Institutional Bypasses in Brazil: Overcoming Ex-Ante Resistance to Institutional Reforms

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Introduction

Why are some countries rich and others are poor? This problem has challenged academics and policymakers since the end of WWII. After decades of heated debate and much controversy, recently development scholars have been converging towards a possible consensual explanation: *institutions*. In the last decade, independent judiciaries, efficient bureaucracies and non-corrupt agencies have taken central stage in the development discourse.[1] Consequently, there has been a massive surge in development assistance for institutional reform projects in developing and transition economies. The World Bank reports that it has supported 303 rule-of-law projects and spent $2.9 billion on this sector since 1990.[2] However, these reforms have had mixed to disappointing results thus far.[3] These failures suggest that scholars in this field may know a lot about functional and dysfunctional institutions, but we know very little about how to transform dysfunctional institutions into functional ones.[4]

While there are many obstacles to reforming dysfunctional institutions, one of the

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[1] Trebilcock, Michael and Prado, Mariana Mota. 2011. *What Makes Poor Countries Poor? Institutional Dimensions of Development*, Cheltenham, UK: Edward Elgar.

[2] Trubek, David. 2006. "The Rule of Law in Development Assistance: Past, Present and Future", in *The New Law and Economic Development: A Critical Appraisal, edited by* David Trubek and Alvaro Santos, eds., 74-94. Cambridge: Cambridge University Press, p. 74.

[3] Carothers, Thomas. 1998. "The Rule of Law Revival." Foreign Affairs 77(2): 95-106; Carothers, Thomas. 2002. "The End of the Transition Paradigm." Journal of Democracy 13(1): 5-21; Garth, Bryant and Dezelay, Yves. 2002. *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy*. Ann Arbor: University of Michigan Press. Tamanaha, Brian. 2004. *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press.
Trebilcock, Michael and Daniels, Ronald. 2008 *Rule of Law Reform and Development: Charting the Fragile Path of Progress.* Cheltenham, UK: Edward Elgar. Andrews, Matt. 2013. *The Limits of Institutional Reform in Development*
Changing Rules for Realistic Solutions, Cambridge: Cambridge University Press. Trebilcock and Prado, supra note 1.

[4] North, Douglass. 2005. *Understanding the process of economic change*. Princeton, N.J.: Princeton University Press, p. 67. See also North, Douglass. 1990. *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.

central challenges is resistance to reforms. Dysfunctional institutions are hard to change in part because either interest groups who benefit from the *status quo* are likely to impose obstacles to change (self-interested resistance) or because people are risk-averse and fear uncertainty and/or potential negative consequences of change (cognitive resistance). In a previous paper, I have explored whether one particular type of institutional reform may help policymakers deal with these obstacles. I call this type of reform an "institutional bypass". Instead of trying to fix dysfunctional institutions, an institutional bypass simply creates a parallel institution that performs exactly the same function of the original institution and competes with it.[5]

The purpose of this paper is to investigate the conditions under which an institutional bypass is likely to help reformers overcome initial resistance to reforms. It will be focused on *ex-ante* resistance, not addressing *ex-post* resistance to reforms. While *ex-ante* resistance may block a reform from being adopted, *ex-post* resistance takes place once the reform has been implemented and aims at undermining the potential success of the reform. The first normally takes place at the design stage, while the later will take place during implementation. The analysis of *ex-ante* resistance is based on three case studies from Brazil: a bureaucratic reform in the state of Sao Paulo in the 1990s (*Poupatempo*); a police reform in Rio de Janeiro in the 2000s (*Unidade de Polícia Pacificadora, UPPs*); and the ongoing use of private security forces by citizens in general.

The paper will be structured as follows. Section 1 defines what an "institutional bypass" is, and highlights examples of reforms that can be considered bypasses, such as Debt Recovery Tribunals in India, Charter Schools in the United States, and international

[5] Prado, Mariana Mota. 2011. "Institutional Bypass: An Alternative for Development Reform". Available at SSRN: http://ssrn.com/abstract=1815442.

arbitration. Section 2 introduces the three institutional bypasses implemented in Brazil: *Poupatempo*, *UPPs* and private security forces. Section 3 discusses the features of bypasses that have the potential to overcome *ex ante* resistance to institutional reforms, drawing from the three Brazilian case studies. I conclude the paper by addressing some questions about what can be considered a successful bypass, and why this type of reform may be an important tool for those trying to promote institutional reforms in developing countries.

1. What is an Institutional Bypass?

Like coronary bypass surgery, in which transplanted blood vessels are used to create a new circulatory pathway around clogged or blocked arteries, an institutional bypass creates new pathways around clogged or blocked institutions. An institutional bypass does not try to modify, change or reform existing institutions. Instead, it tries to create a new pathway in which efficiency and functionality will be the norm.[6]

There are three characteristics of an institutional bypass:

(1) it keeps the traditional institution in place;

(2) it creates an alternative pathway through which to deliver government services or discharge governmental functions (which becomes an option to those using the services); and

(3) it tries to be more efficient or functional than the traditional institution.

One example of an institutional bypass is the Debt Recovery Tribunals (DRTs) in India. DRTs were established by the Government of India under an Act of Parliament (Act 51

[6] Id.

of 1993)[7] as an executive arm of the government. DRTs fall under the purview of the Ministry of Finance, unlike civil and criminal courts, which are part of the judiciary.[8] Nevertheless, the jurisdiction of DRTs partially overlaps with the jurisdiction of regular courts, offering an alternative pathway to those who want to recover their debts.[9] While all the cases brought to DRTs fall under the jurisdiction of regular courts, the reverse is not true: DRTs do not have jurisdiction over all cases brought to regular courts. They only provide recovery of debts owned by banks and financial institutions involving debts of at least 1 million Rupees. This means that they are partial bypasses: these tribunals change a specific point in the system, while keeping the pre-existing institutions in place. Indeed, "Debt Recovery Tribunals were established as the Indian government's attempt to improve the legal channels for loan recovery, without overhauling the entire judicial system".[10] However, some of the expected benefits of faster recovery, such as more and cheaper loans, do not seem to have been reached.[11]

Another example of institutional bypass is Charter Schools in the United States. These are primary or secondary schools established by private parties, such as teachers, parents, non-profit groups, universities or corporations. They are funded with public money and are not allowed to charge tuition, and offer an alternative pathway to public schools, as students can choose to go to a charter school or to remain in regular public schools. They aim to offer

[7] *Recovery of Debts Due to Banks and Financial Institutions Act*, 1993, online: Debt Recovery Tribunal, <http://www.drt.co.in/>

[8] Visaria, Sujata. 2006. "Legal Reform and Loan Repayment: The Microeconomic Impact of Debt Recovery Tribunals in India", Boston University (April 2006).

