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## “DE-CENTERING INSTITUTIONS AS OBJECTS OF STUDY”

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My travels through the vast field of socio-legal studies have not included time in the ‘law and development’ subfield, and so my comments here will not speak to Mariana Mota Prado and Michael Trebilcock’s contribution to that literature in their book, *Institutional Bypasses*. Instead I will speak from the perspective of sociolegal research on governance.

My work on governance – mostly urban governance (Valverde 2012), and recently, the governance of public-private partnerships (Valverde and Moore 2019) – draws eclectically on several sets of resources. Substantively, I read urban studies and legal geography (and now a bit on the financing of infrastructures) (Blomley and Bakan 1992; Cooper 1998). Methodologically, I draw on Foucault (2007; 2010; 2003) and governmentality studies (Burchell, Gordon, and Miller 1991) and on actor network theory and related work (Latour 2007; Callon and Latour 1981; Law 1986), mainly by anthropologists, on the materiality of law, and also postcolonial studies (Spivak 2013; Mawani 2010).

From that perspective, the first thing I would like to mention is that I find it refreshing to shift the analytical focus away from ‘institutions’, taken as self-contained. In this Foucaultians would agree with this book’s starting premise. Foucault’s innovative work developed at a time when critical social scientists were keen on studying the effects of **institutions** – Erving Goffman was hugely influential in this regard, with his famous studies of how “total institutions” constitute identities as well as spaces (Goffman 1961). But more recently, urban studies and other fields of research have shifted to somewhat different objects of study. In urban studies, for instance, approaches influenced by Actor-Network theory and science and technology studies have resulted in less interest in the formal structure of regulatory systems and instead a greater focus on the dynamic networks that constitute urban life, networks that escape the boundaries of particular institutions including city governments (cf. Fariás and Bender 2012).

While he was keen to analyze the institutions that made Europe modern, Michel Foucault made a crucial methodological move by skipping the scale of the institution altogether, and using historical research to document the constitution of networks of governance, in other words the assemblages of techniques, texts, ideas, facts, people, resources, and material objects that constituted modernity historically. Most influentially, Foucault showed that the social relations and physical arrangements and ways of organizing information that give ‘modernity’ its content were historically borrowed across institutions and ‘spheres’. The panopticon is perhaps the most famous of the practices of modernity that he studied. The point of the famous pages on the panopticon in *Discipline and Punish* (Foucault 1995) was not to theorize the prison, contrary to some criminologists’

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narrow view of what the famous book was about. Rather, the point was to document the governance effects of hierarchical surveillance, as a generalized practice. And the prison as an institution was quietly de-centred by showing, by means of historical research, that the panopticon and other disciplinary techniques, such as the timetable and the cell, were in fact invented centuries before the modern penitentiary – invented in monasteries, to serve quite different goals.

In the present day, a good example of the fruitfulness of taking practices and their unpredictable travels as the object of study, rather than institutions, is Michael Power’s influential work on ‘the audit society’ (1999). Power showed what happened as the **audit**, initially a lowly technique for ensuring financial transparency in businesses, escaped that location and was borrowed for unexpected purposes by all sorts of entities. Our universities have campus safety audits, audits of the quality of education, and so on; using the language of audit and some of its practices to account for resources and processes beyond spending money generates interesting effects, effects that need to be empirically studied. Similarly, sociolegal scholars have shown that supply chains are often governed exclusively by means of after-the-fact audits, generally produced with information provided by the very corporations that are being audited (e.g. ‘conflict mineral reports’) (Strathern 2003). This way of governing is suited to generating rankings and doing ‘benchmarking’, but it does not do much to prevent corporations from sourcing materials in questionable contexts. Regulating only through audits and audit-like procedures is clearly very different from what happens when clear rules are set out in advance and are supported by legally binding enforcement mechanisms.

In that vein, I would want to know more about the specific material, legal and cultural details of the innovations discussed in the book. For example, if wealthy families are withdrawing from cities and building private gated communities patrolled by private security, rather than being secured by the public police (one of the examples of ‘bypass’ given in the book), exactly **how** is this done? Do the incoming homeowners build literal walls around the communities? Is there an actual gate? In Latin America that is often the case but in Europe and North America privatized suburban enclaves often do not have any physical gate or wall. That fact is bound to have some importance. And, another question, do the private security personnel enforce any criminal laws? If not, what happens when there is a situation that appears to call for criminal law enforcement? How and when do public police enter the community? And, a different question, what kind of contract, exactly, exists between the homeowners and the security firm? Do individual homeowners have individual contracts, or is there a condominium-style corporation that acts on behalf of the community? If so, who actually decides on the content of the contract? And what mechanism is put in place to ensure contract compliance?



