THINKING WITH THE INSTITUTIONAL BYPASS?

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Sometimes the most promising path to changing an entrenched system is to maneuver around it. Or so argue law and development scholars Mariana Mota Prado and Michael J. Trebilcock who develop the idea of an institutional bypass—an alternative pathway to perform some function or service provided badly by the state. With the institutional bypass, Prado and Trebilcock advance an approach to reform that is incremental, modest, dynamic, contextual, and revisable. And they advance an approach to political governance that favors regulatory competition, decentralization, and flexibility. Through richly descriptive case study analyses, Prado and Trebilcock also illuminate the differential material consequences of specific institutional bypasses—they recommend the bypass's procedural features *if* they work on the ground in the eyes of their users.

What follows in this brief comment is therefore emphatically *not* an argument that Prado and Trebilcock under-attend to the substantive effects of procedural reform. It is, however, an effort to explore how the definition of an institutional bypass can itself alternatively conceal or reveal normative political questions. To that end, I consider how the institutional bypass depends on differentiating means from ends; requires statist evaluations of legality against nonstate social and legal systems; and embeds but also potentially challenges a public/private distinction.

Means/ends first. Prado and Trebilcock explain that an institutional bypass is an alternative means to provide the *same* services and functions as the dominant institution. The state provides some service like healthcare, citizenship documents, or policing but in a dysfunctional manner—the quality is poor, or the wait is long. A bypass, they explain, is a better route to reach the same city, "a means to an end, not the end in itself" (Prado and Trebilcock 2019). Hence even as Prado and Trebilcock ground the idea of the bypass in legal scholarship that commends experimental, pragmatic approaches to reform, unlike other writers in this tradition (e.g., (Sabel 2012), they develop a model in which means and ends are not mutually constitutive. By definition, ends stay constant, the bypass is supposed to improve the means.

To illustrate, Prado and Trebilcock open the book with a case study of what they call an *intentional* bypass—a new public institution in Brazil that provides citizenship documents, offering an alternative to the dysfunctional bureaucracy. The intentional bypass stands for an attractive broader idea: the state itself can spearhead these reforms, as progressive, reform-minded public officials can sometimes facilitate pathways around existing institutions that have become captured by state monopolies and rent-seeking colleagues.

But when we move from examples like the provision of documents to the provision of, say, dispute resolution services, defining an institution as a bypass

presents a weightier normative call. Let me develop this argument through the following question: are state-sponsored forms of mediation public bypasses for courts? Prado and Trebilcock suggest the answer can be yes. For example, they describe public conciliatory settlement processes in India called *Lok Adalats* as bypasses for lower courts, provided *Lok Adalats* supply a robust rather than diluted version of what the courts are meant to offer. But from some normative perspectives, to call *any* consent-based dispute resolution procedure an institutional bypass is to take a side in a debate about ends—that is, a debate about the social meaning of adjudication.

Owen Fiss (Fiss 1979) once levelled a version of this argument at Lon Fuller. Fiss submitted that Fuller – and, then Fiss argued (Fiss 1984), alternative disputes resolution (ADR) proponents more generally – advanced a *dispute resolution model of adjudication*. In this model, a judge takes the place of a neighbor to help individuals settle their differences. It follows that the judge's authority stems from the individuals who desire his assistance and consent to his intervention. It also follows that in the dispute resolution model multiple processes can reach the same end of settlement—some better than others. Hence mediation is an institutional bypass for adjudication.

By contrast, Fiss advanced a *public values model of adjudication* (for elaboration see (Cohen 2009). Here, a judge's authority stems from interpreting authoritative texts and promulgating public norms in a context where citizens consent generally to the institutions that constitute a democratic polity. In this model, mediation is *not* a bypass for adjudication. To argue otherwise would presuppose a particular and, Fiss submitted, deregulatory view of what justifies state power (i.e., individual consent). In the United States, Fiss's argument was telling. As "bypasses" merged with dominant institutions, they did not simply rationalize means. Judith Resnik, for example, observes a new generation of judges who are "suspicious of adjudication" and prefer ADR processes that are "committed to the utility of contract and look . . . to the participants to validate outcomes through consensual agreements" (Resnik 2003).

