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Book Review
Reflections on Boaventura de Sousa Santos's *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd edn

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Since its establishment, international human rights regime has received heavy criticism: to its content, form and frameworks. Critical approaches to human rights theories usually take three routes: those who argue that human rights are entitlements, independent of factors such as nationalities, sex, race and ethnicity; those that regard human rights as a kind of international law that supports human 'grievances'; and still those that view human rights as a new form of Western imperialism. Santos's project mostly takes the third route, further claiming that there is a growing gap between the aspirations of equality and social justice, its reality, and that the existing frameworks will not be able to bridge this gap, unless substantial paradigmatic change takes place. As a book, *Towards a New Legal Common Sense* is a challenging read. It is both undeniably sophisticated in content and approach and, at the same time, also inspirational in its questions and invitations to rethink existing epistemologies on the global legal order. Santos views law as a tool of domination and, through identifying intersections and interactions, puts forward a possible proposal for change and a new way of relating the world. The main purpose of this project is a call to emphasise on human beings and their needs, and to realign social justice movements towards the achievement and sustenance of such ideals. This book not only critically analyses social, cultural, political and legal frameworks, but also offers possible solutions.

The first edition of the book deals with both science and law, but the second edition primarily focuses on law and the crisis it undergoes. The first three chapters of the book are theoretical chapters and discusses the theoretical and historical conceptions of law and modernity. Here he shows how law has failed to take into consideration the modern-day challenges for law and society, and thus failed the promise of justice. Santos positions himself as an 'oppositional postmodernist' and calls for an 'unthinking' of the modern law. He claims that it is 'necessary to start from the disjunction between the modernity of the problems and the postmodernity of the possible solutions, and turn such disjunction into the urge to ground theories and practices capable of reinventing social emancipation out of the wrecked emancipatory promises of modernity' (Santos, 2002, p. 14). Through Chapters Four to Six, Santos discusses the empirical findings of his research. Chapter Four analyses Pasargada law and reveals 'legal experiences that, because they do not fit the legal modernist canon, are ignored, marginalized, silenced in a word, wasted' (Santos, 2002, p. xx, Preface). Chapter Five is the longest chapter in the book and discusses law on a global scale. It explores the conceptions of universal human rights and its implications for human rights effectiveness, in light of a 'diatopical hermeneutics' and intercultural dialogue. The book offers insights about how to rethink human rights from the perspectives of the victims of colonialism and global capitalism and how the Eurocentric origins of human rights could be a problem for a global conception of human rights. To understand the existing paradigms of law

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and social justice, Santos uses both empirics and theory to argue for extensive shifts in the field of critical social thought and legal theory. The ambitious project discusses hegemonic and counter-hegemonic globalisation; law related to vulnerable groups such as refugees, undocumented migrant workers and indigenous peoples; the transnationalisation of the state; European integration; the globalisation of the legal field; the global reform of courts, human rights and multiculturalism; and the common heritage of humankind. Chapter Six goes back a step to compare and explore the tensions between the global and the local. Chapters Seven and Eight return the reader to theory, proposing a new theoretical law based on modern modes of power and knowledge. Finally, Chapter Nine asks the crucial question: whether law can ever be 'emancipatory'.

Santos analyses the international human rights regime in light of the cosmopolitan legal cultures, as part of an emancipatory politics measuring up to the unprecedented challenges, risks and opportunities inherent to an increasingly globalised and interdependent but also increasingly unjust and eco-predatory world society (Santos, 2002, p. 259). He claims that the international human rights regime is still the dominating medium in terms of progressive politics and emancipation for justice seekers. However, the present system is ineffective and unworkable for reasons not only of sovereignty; political-cultural and economic issues present structural barriers to the emancipatory politics of human rights (Santos, 2002, p. 268), but also for reasons of legitimacy within local borders. These are also used to justify, for example, violation of women's rights in Islamic regions (Santos, 2002, p. 265). Santos expresses concern with the universal claims to human rights and the structural obstacles that the unequal exchanges in the world system post to a radical emancipatory politics of human rights. The structure, organisation of the human rights frameworks and the consequent absence of transnational enforcement capabilities and transnational corporations and world superpowers such as the US and Russia add another level of challenges for the human rights regime. Modern globalisation of the economy, according to Santos, is also disadvantageous for human rights, because it enhances vulnerability of those human rights issues that might collide with such imperatives (market-friendly/economic-development-based model); and states will invoke and strengthen the prerogatives of political sovereignty to justify human rights violations; and it engenders global economic actors with tremendous economic and political power (Santos, 2002, p. 268). Santos recalls the massive and widespread human rights violations occurring today, and states that there is little room for optimism (Santos, 2002, p. 263).

