

## Bypassing Intransigent Legal Institutions

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Mariana Mota Prado & Michael J. Trebilcock, [Institutional Bypasses](#) (2018).

An implicit, if not often explicit, premise of the cluster of work often identified as “law and development” is that there are distinct spheres of legal reform activities in countries deemed “developing” and in those that have reached the status of “developed.” Many critiques of these presumptions have raised concerns about cultural politics and empirical verification. And while most acknowledge that institutions matter, making use of this insight has generated more ideological heat than practical certainty. Especially in these darker days of democratic backsliding and growing authoritarianism, grappling with the tangled past of efforts to advise or orient national legal reform projects has left many with the question of “what now?”

[Mariana Prado](#) and [Michael Trebilcock](#)’s new monograph, [Institutional Bypasses](#), takes on this challenge by articulating a more procedural, methodological answer to this question, “what now?,” in lieu of advancing a renewed host of substantive best practices. In line with their recent field-leading publications, Prado and Trebilcock use the concept of the institutional bypass to model the empirically-committed experimentalism they have come to champion by presenting legal reform as an iterative learning process squarely aimed at avoiding the pitfalls of past efforts.

*Institutional Bypasses* provides a comprehensive and systematic interdisciplinary integration of law-and-development debates with theoretical and applied literatures in economic and political science. But its most striking quality is that, through its sober and serious reflection on the relationship of law to larger debates in economic and political development, it collapses many of the very distinctions that often define law and development itself. In grappling with the struggles of legal reform efforts in Brazil and India, it becomes clear that these are the same challenges faced by anyone seeking to reform the law governing police violence, health care provision, access to justice, and public education. This analysis makes it difficult to see anything but common ground in what were once considered distinct “developed” and “developing nations.” Prado and Trebilcock do not set out to do this explicitly, but the main premise of the bypass should seem familiar to anyone working on changing the law and facing entrenched interests and regulatory gridlock.

The second chapter of *Institutional Bypasses* provides conceptual clarity for the term by using their leading example, the Poupatempo reform (PTP) initiated by the Brazilian state of Sao Paulo in 1997. As dedicated incrementalists, Prado and Trebilcock do not latch on to an attempt at total legal reform or at an evaluation of broad economic or social rejuvenation. Instead, they focus on the PTP because it sought to reform the provision of a wide range of routine, but important, government services that citizens had to expend great effort, or pay great sums privately, to navigate. A sort of “one-stop shop” to help streamline and localize access to these services, the PTP is their ideal type of an institutional bypass, as it sought to provide a new avenue for service provision rather than supplant the existing system. They then look to the success of the system as demonstrating how this type of reform alleviates many of the problems that regularly stifle positive legal change by subduing stakeholder resistance and presenting politicians with a lower cost commitment which can be increased only if met with popular utilization and endorsement. Moreover, once in place, a bypass can create a field of regulatory competition that can induce reform on its own, or later lead to merger with the previous system. The PTP is then used throughout the book to explore how other reforms compare to its model of a pilot project, which through iterative learning and feedback can both discover and integrate the informal norms that frustrate more aggressive top-down reforms.

The third chapter of *Institutional Bypasses* is where Prado and Trebilcock place the bypass in the context of a wide

range of debates about legal reform. This chapter will be of interest to those looking from within the law to debates in other fields of reform. It would also be of particular help to those in other fields looking for an introduction into debates within law and development. Culminating with an interrogation of the classic “exit, voice, and loyalty” paradigm of institutional performance advanced by [Albert Hirschman](#), this chapter is one of the first steps towards showing that there is no geographically distinct theoretical ground for legal change.

Empirically, Chapter Four of *Institutional Bypasses* is the most instructive as it analyzes how the bypass model fits three very different arenas of legal reform in modern Brazil: police violence, public health care provision, and labor union governance. Here, Prado and Trebilcock make clear that their analysis is not meant to validate any of the reforms as uncontested successes, but that key aspects of their rollout and development show the potential virtue of the space for policy experimentalism that a bypass allows. As a result, they are able to look at both the successes and failures of these efforts. The rise and fall of the Unidade de Polícia Pacificadora’s (UPP) attempt to bypass the traditionally corrupt and hierarchical police administration in Rio De Janeiro shows how such a bypass can fill an aperture for reform that would not be wide enough for broader change. At the same time, the UPP shows how a bypass divorced from its more iterative and feedback-oriented initiation can lead to reconvergence with the very same (here, violently repressive) policies it sought to avoid. The development of the Unidades de Pronto Atendimento (UPAs) urgent care centers in the public health system offers a more sanguine pattern of a reform as they sought to complement an existing hospital-based care system which persistently resisted outside reform. The rise of the new central union, Central Única dos Trabalhadores (CUT), during Brazil’s democratization effort again shows how a bypass can be wildly successful even if it does not lead to radical change.

Chapter Five explores a number of “spontaneous” bypasses that were primarily initiated by private actors. Here, through the development of private security forces in Latin America and private modes of education and dispute resolution in India, the potentials and limits of bypasses are again demonstrated. While at first blush these examples appear distinct from the examples of Chapter 4, Prado and Trebilcock use these examples to show that the state is still the primary actor in molding the space for such private experimentalism to unfold and should contemplate its constitutional and distributional duties in doing so.

In the end, anyone working on these issues outside of Brazil and India will draw numerous connections that Prado and Trebilcock seek to reveal in legal reform more generally. The productive contrasts and commonalities of “community policing” in Brazil and the United States become clear. Similarly, debates about charter schools and private primary schools in India move away from universal models and cultural generalizations toward mutual conversations about evaluation and scalability. These insights may not lead to the grand re-designs imagined by the first generation of reformers inspired by new institutional economics, but Prado and Trebilcock would say that such inspiration is best put to practical use by taking seriously the need to start with the particular rather than the universal.

If there is an aspect of *Institutional Bypasses* that may leave some readers less than satisfied, it is one that Prado and Trebilcock admit from the outset. The ideal of incremental experimentalism fits the PTP well because reducing the costs of accessing government documents is far from politically controversial—and the resistance of entrenched providers is glaring self-interested. But if one moves to issues such as crime, education, and labor, then the very terms of evaluation become strongly contested. And broad shifts in these values can fully rework institutions once under careful refinement. The fundamental reform of Brazil’s system of labor union regulation, by its current administration, has rendered mute the incremental debates of the last decade. The rapid degeneration of India’s multi-cultural political project has done the same for the very meaning of the nation’s system of public education.

The impact of broad political shifts on ongoing agendas would come as no surprise to legal reformers in any country. Prado and Trebilcock thus help lead us to a properly comparative understanding that legal change requires a portfolio of strategies, none of which can ever be fully sufficient. Their explication of the institutional bypass as an entrée into a serious discussion of policy experimentalism thus demands none of the ideological antipathy for more systemic or radical change often expressed by those who fetishize gradual change as a universal good onto itself. In similar turn, it shows that even change conceived on grander terms must never collapse into justification through pure ideological

attachment either. The balance between the two is a question of politics, but such reality renders neither beyond the grittier realities of sustaining a responsive and reactive legal system.

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