[9] New courts will only be bypasses if they have partial or complete overlapping jurisdiction with pre-existing courts. If they have exclusive jurisdiction, they are not bypasses. For instance, in Canada, courts have exclusive jurisdiction on claims of a certain value, i.e. you cannot sue someone in Superior Court if you are claiming less than $10,000 and you cannot sue someone in Small Claims Court for more than $10,000.

[10] Visaria, supra note 7.

[11] Visaria, Sujata, Ulf von Lilienfeld-Toal and Dilip Mookherjee. 2012. "The Distributive Impact of Reforms in Credit Enforcement: Evidence from Indian Debt Recovery Tribunals", Econometrica, March 2012, Volume 80, Number 2, pp. 497-558.

better education than regular public schools, taking advantage of the fact that they are not subject to the same rules, regulations and statutes that apply to other public schools. In general, they seem to aspire to provide better services than public schools, although their actual level of success is extremely disputed in the academic literature.[12]

While these two examples were spearheaded by governmental organizations, private parties can also implement institutional bypasses. This would be a private bypass, in contrast to the public bypasses described above. International arbitration is an example of a private institutional bypass. It is possible, however, to have private participation in public bypasses. Private parties funded by the government create Charter Schools. To capture these differences, I classify the DRTs as a public-public bypass, and Charter Schools as public-private bypasses. DRTs can be described as a public-public bypass as the bypassed and the bypassing institution are located within the government: the executive branch is bypassing the judiciary by creating institutions that perform some of the functions performed by courts.

In contrast to DRTs, Charter schools in the United States can be considered a public-private bypass. A public-private bypass exists when a private entity (a company, an individual, or a civil society association) receives the responsibility or the power to perform public services. In some cases, the entity is hired by the state to provide such services (contracting out). It is important to note, however, that a public-private bypass only exists if the private institution is performing a service that is still performed by another state

[12] Teske, P., Mark Schneider, Jack Buckley, Sara Clark, 2000. "Does Charter School Competition Improve Traditional Public Schools?", Manhattan Institute for Policy Research, Civic Report, No. 10 June 2000. Available at http://www.manhattan-institute.org/html/cr_10.htm. Caroline M. Hoxby, "School choice and school competition: Evidence from the United States", Swedish Economic Policy Review 10 (2003) at 9-65 (showing that charter schools disproportionately attract students who are performing badly, and make their achievements rise). Jay Greene, Greg Foster and Marcus Winter, "Apples to Apples: An Evaluation of Charter Schools Serving General Student Populations", Manhattan Institute for Policy Research (2003) (showing that charter schools outperformed regular schools in math and reading tests). Carol Hoxby and Jonah Rockoff, "The Impact of Charter Schools in Student Achievement" (November 2004) (showing that the impact was positive in students who applied in kindergarten to grade five, but there was no impact on students who applied in grades six through eight).

institution. Thus, processes of contracting out state services in which the private entity replaces the public entity (such as privatization) would not be considered bypasses, as they would not meet the first criteria.

2. Institutional Bypasses in Brazil

As the previous section suggests, institutional bypasses can be found all over the world, in developed and developing countries alike. Brazil is no exception. As part of a book project, I am developing an in depth analysis of cases of institutional bypasses in Brazil. This paper will draw from some of the cases studies included in the book project, as described below.

The first example of an institutional bypass in Brazil is a bureaucratic reform called *Poupatempo*, which can be translated as "saving time".[13] In 1997, the government of the state of São Paulo created a one-stop shop for bureaucratic services. In contrast to the pre-existing system (in which government services were slow, often plagued by corruption, and accessed by the public at multiple service points), offices of the federal, state and, in some cases, local administration were placed in one location in order to provide easy access to a variety of services, such as requesting a driver's licenses, obtaining criminal records and filing tax returns. Services were provided more quickly than within the pre-existing bureaucracy, and largely because of that *Poupatempo* became the main provider of governmental services within the state soon after its creation. In 2007, it provided services to an average of 50,000 people a day in the state of São Paulo. In that year, 18 units together serviced 23 million people. *Poupatempo* is an example of an institutional bypass because it created a new

[13] Prado, Mariana and Chasin, Ana. 2011. "How Innovative was the Poupatempo experience in Brazil? Institutional Bypass as a New Form of Institutional Change" *Brazilian Political Science Review* Vol 5, No 1, 2011, pp. 11-34. Available at http://www.bpsr.org.br/index.php/bpsr/article/view/112/103.

pathway for the provision of the same services that were being provided by the existing bureaucracy, and it tries to provide services in a more efficient fashion.

Poupatempo was originally designed as a public-public bypass, as the people hired to work on *Poupatempo* units were civil servants and people hired directly by the government. However, the most recent units of *Poupatempo* do not rely on public servants. Instead, the government, through management contracts, have delegated to a private company the responsibility of running entire *Poupatempo* units, including hiring personnel, according to strict guidelines regarding service provision. In other words, *Poupatempo* is being contracted out to private companies. Therefore, unlike the original units of *Poupatempo,* the newer units are public-private bypasses.