In the global urban studies literature there is much talk of the negative effects of privatized enclaves that withdraw from the city at large, often engaging private security (Freeman 2000; Sagalyn 2007; Custos and Reitz 2010); but what sociolegal scholarship has yet to probe in detail are whether the particulars of different regulatory and contractual arrangements (including contract details as well as the jurisdiction of the private security agents) result in different results, both for the inhabitants and for people living nearby who are not part of the enclave.

This raises a more general point about the risks of generalizing about contract mechanisms supplanting public rules and bureaucratic systems. As contract law scholarship has amply shown, contractual governance is not a unified system with a single logic. Contracts serve many purposes and take many forms (Freeman 2000; Hodge 2004; Siemiatycki 2009). To understand the specific effects of contracts for private security services, one would need to know exactly what is meant by 'security', what powers the private guards have, what expectations the customers have, how the workers are trained, how the workers see themselves in relation to the public police, etc. Contractual security services are extremely common, but they generally exist alongside other types of security forces, including urban police, national police, national security agencies, and various military and paramilitary organizations, not to mention other private and public agents who have different types of contract with the same entity (a gated community, say), such as cleaning services, fire services, and so on. Poupatempo, the government-services one-stop kiosk described in the book, for example, does not exist in a vacuum. It is one element in a vast array of formal and informal relationships linking people to the state and linking the state with both private corporations, nonprofits, citizen groups and so on.

Furthermore, material details might also be quite important. The sidewalk kiosk for government ID services that is discussed at length in the book is a technique for delivering goods/services that has a distinctly commercial origin, but commercial as in small-time entrepreneurs, not big capital. Kiosks selling newspapers, ice cream, balloons, roasted chestnuts, postcards and so on are very common around the world, and they generally have a positive and friendly image. The old man who buys his newspaper every day from a vendor whose name he might not know is enacting a particular, very positive type of urban citizenship. And the old man who remembers having bought candy or comics at the same stall or kiosk as a child is also engaged in a practice of citizenship that represents the best of urban life.

These meanings, and the emotions associated with them, exist in the society well before any government official thinks of using kiosks to 'bypass' the range of bureaucratic offices which Brazilians would otherwise have to locate and visit. It is quite possible that in this as in other innovations that recycle objects and relationships first deployed for other purposes (think of the monastic cell recycled in the penitentiary), the outward appearance already sends a message that is readily legible before the citizen proceeds to the window to ask for documentation.

If the kiosk looks more like an ice-cream or a newspaper stand than like a government office, that will undoubtedly shape people’s experiences as they approach it, in a positive way. Some of the ‘flavour’ of the original function will linger on when the architectural form is used for new purposes. To probe this further, the science and technology literature could be very helpful, since it has shed much light on the role and the effects, practical and cultural, of material details (Law 1986; Latour 2007).

In the book, the particularities of the various innovations, the material and social and economic details, are largely left to the side. We do not know what kind of uniform the private security agents at the gated communities wear (are they dressed like police? do they have weapons?). We are also not told whether all units of *Poupatempo* look alike, whether they are painted bureaucratic grey or in bright coloured stripes, or whether particular building materials or signage are consistently used, and so on.

No doubt this is because the authors are less interested in anthropological detail and more interested in **defining** and **identifying** what is and is not an institutional bypass --as distinct from institutional reforms, institutional pluralism, and other categories that have been used for similar purposes. That is certainly valid. However, personally, I am very wary of the effects of the historic human effort to sort social processes into categories and come up with fixed definitions for abstract terms – an effort taken particularly seriously by conventional social scientists. To that extent I am wary of efforts to define categories, including institutional bypass. I would instead be interested in lengthier and more detailed descriptions of how various innovations came to be and how they have changed over time.

Focusing on the innovative effects of a variety of situations defined as institutional bypasses is useful and positive in that it highlights innovations in governance, innovations that in many instances are responsive to people’s needs. However, this is not always the case: governments and other institutions, say universities, are constantly producing ‘innovative’ ways to deliver services, many of which do create ‘bypasses’ in Prado and Trebilcock’s sense, that arise out of senior managers’ notions rather than from documented needs.