Prado and Trebilcock compellingly engage with Albert O. Hirschman's famous trilogy of loyalty, voice, and exit. They argue that exit to an institutional bypass *is* a form of political voice that can spur state reform. What Prado and Trebilcock call "exit-as-voice," I am suggesting, may also reflect a political struggle over ends—a point which recedes from view when bypasses are defined as singularly about means.

Legality next. Prado and Trebilcock also describe *spontaneous* bypasses, which are often (but not always) spearheaded by private parties. Here, one of their definitional stipulations becomes particularly relevant: the bypass must be legal or, more accurately, it must not expressly conflict with state law as it is both written and enforced.

Consider another normative question set again in a US context. Do community-based forms of restorative/transformative justice "count" as spontaneous institutional bypasses? In the wake of the crisis of mass incarceration in the United States, prison abolitionist feminists and collectives of women of color increasingly encourage mediative responses to intimate and family violence. These radical organizers aim to circumvent the dysfunction and racism of the dominant state system. Via detailed training manuals, practical curriculums, and broad-based efforts to share best practices, they help community members instill accountability within offenders through facilitated conversations that emphasize empathic listening, relationship building, and extensive forms of moral, material, and spiritual reparations (see Cohen 2019).

On one reading, community-based restorative justice is not an institutional bypass. First, like the civil mediation example above, it raises a debate about ends: it aims to redefine crime from primarily a question of public social order and therefore subject to public adjudication, to primarily a question of interpersonal harm and therefore subject to dialogue and restoration. But more to my second point, community-based restorative justice also aims to prevent actions defined *as crimes against the state* from reaching the attention of the public officials who enforce a monopoly over prosecution. As Prado and Trebilcock explain, a spontaneous bypass "would not include illegal initiatives that try to circumvent the dominant system" (98).

But could the definition of the bypass build in some complexity and ambiguity in the direction of legal pluralism (cf. Ramraj 2019)? Prado and Trebilcock explain , for example, suggest that their legality requirement raises an important question: "Are government restrictions being imposed for principled reasons (e.g. to prevent derogation from the rule of law), or are these restrictions protectionist measures to favour certain groups to the detriment of others?" (2019, 98). Building on this question, organizers could argue that decades of race-based, class-based, and gender-based discrimination within the American criminal justice system should legitimate community-based restorative justice initiatives as institutional bypasses. However, Prado and Trebilcock's response to this potentially compelling claim would likely be statist: that the status of community-based restorative justice initiatives must be determined by "the government's openness to them" (2019, 129).

And finally, the public/private distinction. When Prado and Trebilcock describe dominant institutions, they reference examples of service provision that are owned, controlled, funded, administered, etc. by a state. I wonder, then, if they would recognize what I might awkwardly call an intentional private institutional bypass? This language is awkward because my question aims to explore how the public and private can blur in the bypass's definition.

Here is one way to unpack what I mean. When a new firm supplies a service for less money or better quality than a dominant firm, analysts who hold classical liberal views about self-regulating markets would likely not see an institutional

bypass but market competition. But legal realists would be suspicious of the very public/private distinction necessary to produce a public initiative as an "institutional bypass" and a private initiative as "market competition." This is because there are stakes in these two descriptions: the first makes visible how state officials labor to advance reform in a direction they desire, the second invokes only private will and creativity.

Let me illustrate with an example. In India, large domestic and multinational retailers are attempting to transform how food is produced, distributed, and consumed. These new entrants wish to circumvent existing and overwhelmingly dominant traditional agricultural markets so that they can purchase commodities directly from farmers. Walmart's entry into India is thus easily described as simply market competition. But what if we described it instead as an institutional bypass? Would different kinds of efforts and questions come into view?