Another example of institutional bypasses is related to private security forces, a topic discussed in my 2010 SELA paper.[14] In some cases, companies that offer private security services can be considered institutional bypasses. In Latin America, ever increasing crime rates and failed reforms are creating a latent demand for enhanced security,[15] which is fuelling a significant expansion of the private security sector.[16] In this context, it is common for private companies and individuals to hire security forces in an attempt to *replace* the services that should instead be provided by the public police force. This arrangement contrasts with the situation in developed countries, where private security forces are hired either by private parties who are using these forces to complement public security services, or they are hired by the state who is using private forces to replace public security services. In the first case, a

[14] Prado, Mariana Mota, "A Tragedy of the Privates: Private Security Services in Latin America", available at http://www.law.yale.edu/documents/pdf/sela/MatoPrado_Eng_CV_20100420.pdf.
[15] Davis, D. E. 2006. Undermining the rule of law: Democratization and the dark side of police reform in Mexico. *Latin American Politics and Society, 48*(1), 55-86. Fruhling, H. 2009. Research on Latin American police: Where do we go from here? *Police Practice and Research, 10*(5-6), 465-481.
[16] Ungar, M. 2007-2008. The Privatization of Citizen Security in Latin America. *Social Justice, 34*(3-4), 20-37.

private party with very specific security needs may want to hire private security services to address these needs, given that such specific needs would not be addressed by public security forces. An example is private security for banks and companies, where private security complements the work of the police force even in cases in which they are conceived as replacements.[17] In the second case, the state (not a private party) may decide to hire a private company to provide public security. The rise of the neoliberal state has pushed outsourcing and privatization, in which private security companies are hired and paid by the state to provide public security, or military services.[18]

The table below summarizes the different agents and purposes for hiring private security services:[19]

Agent/ Purpose	**Complement**	**Replace**
Private Parties	(1) Security Guards for Companies (e.g. Banks)	(3) Private body guards and Street Vigilantes (Latin American security services)
State	(2) Special protection to government officials; witness protection programs	(4) Private military services, outsourcing of prisons and police forces

Basically, the only situation in which private security forces operate as institutional bypasses is the one described in the third quadrant in the table above (3). Quadrants (1) and (2) are offering a very specialized service that is not normally performed by the police forces. In this sense, they do not offer an "alternative pathway" to the delivery of services provided by the government. Indeed, in offering such services, private security forces are working in cooperation with the police to reduce the security risk of certain organizations or individuals, not in competition with it. Quadrant (4), in turn, is not a bypass because the traditional

[17] MacDonald, John and Klick, Jonathan and Grunwald, Ben. 2012. The Effect of Privately Provided Police Services on Crime (November 4, 2012). *U of Penn, Inst for Law & Econ Research Paper* No. 12-36. Available at SSRN: http://ssrn.com/abstract=2171038.
[18] Button, M. 2007. Assessing the regulation of private security across Europe. *European Journal of Criminology, 4*(1), 109-128, p. 111.
[19] Prado, supra note 14.

institution is not kept in place. In the case of the outsourcing of security services, the public police force is replaced by private security. In contrast, quadrant (3) keeps the traditional institution in place (i.e. the public police force is neither fired, nor removed from its function or deprived of its jurisdiction), while at the same time offering an "alternative pathway" to citizens seeking more security. A citizen can choose to rely on the police force, but in Latin American countries citizens are relying on these private security forces to deliver the services that would otherwise be delivered by the police.

While private security forces in Latin America can be considered institutional bypasses, there is one significant difference between them and the *Poupatempo* example. This is a 'private bypass', similarly to international arbitration. The security forces are a private initiative, i.e. they are organized, funded, offered and hired by private individuals and organizations. In contrast, *Poupatempo* is a public bypass, as it is offered and promoted by a public institution. The state is providing an option to citizens, who can choose to request such services in the pre-existing bureaucracy or in the bypass.

The question that follows is whether we can conceive of a 'public institutional bypass' for public security. Such a reform would necessarily maintain the 'original' police force in place while somehow creating a distinct alternative institution. This alternative institution would, in turn, serve citizens with a different model or approach to public security. These two institutions (the old and the new) would be performing the same function (providing public security) but not in complementary fashion. In other words, a public institutional bypass of the police force would require two police forces 'competing' to see who could provide the 'best' service. It may be hard to envision how this could be designed without destabilizing the state's monopoly on violence. This question is especially sensitive in regions like Rio de Janeiro, where this monopoly is already in question. Non-state armed groups' control over

territory, military weaponry and forms of taxation in many parts of the city raise legitimate theoretical questions about the sub-national state's monopoly. Presuming that the state overcomes these questions, an institutionally fractured police force may eventually raise the empirical and theoretical stakes about who, within the state itself, is the state's agency of legitimate violence. However, the implementation of two institutions performing policing is exactly what was achieved in Rio de Janeiro with the implementation of the *Unidades de Polícia Pacificadora*, UPPs, as I had suggested in my 2012 SELA paper.[20]

The UPP project is focused on taking back territories controlled by drug dealers and criminal organizations, mostly in low-income neighborhoods with illegal settlements known as *favelas*.[21] The project is divided in three stages: occupation, pacification, and the creation of a new police unit (UPP). [22] The occupation and pacification are done by an elite police force called BOPE (in some cases with the help of the army). [23] In this process, the government has tried to avoid violent confrontation between police officers and criminals by announcing in advance the day of military occupation of a certain region. This allows

[20] The Brazilian police force is divided into military police (crime prevention and street patrolling) and civil police (investigation of crimes). The UPPs are bypassing the military police in the State of Rio de Janeiro, which is referred throughout this paper either as military police, traditional police or simply police. A revised version of my 2012 SELA paper (co-authored with Trebilcock, Michael and Hartford, Patrick) was published as "Police Reform in Violent Democracies in Latin America", in *Hague Journal on the Rule of Law* Vol. 4, n.2, September 2012, pp. 252-285.

[21] Ignacio Cano et al. 2012. *Os Donos do Morro: Uma Avaliação Exploratória do Impacto das Unidades de Polícia Pacificadora (UPPs) no Rio de Janeiro* (Forum Brasileiro de Segurança Pública and Laboratório de Análise da Violência – UERJ, May 2012), 144-146. Ricardo Henrique and Silvia Ramos, "UPPs Sociais: ações sociais para consolidar a pacificação", in *Rio a Hora da Virada*, eds. André Urani and Fabio Giambiagi (Elsevier, Rio de Janeiro, 2011), 243. See also Clarissa Huguet and Ilona Szabó de Carvalho, "Violence in the Brazilian Favelas and the Role of the Police", *New Directions for Youth Development* 119 (2008 Fall), 93-109 (providing a history of *favelas* and showing the concentration and extremely high incidence of police violence against people living in these areas).