Toward a New Legal Common Sense invites the reader to think about the concept of 'universal human rights', and questions whether the European origins of the present-day international human rights regime affects modern-day effectiveness within domestic legal regimes that are fundamentally different to Europe, economically, politically, but also in socio-culture. This is particularly important given that 'the success of emancipatory struggles is measured by their capacity to constitute a new political relationship between experiences and expectations, a relationship capable of stabilizing the expectations on a new and more demanding and inclusive level' (Santos, 2002, p. 2). Santos claims that human rights itself is a globalised Western localism and therefore cannot be truly 'universal' (Santos, 2002, p. 271). These human rights began as 'interests' of the world's hegemonic capitalist states and were 'universalised' through regulatory and emancipatory claims, and under the tutelage of Western capitalism, through a process of tailoring and retailoring (Santos, 2002, pp. 270–271). 'Universality' of human rights is therefore a Western cultural question and is universal only when viewed from a Western standpoint (Santos, 2002, p. 269). For Santos, human rights is a cultural product mediated and created by local interests. He further claims that all cultures are relative and that these cultures define values that they consider ultimate as 'universal' (Santos, 2002, p. 269). It is not something that can be viewed from the above and integrated into different contexts. Moreover, although human beings may be

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given worth and value in all cultures, but not *all* give equal value to *all* rights espoused in the international human rights regimes. At present, both concepts of universalism and cultural relativism are therefore misconceived and existing debates based on these are based on false premises. Santos thus urges to rethink the conceptions of 'globalisms' and 'localisms' and their limitations, which can be useful to explore the challenges of implementation faced by the international human rights framework at the local level. Santos therefore claims that 'modernity' has failed to realise the emancipatory promise, and will fail more in the future, unless there is a rethinking of the existing issues, and restrategising to fill in gaps.

Santos argues that one solution to these issues is to move towards cosmopolitanism, which he defines as 'the globalization of moral and political concerns with and struggles against social oppression and human suffering' (Santos, 2002, p. 272). Santos's main proposal for change is a cross-cultural dialogue, or a 'diatopical hermeneutics' (Santos, 2002, p. 273). Santos argues that, instead of being suppressed in the name of postulated universalisms, such differences must be mutually intelligible through translation and what he calls 'diatopical hermeneutics' (Santos, 2002, p. 474). According to Santos, 'diatopical hermeneutics is based on the idea that the *topoi* of an individual culture, no matter how strong they may be, are as incomplete as the culture itself', and cultural 'incompleteness' manifests as an 'inadequate formulation of the problem itself' (Santos, 2002, p. 273). Diatopical hermeneutics stands for the thematic consideration of understanding the other without assuming that the other has the same basic self-understanding. It is a hermeneutic that goes beyond traditional morphological hermeneutics and diachronical hermeneutics, by departing from the *topoi* (locations within distinct cultures) of one culture to understand the other tradition or culture. Seeking, among other things, to break out of the hermeneutic circle created by the limits of single culture, diatopical hermeneutics attempts to bring into contact radically different human horizons, traditions or cultural locations (topoi) in order to achieve a true dialogical dialogue that bears in mind cultural differences (Panikkar, 1982, pp. 86–87).