However, and somewhat paradoxically, the very notion of an institutional bypass tends to reproduce the notion of the institution as the object of study, even if the focus is now on the innovation that exists beside or near or on top of the ‘old’ institution. Perhaps the term ‘bypass’ is a little too stark. In cardiology, a bypass is a new, surgically produced channel that takes over the function that a clogged artery can no longer serve. But the innovations discussed in this book do not wholly replace ‘old’ bureaus and agencies; in the cases described at least, they exist alongside and in some kind of relationship to the ‘old’ systems.

In relation to the first and most extended example, the *Poupatempo*, I would note that the kiosks presumably have computers; and those computers would have to have access to the databases held by the driving licence bureau, the passport office



and so on in order to do their job. Without access to existing government archives (digital or analog), the kiosk would not have functioned. Thus, we could just as well see the kiosk as an innovation **within** government rather than as a bypass. Along these lines, on page 95 the authors note that bypasses work best when there is collaboration from the 'old' institution. But in that case, why call the new entity or process a bypass? Why not see it as public sector innovation?

The authors also use the slightly different metaphor of the highway bypass -- which does not completely replace the old highway. That seems to me to be more appropriate than the coronary artery bypass metaphor; but in the highway situation the bypass and the old highway, while existing at the same time, are very distinct, with drivers having to choose either one or the other, not a combination of both. While some innovations in governance may take this binary, either-or form, many other innovations that could potentially be called bypasses do not have a zero-sum relationship with the 'old' systems. A gated community that hires private security does not thereby give up any and all claims to call in the public police.

This brings me to the last point, which is how discussing 'bypasses' tends to assume a particular picture of existing government services. It is a commonplace observation in current administrative law and public policy studies that government work is often distributed – not only amongst different ministries and bureaus but also in countless more or less public arms-length authorities and agencies, as well as among private sector personnel engaged in government contract work (cf. Valverde 2016). The 'distributed' nature of government work is often thought to be a new phenomenon, a result of neoliberalism and/or the new public management. But that is not the case: governments have seldom monopolized public services. Governments have historically relied on charitable organizations and/or other non-state entities, as well as on private sector contractors, to serve the public. I think one could state, as a generalization, that government work is not limited to what goes on in ministries. Public sector work is often carried out through an often unpredictable chain of actions and events taking place in many locations, even in political systems intended and designed as top-down and subject to rigid norms and rules. The connections may be informal or formal, and may or may not be visible to the public, but they are nevertheless crucial.

Today, the relationships between government proper and other agencies that deliver public services are in some cases confined to grant applications, funding decisions, and reports about how the funds were subsequently spent (with a program evaluation often included, and sometimes a benchmarking exercise) (Flynn and Valverde 2019). But whatever the exact methods used to link state and non-state agencies, and government officials and non-state actors, relationships are crucial. In the case of *Poupatempo*, the friendly kiosk on the sidewalk and the bureaus that continue to exist in a grey imposing building somewhere else have to be linked --if the kiosk is to issue valid ID, rather than forged or hacked ID. Those

links would be well worth studying, in my view. Appreciating how exactly the information held in government databases and archives is shared with the ‘innovators’ –are there computers linked to a common drive? Are there messengers who go back and forth with actual papers?-- would illuminate both how the innovation drew on existing resources and information and also how the flow of information, papers, data, and personnel has changed and is likely to continue changing over time.

To sum up: I agree with the authors that it is very important to move sociolegal studies away from the traditional focus on institutions. Institutional ethnographies and other methods for analyzing the dynamics of institutions have given us a great deal of information and insights, but choosing a single institution as the object of one’s study has the effect of invisibilizing extremely important connections, relations, flows of people and information, collective norms that flow across institutional boundaries, and so on. Focusing on innovations that transcend the boundaries of a traditional institution is thus very helpful and in tune with contemporary developments in the social sciences.

However, the effort to define what an institutional bypass is, conceptually, in contrast to other ways of describing innovations that go beyond the strict boundaries of an agency or bureau or corporation, should not, in my view, be taken too far in the direction of scientific clarity. One can always define concepts clearly and concisely, but in doing so one inevitably runs the risk of generating a less than accurate picture of reality. In the public sector as in the private sector, relationships that cross institutional boundaries have always been important, whether they are regarded as innovative or not. These relationships can only be studied in concrete settings, not in the abstract. And in studying the ever-shifting relationships, conflicts, and collaborations that deliver public goods and services, it could be useful to pay attention to the symbolic meanings and material details that often remain unmentioned by both sociologists and legal scholars but that silently convey strong messages about what type of work is being carried out and what kind of citizen is envisaged as the ideal ‘client’.

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