[22] Stahlberg, Stephanie Gimenez. 2011. "The Pacification of Favelas in Rio de Janeiro: Why the Program is Working and What are the Lessons for Other Countries", Paper presented at the Conference Violence, Drugs and Governance: Mexican Security in Comparative Perspective, Oganized by CDDRL, CISAC, FSI Stanford, Stanford, October 3-4, 2011, 8-9. Available at http://iis-db.stanford.edu/evnts/6716/Stahlberg,_Stephanie_-_Pacification_of_Favelas_in_Rio_de_Janeiro_(Work_in_Progress).pdf, pp. 8-9.

[23] The Economist, "Conquering Complexo do Alemão," *The Economist*, December 2, 2010, accessed March 2, 2012, http://www.economist.com/node/17627963.

criminals to flee before the police force or the army arrives. However, this strategy has been criticized for allowing criminal groups to simply relocate to other areas.[24] In the third stage, a new unit is created. Today there are 30 UPP units in Rio de Janeiro providing services to an estimated 400,000 citizens.

This UPP can be considered an institutional bypass for three reasons.[25] First, UPPs are certainly not a new formal police force but today they operate largely outside of the accountability structures, bureaucracy and authority of the traditional police.[26] This separation may be further reinforced with the creation of a special accountability unit to investigate and prosecute abuse and misconduct of UPP officers. The government has announced its intention to create such a body in October 2012.[27] This gradual separation of UPPs units from the traditional police in Rio de Janeiro seems to reinforce the idea that despite not being a new police force, UPPs operate as a parallel police force. Second, the UPPs are trying to perform the same functions of the traditional police force in a more effective manner. In this regard, UPPs have adopted strategies to create a respectful dynamic between police officers and members of the community, known as proximity policying. The strategies to create proximity in UPPs are mostly training and a system of financial incentives where police officers receive bonus payments if a certain region has reduced rates of crime and police abuse.[28] Third, UPPs also offer a *de facto* alternative or an option to those using the services. In their daily operations, the UPPs encourage citizens to direct their emergency calls or preventative

[24] Stahlberg, supra note 22, p. 9.
[25] This idea was original articulated at Prado, Trebilcock and Hartford, supra note 20; and further developed in Graham Denyer and Prado, Mariana Mota, "Process and Pattern in Institutional Reforms: A Case Study of The Police Pacifying Units (UPPs) in Brazil", *World Development* (forthcoming).
[26] Since January 2011 the Coordination of the UPPs has been directly subordinated to the Commander in Chief of the Military Police, who in turn reports directly to the Public Security Secretary and the Governor (Decreto No. 42.787 de 06 de Janeiro de 2011, art. 3, par. 1).
[27] Kopschitz, I. 2012. Policia militar receberá R$ 1,4 bilhão em investimentos. Retrieved from http://www.rj.gov.br/web/imprensa/exibeconteudo?article-id=1252512.
[28] Stahlberg, supra note 22, p. 13-14, 27.

concerns directly to the UPP station via email, telephone or face-to-face contact, as opposed to contacting a central dispatcher. This offers an optional way of communication with the police, that was not offered before and ensures that potential problems in the centralized communication system will not undermine the possibility of UPP units acting effectively within the communities where they operate.

3. Overcoming *Ex-Ante* Resistance to Reforms

There are many obstacles to implement institutional reforms in developing countries and there is a burgeoning literature exploring these.[29] This section is focused on one particular obstacle that is very visible: *ex-ante* resistance to the creation, design and implementation of reforms. *Ex-ante* is any kind of resistance that precedes any steps towards actual implementation.

There are at least two reasons why interest groups may resist reforms *ex-ante*: self-interested reasons and cognitive reasons. In the first case, the outcome of the reforms is very clear, and the group can foresee that proposed institutional changes will eliminate their privileges, no longer foster their preferences, or will not offer them any benefits (material or otherwise). As a result, they will resist reforms, since they see significant costs and few or no benefits from the institutional changes proposed. Cognitive resistance, on the other hand, differs from self-interested resistance insofar as the groups resisting reforms cannot clearly see the outcomes of the proposed changes. Thus, resistance is informed by lack of sufficient

[29] See supra note 3.

information, instead of self-interest. In this case, the risks (i.e. the lack of any guarantee that one outcome will prevail over the other) or uncertainties (i.e. the lack of capacity to predict what would be the possible outcomes) are the main drivers of resistance. These two reasons may not be distinguishable in real world, but for analytical purposes we will analyze each of them in turn.

3.1 Overcoming Self-Interested Resistance

Political economy impediments involve the resistance of interest groups that benefit from the status quo. People may simply resist change if modifications to existing institutions are likely to force them to internalize the costs of changing existing practice or attitudes. This problem is referred in the academic literature as switching-costs[30] and may be addressed with compensation for the costs incurred in the transition.[31] Another type of self-interested resistance is related to reforms that will impair rent-seeking activities. For instance, people who receive bribes may actively resist anti-corruption reforms that may deprive them of these rents. One possible strategy to overcome this resistance is to strengthen interest groups that will benefit from the reforms, making them better able to press for change.[32] However, there is no guarantee that those willing to promote change will not be overpowered by those who are resisting it.

