilcock’s book sits squarely at the intersection of the many literatures debating the virtues and limits of incrementalist approaches. Their main contribution lies in the expansion of the portfolio of solutions available to reformers facing strong resistance to the overhaul of dysfunctional institutions. At the same time, the concept of institutional bypasses raises familiar questions, partly addressed by the book. These questions relate to the relevance of the many interdependencies each institution has to deal with. When managed successfully, interdependencies become complementarities or synergies. Otherwise, interdependencies lead to conflicts and failures. The concept of institutional bypasses confronts the reader with both options. It requires to explicitly consider them. At the same time, it also shows how many hard choices proponents of incrementalist approaches have to make.

Prado and Trebilcock’s research strategy is a straightforward one. First, they define the concept to be studied. Second, they distinguish it from other approaches to institutional reform. Differences from the concepts of institutional layering, regulatory dualism and institutional multiplicity are discussed. The authors also observe that the concept of institutional

- 1 *Michele Graziadei*, Comparative Law, Legal Transplants, and Receptions, in: Mathias Reimann / Reinhard Zimmermann (eds.), *Oxford Handbook of Comparative Law*, Oxford 2019.
- 2 *Elinor Ostrom*, A Diagnostic Approach for Going Beyond Panaceas, *Proceedings of the National Academy of Sciences*, 39 (2007), p. 15181-87.

bypasses is influenced by, but not identical to, the analytical framework proposed in the 1970s by Albert Hirschmann. While institutional bypasses clearly involve both exit and voice, what matters is how they interact and what the meaning of each option is (p. 54-58, 138f.). Third, a taxonomy of institutional bypasses is provided. The authors propose a two-fold distinction: intentional bypasses represent “conscious, planned, and centralized attempts to fix what are perceived as dysfunctionalities in the dominant institution”; spontaneous bypasses are “scattered and uncoordinated solutions that emerge independently of each other but collectively amount to an arrangement that offers an alternative institutional pathway to the dominant system” (p. 63). Fourth, the authors document the existence and impact of institutional bypasses with five case studies from Latin America and two from India. The variety of the experiences they recount invites optimism, not because the case studies show examples of successful reforms (they do not, or the long-term outcome is uncertain), but because they help flesh out the most pressing knowledge needs. Six of them are briefly outlined here.

To begin with, the introduction of bypasses assumes that policymakers select a specific institutional dysfunction and try to address it. The selection is likely to depend on processes of problem framing the literature on policy studies is familiar with.<sup>3</sup> Legal contexts affect problem framing, too: the choice of a bypass could depend on factors like the role of the state in a specific legal system, the way the judicial system is organized or constitutional provisions on public and private education. A deeper understanding of factors influencing the framing of dysfunctions should help sort out ‘good’ and ‘bad’ bypasses, the latter being solutions that shift resources toward interest groups without improving social welfare (p. 18).

Secondly, the authors underline that “(c)hoice is central to the idea of a bypass” (p. 31). It seems that competition promoted through institutional bypasses could be the main driver of improved service delivery. However, more attention should be paid to the risks entailed by users’ choices. One of these risks is related to biased choices: are all users really able to access the institutional bypass? Or are there classes of excluded users? If more than one bypass is available, are users able to choose the right (from their point of view) one? A related issue is that the co-existence of institutions performing the same tasks increases interdependencies and cross-subsidies among users. Those who choose to switch to the bypass might increase costs for those who choose to stay. This could happen because more resources are diverted toward the bypass and lower investments are made in the dominant institution, or because the fixed costs of an existing infrastructure are shared among fewer users. The authors point out that this could be a possible outcome (p. 14), but also assume that in many cases bypasses do not impose negative externalities on nonusers (p. 21). It would be preferable to acknowledge that interdependencies and cross-subsidies do exist in any market, in-

3 E.g. *Merlijn Van Hulst and Dvora Yanow*, From Policy “Frames” to “Framing”: Theorizing a More Dynamic, Political Approach, *American Review of Public Administration* 46 (2016), p. 92-112.

cluding the market for bypasses. Even though not all cross-subsidies can be avoided, their level and direction should be openly discussed and systematically assessed.

Thirdly, the definition of institutional bypass requires the establishment of a separate institution (p. 34 f.). But are bypasses completely disembodied from the institutional context? If so, they offer a counter-example to the widespread idea that successful institutions must have complementary relationships with other institutions. I would prefer to interpret bypasses as creating new types of institutional complementarities. This means that identifying those complementarities should be part of the analysis.