Perhaps analysts would more readily consider the public character of private markets: well-ordered markets are crucial state services, especially markets for politically significant commodities like food. Perhaps analysts would likewise more readily consider how specific state-centered logics can therefore drive market reforms. From the perspective of some Indian policymakers, a key problem with existing commodity markets isn't exactly or only inefficiency, it is also illegibility and ungovernability. Disaggregated networks of indigenous traders are understood to govern markets through closed kinship networks, social forms regulation, and informal instruments of credit—making it hard for the state to monitor and regulate them. By contrast, new large corporations, with practices like formal contracts and third-party accounting and auditing schemes, promise to enhance the ability of Indian regulators to "see" and thus govern food supply chains (Cohen and Jackson, n.d.; Cohen 2018).

State actors who wish to reform agricultural markets in a direction they desire describe new retail chains in language that invokes the idea of the bypass. For example, the Director of the Department of Agriculture of Karnataka explained that the state enacted regulations to facilitate "alternative" and "parallel" markets. "*Then only*," he reasoned, "these traders are coming to our [the government's] way." The Minister of Agriculture echoed this point. He hoped that a critical mass of new private players would force traditional market actors "to up their game." "The only way you can bring reforms into the traditional system," he elaborated, "is to create effective alternatives. So then [traditional actors] will be forced to align themselves" (Cohen and Jackson n.d.). Aligning themselves means (among other things) becoming market actors subject to liberal forms of government oversight. In other words, I am suggesting that some policy elites see large capital as an institutional bypass that can help them consolidate regulatory control over politically significant markets for food.

Above I proposed that calling an initiative like mediation an institutional bypass can occlude a normative debate about ends. Here I offer the opposite claim: that

renaming what looks like market competition as an institutional bypass can reveal some of the specific political justifications and legal interventions designed to advance or constrain economic change. In India, stakeholders vigorously debate whether the delivery of food is most efficiently and equitably accomplished under the old or new (or some alternative) market system, and which constituencies of farmers, consumers, retailers, traders, and policymakers stand to lose or gain.

In sum, Prado and Trebilcock have elaborated a procedural mechanism that, as they persuasively illustrate, offers promising experimental pathways to reform. In this comment, I have suggested that Prado and Trebilcock *also* offer a generative analytical category that is good to think with. The idea of the institutional bypass invites readers to grapple with the relation between means and ends, the legitimacy of dominant state laws and policies, and the public political nature of market change.

REFERENCES

Cohen, Amy J. 2009. "Revisiting against Settlement: Some Reflections on Dispute Resolution and Public Values Symposium - Against Settlement: Twenty-Five Years Later." *Fordham Law Review* 78 (3): 1143–70.

Cohen, Amy J. 2018. "Transnational Legal Methodology and Domestic Markets for Food." *Transnational Legal Theory* 9 (3–4): 361–70.

Cohen, Amy J. 2019. "Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States." *Minnesota Law Review* 104 (2): 889–954.

Cohen, Amy J., and Jason Jackson. n.d. "How Markets Make States: Multinational Supermarkets in the Indian Bazaar (under Review)."
Fiss, Owen. 1979. "The Forms of Justice." *Harvard Law Review* 93 (January): 1–58.

Cohen, Amy J. 1984. "Against Settlement." *Yale Law Journal* 93 (January): 1073–90.
Prado, Mariana Mota, and Michael Trebilcock. 2019. *Institutional Bypasses: A Strategy to Promote Reforms for Development*. Cambridge: Cambridge University Press.

Ramraj, Victor V. 2019. "International Institutional Bypasses and Transnational Non-State Regulation." *Transnational Legal Theory* 10 (3–4): 295–317. https://doi.org/10.1080/20414005.2019.1644796.
Resnik, Judith. 2003. "For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication." *University of Miami Law Review* 58 (January): 173–200.
Sabel, Charles. 2012. "Dewey, Democracy, and Democratic Experimentalism." *Contemporary Pragmatism* 9 (2): 35–55.