One possible obstacle in empowering beneficiaries to overcome rent-seekers' resistance is collective action problems. For example, imagine a country where citizens could benefit from faster and better bureaucratic services. At the same time, actors within a

[30] For a summary of the literature, see Prado, Mariana Mota and Trebilcock, Michael. 2009. "Path Dependence, Development and the Dynamics of Institutional Reforms", *University of Toronto Law Journal* 59 (3), 2009, pp. 341-380.
[31] Trebilcock, Michael. 2014. *Dealing with Losers: The Political Economy of Policy Transitions.* Oxford: Oxford University Press.
[32] Daniels and Trebilcock, supra note 3.

bureaucracy may not see changes to the current institutional arrangement as beneficial to them. Bureaucrats may earn additional income from discretionary schemes that allow for corruption, which have a higher demand when services are slow and of low quality. They will likely resist any reform effort that could deprive them of these rents. Additionally, these bureaucrats may not want to employ greater efforts and increase their workload if a reform increases the pace in processing requests for services. The internal resistance to *Poupatempo* illustrates this point. In police stations issuing identity cards, certain groups were receiving bribes to expedite the process to issue legitimate documents or to falsify documents. Thus, they did not want *Poupatempo* to issue identity cards. In the Department of Motor Vehicles, a group of private doctors who provided physical exams to those taking the driver's license test also resisted the implementation of *Poupatempo*. In *Poupatempo,* doctors from the public health care system would be providing the medical examination, what would remove a great deal of the clientele of the private doctors. Finally, the Federal Police could not be persuaded to offer passport services in *Poupatempo.* While they claim that *Poupatempo's* expedited procedures would violate their security standards, one may wonder if the extended hours of services provision, or even corruption schemes were not the real reasons behind their resistance.[33]

This example illustrates that the dynamic of resistance to reforms in public and private bypasses is very different. In public bypasses, there are two very distinct interest groups. On one hand, there is a scattered, non-organized mass of citizens who could largely benefit from reforms. This group faces high transaction costs in order to organize and demand changes. On the other hand, there will be a small group of bureaucrats, concentrated in one place. This group can effectively organize against the reform and strongly voice their preferences at a

[33] Prado and Chasin, supra note 13, pp. 24-25.

much lower cost. The difference in costs makes it much easier for those resisting reforms to succeed. The prediction is that institutional reforms will only happen if the group demanding reforms has more power and influence. In this context, empowering the group that wants reforms and weakening the group that does not can be a formidable goal.

In private bypasses, in contrast, the dynamic is different. Those who are unhappy with the existing provision of public services can opt out of the system anytime. There is no collective action problem, as the decision is individualized. As I had discussed in my 2010 SELA paper, however, the use of private security forces in Latin America shows how this may have perverse consequences. First, a portion of the population that could be pressing for changes and improvements in the delivery of the service will have fewer incentives to do so.[34] Second, considering that access to private services is determined by the ability to pay, it is likely that only wealthy people will benefit from this option, and this may concentrate crime and violence among lower classes. Third, there may be a regressive component, if the private forces are being staffed by people trained and equipped with public funds, as often happens with police officers moonlighting as private security guards. In sum, while private bypasses may face even less resistance to be implemented than public bypasses, they may not be as desirable.[35]

This example shows that the sheer fact that institutional bypasses may be able to overcome obstacles to institutional reforms does not necessarily provide immediate and automatic support for their use. There are desirable and undesirable bypasses, and these can be public or private. While private security forces provide an example of undesirable private

[34] A similar dynamic may occur in investment arbitration. See Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law and Economics* 107. For a contrary view, see Susan Franck, 'Foreign Direct Investment Treaty Arbitration and the Rule of Law' (2007) *Pacific McGeorge Global Business and Development Law Journal* 337.
[35] Prado, supra note 14.

bypasses, one could imagine a bureaucratic reform similar to *Poupatempo* in which driver's licenses would be issued in a shorter period of time due to reduced or no scrutiny. This would be an undesirable public bypass, as we require people to have a license to drive to guarantee safety on the roads. In this case, increased efficiency in the issuance of the driver's licenses seems to be a small benefit if the cost incurred in less scrutiny in the process to select capable drivers, which is the primary goal of the service.

Assuming this knowledge will be used to design desirable bypasses, it may be useful for reformers to understand how an institutional bypass may help overcome such *ex-ante* resistance. By creating a separate institution that operates in parallel with the dysfunctional one, bypasses create a very different political dynamic if compared to reforms implemented within existing institutions. While a reform in an existing institution would require reformers to engage in a negotiation process with those operating the dysfunctional institution, the bypass allows them to avoid engaging in such a negotiation process. Unless those in the pre-existing institution are empowered to veto the bypass, there is very little they can do to impose obstacles to its design and implementation. If the reforms were happening in the existing institution, in contrast, they would have significantly more power to resist.

This may also be the case in the implementation stage: the bypass is a parallel institution and therefore does not require full cooperation of those operating the dysfunctional institution in order to be implemented. To be sure, some level of cooperation will often be necessary. If nothing else, reformers will need at least information about internal processes and mechanisms that will help them identify problems and try to design solutions to fix them. In the case of *Poupatempo*, for instance, reformers benefited from the expertise of public

servants who believed that reforms would be beneficial to the system.[36] The same happened in the UPPs: officers in charge of UPP units are often officials of the military police that excelled in training programs promoted by the National Secretary for Public Security (SENASP). Such programs promote new ways of thinking about policing. SENASP also provided training and resources for new UPP recruits and, in many cases, it deployed a federally-trained quick response force, the *Força Nacional*, to occupy favelas, guarding the space as the state hired and trained future 'proximity police' officers.[37]

In sum, the two institutions – the pre-existing one and the bypass -- can run relatively independently of each other, making it harder for those resisting reforms to impose the same obstacles to the bypass's creation as they could impose if the changes were happening within the institutions they are affiliated with. For example, previous attempts to change the traditional police force, including numerous community-based policing programs similar to UPPs, had met fierce resistance from police officers.[38] Indeed, one of the earliest and relatively successful community-based policing experiments in the state of Rio de Janeiro remained restricted to a relatively small area of the city (a low-income neighborhood known as *Pavão-Pavãozinho-Cantagalo*), never being translated into systemic change.[39] On the contrary, during its short existence, colleagues often ostracized the officers working on the project.[40]

[36] Prado and Chasin, supra note 13.
[37] Willis and Prado, supra note 25, p. 16 (of the manuscript).
[38] Ferreira, Sérgio Guimarães.2011. "Segurança pública no Rio de Janeiro: o caminho das pedras e dos espinhos," in *Rio a Hora da Virada,* eds. André Urani and Fabio Giambiagi (Elsevier, Rio de Janeiro, 2011), 73-99.
[39] Graziella Moraes D. Da Silva and Ignacio Cano, "Between Damage Reduction and Community Policing: The Case of Pavão-Pavãozinho-Cantagalo in Rio de Janeiro's Favelas," in *Legitimacy and Criminal Justice*, ed.Tom Tyler (New York: Russell Sage Foundation, 2007).
[40] Sergio Guimarães Ferreira, "Segurança Pública nas Grandes Cidades," in *Brasil: a Nova Agenda Social*, ed. E. Bacha and S. Schwartzman (Rio de Janeiro: Editora LTC, 2011), 298-299.