Fourthly, the distinction between spontaneous and intentional bypasses might not be the best terminological choice. The authors clarify that they do not want to use the public/private distinction (p. 63). But spontaneous bypasses are intentional as well. Maybe the distinction is about coordinated and uncoordinated bypasses, or centralized and decentralized bypasses. Terminological choices might matter: it is likely that institutional bypasses happen at different institutional levels, so connecting them to the literature on multi-level governance could be useful. About the public/private distinction, it should be acknowledged that private opting out (a type of institutional bypass) is sometimes controversial. For example, traders do opt out of state contract law and state judicial systems, but they could do so to monopolize markets.<sup>4</sup> More generally, the benefits of opting out of the state legal system are less clear when some users do not have real alternatives.

Fifthly, are institutional bypasses only relevant in developing countries? My educated guess is that the answer should be no.<sup>5</sup> For example, *Poupatempo* was a one-stop-shop solution aimed at reducing bureaucratic costs in Brazil. How does it compare to administrative simplification programs adopted in developed countries? One could argue that developed countries were able to adopt broader reforms, while Brazil had to resort to bypasses. But is it possible to find examples of bypasses in developed countries, too? Why or why not? What are the differences between bypasses in developed and developing countries? The case studies proposed by the authors are focused on a single country or geographic area. An important avenue for future research is the comparative analysis of bypasses in the most challenging fields of law and development. For example, the theoretical framework proposed by Prado and Trebilcock should be applied to the implementation of the Sustainable Development Goals in developed and developing countries.

Sixthly, a more systematic discussion of the relationship between bypasses and institutional experimentation is needed. The authors observe that “reformers should focus not entirely on *what* is implemented but *how* it is implemented” (p. 137). The problem is that today a wide range of experimentation strategies are being deployed in development studies. Economics Nobel Prize winners Abhijit Banerjee, Esther Duflo and Michael Kremer pio-

4 E.g. Barak D. Richman, *Stateless Commerce. The Diamond Network and the Persistence of Relational Exchange*, Cambridge, Mass. 2017.

5 See, in the same vein, Jediah Kroncke, *Bypassing Intransigent Legal Institutions*, JOTWELL (April 19, 2019), <https://intl.jotwell.com/bypassing-intransigent-legal-institutions/> (last accessed on 2 November 2019).

neered randomized controlled trials and field experiments.<sup>6</sup> Randomizing regulation, policy pilots and regulatory sandboxes are other examples of experimentation strategies proposed in a variety of legal fields.<sup>7</sup> What they promise to do is to disentangle the causal effects of regulatory measures. Applied to institutional bypasses, they could provide empirical evidence about their effectiveness and help displace dysfunctional institutions. Though, choosing the right type of experimentation strategy and interpreting its results is no easy task. Moreover, experimentation strategies should not be used to reduce the relevance of the contextual evidence used by Prado and Trebilcock in their case studies.

In sum, reading this book is highly recommended, not because policymakers should be asked to develop a large number of institutional bypasses, but because this concept can guide the discussion of the most relevant issues in the contemporary debate on law and development: how dysfunctional institutions are identified, who are the winners and losers with each type of institutional bypass, what kind of institutional complementarities can be fostered, how the impact of bypasses can be evaluated, and how to compare bypasses in different legal systems.

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6 See, e.g., *Vinayak A. Banerjee and Esther Duflo* (eds.), *Handbook of Economic Field Experiments*, Amsterdam 2017; *Michael Kremer et al.*, *Behavioral Development Economics*, in: Douglas Bernheim et al. (eds.), *Handbook of Behavioral Economics*, Amsterdam 2019.

7 E.g. *Michael Abramowicz et al.*, *Randomizing Law*, *U. Penn. L. Rev.* 159(4) (2011), p. 929-1005; *Colleen V. Chien*, *Rigorous Policy Pilots: Experimentation in the Administration of the Law*, *Iowa L. Rev.* 104 (2019), p. 2313-2350; *Hilary J. Allen*, *Regulatory Sandboxes*, *George Wash. L. Rev.* 87(3) (2019) p. 579-645; *Michael M. Wechsler et al.*, *The State of Regulatory Sandboxes in Developing Countries*, *Digital Financial Services Observatory Working Paper*, Columbia Institute for Tele-Information, November 2018, <http://dfsobservatory.com/publication/state-regulatory-sandboxes-developing-countries> (last accessed on 2 November 2019). This is another example of a medical metaphor, this time with reference to clinical testing methods.