
REACTIONS TO DAVID TRUBEK AND CAMILA ALVES

Mariana Mota Prado and Michael J. Trebilcock

David Trubek and Camila Alves focus their reactions on the concept of spontaneous institutional bypasses, offering a potential case study. We are deeply grateful to them for engaging with the concept we offered and also setting a potential agenda for future research. We are hoping that our book will stimulate not only normative studies that set the parameters to distinguish successful and unsuccessful bypasses (see our response to Machado, in this volume), but will also incentivize the kind of descriptive analysis developed by Trubek and Alves. The descriptive analysis basically consists of exploring other examples that may also be characterized as what we call an institutional bypass. Offering a concrete example for researchers to explore, as Trubek and Alves do, is certainly of great value.

While finding new cases of institutional bypasses in and of itself may be a worthwhile endeavor, there are cases that bring conceptual challenges that may require refinements in our original definition. We believe that the potential case proposed by Trubek and Alves falls into this category. The authors indicate that Brazilian law schools have not developed adequate training for those interested in practicing corporate law and, as a result, a series of workarounds have been developed. They suggest that these may be institutional bypasses. Some of them clearly are: for instance, private law schools that try to offer the corporate legal training that traditional law schools are not offering. In contrast, some of the other workarounds explored by Trubek and Alves may be lacking the characterizing features of a bypass, which normally involve mutually exclusive options. For instance, low-cost private schools in India are an alternative to what is being offered by traditional public and private schools (the dominant system). This choice is available in the case of students who forego the option to attend a traditional law school, choosing instead a private one where corporate legal training is offered. However, law students going to the traditional law schools and then supplementing their education with other training opportunities are not exercising a choice between mutually exclusive alternatives but rather are complementing the traditional system with an additional component. This is akin to a pupil going to a dysfunctional public school in India in the morning, and then taking private lessons with a tutor in the afternoon. Some of these workarounds, such as master degrees (LLMs) in foreign universities, take place after these students have completed their legal education. Therefore, if we think about these as bypasses, it is necessary to ask how they are offering an alternative pathway, rather than a complementary one.

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Perhaps a more granular analysis, based on the objective of each individual student, will allow a researcher to determine whether a particular workaround is a mere complement of one's legal education or an institutional bypass. As Trubek and Alves mention in their paper, for those attending law school to pursue a career in civil service, corporate law is not a priority. For these students, an LLM or any kind of corporate law training are not essential components of their legal education. In contrast, for those students determined to practice corporate law in big law firms, corporate law is the core of their legal education. For them, workarounds like LLMs and additional training opportunities are essential. This suggests that these workarounds may be only bypasses for some, not for all law school students (e.g. not for those intending to pursue public law careers). This seems to be in line with our definition in the book since the criteria to determine if a bypass performs the same function as the dominant institution is subjective and determined by the user. Therefore, two users may have different views about the workaround, which may be a bypass for one but not the other.

Another interesting conceptual challenge that Trubek and Alves bring is regarding the type of bypasses. Our book is focused on what we call domestic institutional bypasses, which are implemented in the same jurisdiction where they produce effects. Again, the creation of private law schools in Brazil that offer corporate legal education falls into this category. In contrast, pursuing LLMs in foreign universities does not. Despite producing effects in Brazil, the bypass is implemented in another jurisdiction. The LLM could not be classified as an international institutional bypass either since it does not involve a supranational or international institution (Prado and Hoffman 2019). Thus, this may be an example of a kind of bypass that has not been conceptualized yet. Perhaps we could label it a transnational institutional bypass, an extension of our concept that is certainly ripe for exploration.

Last but not least, the authors' concern with the distributional implications of the various workarounds echoes Hirschman's (1972) original and famous concern that exit from dysfunctional institutions is often exercised by better-endowed citizens, leaving the original institutions dependent on attenuated voice. Hirschman's example, amongst others, was poorly performing public schools in the United States, where wealthy parents could move to wealthier neighbourhoods with better public schools or enroll children in private schools. To make institutions more responsive while at least partially addressing this kind of distributional concern, it is crucial that there be consequences for these institutions for non-responsiveness. Hence, student grants or subsidies that move with the student among the alternative institutions available generates consequences for the unresponsive pre-existing institutions, while at the same time addressing the distributional biases that the authors worry about in the Brazilian legal education context. However, as we noted in the book, attaching financial and related consequences for unresponsiveness by pre-existing institutions to constituents'

needs present something of a conundrum: this may induce these pre-existing institutions to oppose more vigorously any reforms that are likely to make them more responsive; this, in turn, will further entrench the status quo. Without such reforms, we are left with workarounds that are available predominantly to better endowed students and their families.

In summary, Trubek and Alves have offered several suggestions of what could potentially be a series of case studies. Each of the workarounds that they identify seems to merit close scrutiny on their own. Such scrutiny should involve both a descriptive and a normative exercise. The descriptive analysis could assess if a given workaround matches the concept of institutional bypass as we articulated it, or if our concept could/should be revised. The normative exercise should engage in a detailed analysis of the implications of these workarounds (assuming they are considered to be bypasses), including their potentially regressive and elitist nature. It is entirely possible that there may not be desirable bypasses, but determining that would require developing a normative framework that we have not provided in our book. This is another important topic for future research.

REFERENCES

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