3.2 Overcoming Cognitive Resistance

As explained earlier, cognitive resistance is informed by fear of the risks or uncertainties related to the possible outcomes of the reforms. Uncertain as to whether they will be among winners or losers, some interest groups may adopt a risk-averse position, resisting any kind of change. A great deal of this uncertainty comes from the fact that formal institutions – where most reform efforts are focused – are influenced by a set of social, cultural and historical factors. These factors are often referred to as informal institutions[41] and they present a unique set of challenges to reformers as they are often perceived to be the black box of institutional change.[42] While it is almost intuitive to say that these informal institutions, such as cultural norms and values, play a role in influencing human behavior, until recently very little attention had been paid to their actual role in institutional change. This is true within economics in general, and for the field of new institutional economics in particular.[43]

In addition to the risks and uncertainty about the direction of the changes, there is also a great deal of uncertainty as to whether or not we can ever capture and systematize this knowledge in a way that allows us to predict, with some level of certainty, the outcomes of reforms. Many scholars have supported the idea that academic studies need to acknowledge that there is a complex interaction between formal and informal norms and rules of behavior, and to develop effective methods to investigate and understand when and how informal institutions and norms can reinforce formal institutions and vice-versa.[44] The question is

[41] North 2005, supra note 3.
[42] Licht, Mair, Goldschmidt, Chanan, and Schwartz, Shalom. 2007. Culture Rules: The Foundations of the Rule of Law and other norms of Governance, Journal of Comparative Economics 35 (*2007*) 659–688.
[43] Sen, Amartya. 2004. "How Does Culture Matters?" In Rao and Waltron (eds.) *Culture and Public Action.* (Stanford University Press).
[44] Acemoglu, Daron and Johnson, Simon. 2005. "Unbundling Institutions." Journal of Political Economy 113(5): 949-995.

whether it is possible to ever perform this investigation with a level of certainty that would allow us to overcome political resistance to reforms. In other words, regardless of how scientific these attempts to systematize and generate knowledge about the complex interaction between formal and informal institutions are, they may still be plagued with uncertainties, as complex social determinants of institutional arrangements are rarely amenable to a few, simplified formulas.[45]

Many scholars argue that the solution to this conundrum is experimentation, i.e. the only way to determine whether or not a reform will work is by testing it empirically. Empirical testing offers the possibility of generating information that will dispel resistance based on lack of information. More than that, experimentation can actually captivate political support from potential beneficiaries, who are assured, based on the results of the experimentation, that the benefits of reforms outweigh their costs (or not). There are many ways in which experimentation can be structured. Banerjee and Duflo propose randomized controlled trials, whereas Charles Sabel subscribes to something more akin to a trial and error process. [46]

An institutional bypass may reduce the resistance to reforms that is simply based on fear of unexpected results for three reasons. First, it has demonstration effects. Those who are afraid of changes can observe concrete results before deciding whether or not to support reforms. This is often touted as one of the advantages of pilot projects, and may be also a feature of institutional bypasses. In both cases, undoing or abandoning the pilot project or the

[45] Helland, E. and J. Klick. 2011. "Legal Origins and Empirical Credibility", *in Does Law Matter? On Law and Economic Growth* 99 (Michael Faure & Jan Smits eds., Intersentia: 2011). (for a criticism of the legal origins literature and other attempts to capture these dynamics through quantitative analyses)

[46] Banerjee, Abhijit and Duflo, Esther. 2011. *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty.* New York: Public Affairs. Sabel, Charles. 2007. "Bootstrapping Development: Rethinking the Role of Public Intervention," in V. Lee and R. Swedberg (eds.), Promoting Growth, On Capitalism, Stanford: Stanford University Press, pp. 305-341.

bypass will not generate significant disruption because the original institution was left untouched.

Second, similarly to a pilot project, an institutional bypass allows for direct experimentation because it offers the same services to the same citizens that use the dysfunctional institution. Thus, the experiment is based on the actual conditions under which a new institution would operate. This is an important contrast with an experiment that would be located in some other geographic location (another city, institution or country), as such experiments do not offer any guarantee that the same results will be achieved once transplanted to another setting. Some scholars, including myself, have argued that countries should explore institutional reforms in locations with similar socio-cultural-historical circumstances to the one where the reform is being implemented.[47] This may reduce some of the uncertainty, but this is still not as secure (from an informational perspective) as "testing" the new institution under the actual conditions in which it will operate, as the institutional bypass does. Banerjee and Duflo argue that there is a scientific way of conducting these tests: randomized control trials (RCTs).[48] While RCTs may be useful and informative in certain circumstances, they present significant financial, logistical, ethical and political obstacles in many circumstances.[49] In such cases, an institutional bypass or pilot projects may be a preferable strategy.

Third, a bypass may have an advantage over a pilot project because it can be scaled to size, without disrupting the original institution. While experimentation with pilot projects can generate useful information regarding possible outcomes to interested parties, in some cases

[47] Trebilcock and Prado, supra note 1.
[48] Banerjee and Duflo, supra note 45.
[49] Easterly, William and Cohen, Jessica. 2009. *What Works in Development? Thinking Big and Thinking Small.* Brookings Institution Press. Davis, Kevin and Prado, Mariana Mota. 2014. "Law, Regulation and Development", in D. Malone et al. (eds.), *Development: Ideas and Experience* (Oxford: Oxford University Press)**.** Available at http://iilj.org/courses/documents/KevinDavisandMarianaPrado.pdf.

the positive results obtained with the pilot project are not observed when the institution is scaled to a normal size. At this point, pilot projects are often replacing the original institution, which are being scaled back, while the pilot is being scaled up. This can generate significant costs if the changes resulting from the expansion of the pilot project become hard to reverse. In contrast with this scenario, an institutional bypass, in turn, may start as a pilot project, and evolve into a full-blown institution without promoting any changes in the existing arrangement. An institutional bypass could be structured such that it can be quickly abandoned without having much of an impact on the status quo. To be sure, a small institutional bypass is likely to have fewer consequences for society than other institutional reforms. Achieving this with large and multiple simultaneous bypasses, such as the idea of charter cities, proposed by Paul Roemer,[50] may not be so easy. In any event, the bypass offers a possibility to effectively dispel fears of the costs and lingering effects of experimentation even more effectively than a pilot project. For these three reasons, depending on how it is structured and presented to interest groups, an institutional bypass can reduce resistance to reforms that are linked to the fear of unexpected outcomes.

Both Poupatempo and the UPPs illustrate these three reasons why institutional bypasses can reduce cognitive resistance to reforms. Regarding experimentation, the coordinator of Poupatempo reports that the task was very experimental, and none of the people involved in its designed had done anything similar before.[51] The history of UPPs is very similar. Indeed, two weeks after the second UPP had been created, the Secretary of Public Security stated in an interview to the press "Dona Marta [the second community occupied by the police forces] is a laboratory. It is an attempt to put in place something that

[50] New York Times, The. 2012. Plan for Charter City to Fight Honduras Poverty Loses Its Initiator (http://www.nytimes.com/2012/10/01/world/americas/charter-city-plan-to-fight-honduras-poverty-loses-initiator.html?_r=0).
[51] Prado and Chasin, supra note 13, p. 17.

will certainly succeed. We want to show what we believe about public security and how we want to do it."[52] Both projects were embedded with a high degree of flexibility and decentralization, to allow those running the operations to modify procedures and plans when necessary, reinforcing the experimental nature of the projects.

Both projects have also relied on feedback mechanisms, constantly collecting information about performance and results achieved followed by a self-reinforcing system for regular improvements.[53] In this process, both projects have significantly modified the institutional culture of their respective institutions, radically changing how civil servants and police officers conceive of their roles and their responsibilities. Poupatempo has shifted the focus from processes to outcomes, and inculcated a "customer service" mentality in all units. Civil servants are trained to provide services in a friendly, efficient and effective fashion.[54] UPPs, in turn, represent a sweeping change in the way that policing has historically been practiced in the city. They follow a model of policing based on the notion of 'proximity'.[55] This approach is based on the idea of having patrolmen and women walking the street, visible and serving as an open conduit of state-society communication. In contrast to the 'old' police, proximity denotes fewer patrols in vehicles, greater decentralization and special training in community communication techniques. The UPP system seeks to enhance trust directly between citizens and UPP officers, creating an orientation towards the public as opposed to superiors.[56] The strategies to create proximity in UPPs are mostly training and a system of financial incentives where police officers receive bonus payments if a certain region has

[52] Freire, A. 2008. Favela da zona sul é modelo de ocupação da polícia. *Globo*. Retrieved from http://g1.globo.com/Noticias/Rio/0,,MUL913118-5606,00.html.
[53] Prado and Chasin, supra note 13. Willis and Prado supra note 25.
[54] Prado and Chasin, supra note 13.
[55] Stahlberg, supra note 22, p. 9.
[56] Willis and Prado, supra note 25.

reduced rates of crime and police abuse.[57] Differential training and a small salary increase were also used in Poupatempo.[58]

Regarding demonstration effects, both Poupatempo and UPPs started as small pilot projects, being expanded as they gathered more political support from certain interest groups and from the public in general. Indeed, Poupatempo started with one unit and a budget of R$10 million in 1997, but it success created long lines and demand for more units. Such additional units have been created at a significant pace, reaching a total of 32 in 2012. The budget has also increased significantly: it increase from R$ 150 million in 2008 to R$375 million in 2012.[59] In a similar fashion, the first UPP was created in 2008 and now the city has a total of 30 UPP units. In the meantime, the total budget for police forces in Rio de Janeiro has doubled from 2007 (R$1,9 billion) to 2012 (R$4,1 billion).[60]

It is not clear, however, whether it is desirable or feasible to scale these two projects to size. As it is often the case with pilot projects, these are infused with an especially large amount of resources and highly enthusiastic people. In the process of scaling the project to size, it may become hard to sustain similar levels of financing and/or enthusiasm. One of the reasons for this difficulty is economies of scale. For instance, Poupatempo has opened units in smaller cities in the state of São Paulo, where the fixed costs of the unit are similar to the ones in a larger city, but the demand for services is lower. As a consequence, the budget has increased 709% from 2002 to 2012, but the number of people using the service has increased only 85%. This has increased the price of the service per capita from R$2.77 to R$ 12.10,

[57] Stahlberg, supra note 22, pp. 13-14, 27.
[58] Prado and Chasin, supra note 13.
[59] Prado and Chasin, supra note 13, p. 22; Renan Truffi, "Poupatempo fica 700% mais caro em 10 anos, mas atendimentos só crescem 85%", available at http://ultimosegundo.ig.com.br/brasil/sp/2013-09-09/poupatempo-fica-700-mais-caro-em-10-anos-mas-atendimentos-so-crescem-85.html.
[60] Beltrame, José, Apresentação em Audiência Pública da Assembléia Legislativa do Diro de Janeiro, May 7, 2013. Available at http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cspcco/audiencias-publicas/pasta-audiencias-2013/ApresentaoJosMarianoBeltrame070513.pdf

raising questions about the need to impose limits to Poupatempo's expansion.[61] Similar questions may be raised regarding UPPs: between 2007 and 2012 the total budget for the police force in the stae of Rio de Janeiro increased 115%, while the total amount of officers increased 10% (they had a salary increase of 101% in this period). [62] This raises questions about the limits of UPP's expansion, as it would require significant resources. The availability of such resources is particularly uncertain if one considers that the external sources of funds (federal government and private sector) may dry up after the mega events take place in Brazil (World Cup in 2014 and Olympics in Rio de Janeiro in 2016).

While there are limits in the possible expansion and scaling to size of the two public bypasses mentioned above, the use of private security forces illustrates the dangers of experimentation in private bypasses. As mentioned earlier, the decision to hire private security forces is largely individual and devoid of collective action problems. However, this very same decision may be influenced by common practices and social pressure. For instance, if security becomes a symbol of status, it may become widespread without any further analysis about its effectiveness. Moreover, individuals are more prone to consider anecdotal evidence and to be guided by heuristic biases than governments. Thus, they may ground their decisions to invest in such services in unreliable empirical evidence. But most importantly, the collective impact of such individual decisions can be potentially disastrous. Indeed, in countries where the private security sector is larger than the public sector, such as Colombia, the United States or South Africa, there has been a marked increase in crime and a growth of prison populations.[63] Thus, the fact that institutional bypasses open room for experimentation is not necessarily a positive feature, especially if there is no guarantee that such

[61] Truffi, supra note 59.
[62] Beltrame supra note 60.
[63] Prado, supra note 14.

experimentation will be grounded on reliable data and impartial evaluation of the results. And this is not only a risk with private bypasses. One could imagine, for instance, a public bypass that is presented as an experimentation, but has its results manipulated by an interest group in order to convince the population to adopt a institutional that is less favorable to the public than the existing one.

Conclusion

Not every single institutional bypass is desirable. I have argued in my 2010 SELA paper the increasing use of private security services in Latin America in general, and in Brazil in particular is undesirable. In contrast, my previous analyses of Poupatempo and UPPs have suggested that these were generally positive, and should be welcomed by those analyzing institutional reforms in Brazil. In other words, these could be considered desirable bypasses.

These positive assessments are often met with resistance in academic forums where I have had a chance to discuss these ideas. In the case of Poupatempo, the decline in the quality of the services, its increasing costs, and the construction of new units only in electoral years could be marshaled as evidence of its failure. In the case of UPPs, there have been some critical analyses of the initiative, pointing to lack of legitimacy, unreported cases of abuse and questionable crime rates.[64] Also, public opinion turned against UPPs after the disappearance of a construction worker in the hands of UPP officers in 2013, which was widely publicized in

[64] Cano, I., et al. 2012. *Os donos do morro: Uma avaliação exploratória do impacto das unidades de polícia pacifi cadora (UPPs) no Rio de Janeiro*. Forum Brasileiro de Segurança Pública and Laboratório de Análise da Violência – UERJ. Available at http://riorealblog.files.wordpress.com/2012/07/relatc3b3riofinalcaf13.pdf. Lemgruber, J., Soares, B. M., Musumeci, L., & Ramos, S. (2011). Unidades de polícia pacificadora: o que pensam os policiais. Rio de Janeiro: Universidade Cândido Mendes. Retrieved from http://riorealblog.files.wordpress.com/2011/05/pesquisa-upp-o-que-pensam-os-polciais-com-introduc3a7c3a3o-21.pdf.

the media (the Amarildo case).[65] This is often brought as evidence that the initiative is at least questionable, if not a total failure. The underlying question is what can be considered success in an institutional bypass. How can we draw the line between success and failure in these two cases?

The arguments against Poupatempo seem to rely on the assumption that a successful bypass would need to be eternal. This, however, does not seem to be a reasonable expectation regarding any institution. These are always in flux, changing. Some are able to change rapidly enough to adapt to new circumstances and not become obsolete. Others fail to adapt, become redundant or dysfunctional and disappear. But the failure to adapt to changing circumstances should not be a reason to ignore the fact that these institutions have been effective in performing their functions during a certain period of time. I do believe this was the case of Poupatempo. The units were highly functional in their initial years, and the quality of service provided, albeit declining in recent years, is still superior to the one that citizens used to get in the offices of the old bureaucracy.

The arguments against UPPs, in turn, assume that a successful bypass needs to be flawless. It needs to be designed and implemented with such precision that no mishaps would occur as a result. Such expectation, however, seems unrealistic. Institutions will fail, no matter how well designed they are. The question is whether they are able to react to such failures promptly, and whether they are able to change fast enough to avoid mishaps from reoccurring. In the case of UPPs, the answer is positive. The officers who tortured and murdered Amarildo were charged and are being investigated. Their hierarchical superior was

[65] Pearson, Samantha. 2013. "Brazil: Where is Amarildo?", Financial Times Blog, Aug 3, 2013, available at http://blogs.ft.com/beyond-brics/2013/08/03/brazil-where-is-amarildo/

removed from office.[66] And perhaps most importantly, the popular upraising that brought the case to the attention of the media signals that the general population seems to have changed its outlook and expectations regarding the police force. Thus, it is possible to argue that UPPs' success may lie in how the project is changing, however slowly, the way that citizens in marginalized areas perceive, establish trust in, and connect with the police force. These may be positively reinforced with a series of positive outcomes associated with the UPPs such as reduction in crime rates and effective prevention, but the change in perception may occur independently of such indicators.[67]

So, what is a successful institutional bypass? One that opens the possibility for institutional change, especially in contexts in which change would have been difficult, if not impossible, otherwise. Institutional bypasses may not succeed in promoting change, being cancelled early on, while they are still at the initial stages (e.g. the previous community policing experiences in Rio de Janeiro). In such cases, they may be considered failures. However, institutional bypasses that generate some sort of change inside or outside the existing institutions can be considered successful, as they have helped overcome initial (*ex ante*) resistance to reform. In the case of Poupatempo, for instance, identity cards are now only offered at offices of Poupatempo and a major digitalization project of the identity card system was implemented. In the UPPs, the Amarildo case seems to illustrate that the expectations of the marginalized populations towards the police in Rio de Janeiro have significantly changed, as well as the public pressure for accountability for police abuse. Such chances may allow us to consider these cases as successful bypasses.

[66] BBC, "Brazil police charged with Rio murder over Amarildo case", October 5, 2013. Available at http://www.bbc.co.uk/news/world-latin-america-24362311.
[67] Willis and Prado, supra note 25.

In sum, successful institutional bypasses are the ones that manage to overcome ex-ante resistance to institutional reforms, even if they do so for a short period of time. Once the bypass itself is unable to adapt to changing circumstances and becomes dysfunctional, the solution is to promote an institutional bypass of the bypass. Thus, the success of a bypass does not lie in its longevity, but in its ability to promote change, especially when institutions are not malleable enough and become dysfunctional over time. An institutional bypass is a means to an end, not the end in itself.

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