Santos conducts a diatopical hermeneutics between the *topos* of '*dharma*' in Hinduism (Panikkar, 1982, p. 95) and '*ummah*' in Islam against the *topos* of human rights in the West (Santos, 2002, p. 273). He argues that the concept of human rights in the West, and despite the surrounding realities bearing heavily on the individual, seeks to give value to the individual. This is significantly different to the concepts of *dharma* and *ummah*, which place an equal emphasis on the community, as opposed to a single individual. Santos then goes on to argue that there are extremes within belief systems, which also adds another level of complexity to the problem. To explain this, he uses the restrictions on women's rights under fundamental Islam and modern Islamic states as an example, and claims that there are factions even within a 'topoi' and are usually ambiguous in many cultures. This claim has real bearing because even the concept of *ummah* in Islam is not universal to all Muslims, especially if one came from a part of the world that is geographically far from the Middle-East. How these people connect with traditions of the Middle-East, mixed with their own cultural and colonial backgrounds, can result in an entirely different Islamic culture. Historically, men and women in some Islamic cultures were treated unequally. Certain rulers and administrators and most legal scholars imposed a system of inequality, which they justified by their interpretation of the Qur'an and the Sunnah. For example, women have been completely excluded from public life in many Islamic countries. Despite the fact that Islamic history provides support to (not limited to) female leaders, ambassadors, judges and entrepreneurs, there is a continuous effort to restrict women to private spheres of life in Muslim societies. Despite such controversies and complexities within cultures, emerging scholars and activists seek equal rights for men and women. Moreover, the existing human rights regime on women's rights have become an ideal standard of rights for many cultures, including Islam – and something that appears to be of value, with immense emancipatory value to, for example, women from different parts of the

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world. This is exactly the case for Santos's emancipatory common sense (Santos, 2002, p. 87), to be applied as the 'progressive political agenda' through law (p. 86). This is also the key idea behind human rights regimes such as CEDAW.

The possibilities for an intercultural dialogue exists within the current international human rights framework, specifically through the treaty-reporting processes and interactions between the relevant treaty body committees and the states parties. Although the platform is available for a dialogue, these platforms unfortunately do not lead to an 'intercultural conception' of human rights, but usually only place more pressure on 'accepting' or 'imposing' the Eurocentric conception of human rights. Santos also asserts that the world, in particular the UN, has lost focus on the 'emancipatory aspect' of the Convention, and is geared towards a global trend to focus on the regulatory aspects of the human rights Conventions. For example, rather than focusing on eliminating the discriminatory traditions within cultures, there is a stronger push towards creating temporary special measures or affirmative measures such as quotas. It is asserted that the creation of quotas will possibly solve the issues with women's rights to public life. Yet, the underlying issues of patriarchy neoliberalism hinder women's participation in public life significantly and any regulatory framework does not address these issues. All of these operating together make human rights a prisoner to the economic interests of sovereign states and take away from the promise of human rights, as opposed to giving value.

William Twining called this book 'the most important work to date to view law from a global perspective'. Santos's problematising of universal human rights provides a useful lens to explore timely debates, understanding the gaps between universal human rights and local challenges to the realisation of these rights. It forces one to reflect on what is important for the law to be effective and provides useful insights into possible future inquiries in law. Thus, this book is a much-needed bold contribution to the academic debate in social theory, law and human rights. It reminds us that we live in difficult times – one of massive human rights violations – and that historical inertia and monoculturalism will not fulfil the promise of human rights. This book is useful for anyone raising the questions: How much of an effect does the international human rights regime have on modern states? Why are there growing concerns with the enforcement paradigms under international law? Does normative commitment from states parties make a difference to the achievement of human rights? How best can the emancipatory potential of the law be employed? For this reason, Santos's theories of globalisation, states and the international human rights regime continue to be highly relevant twenty years on.

References

PANIKKAR, Raimon (1982) 'Is the Notion of Human Rights a Western Concept?', *Diogenes* 30(120): 75–102.

SANTOS, Boaventura de Sousa (2002) *Toward a New Legal Common Sense: Law, Globalisation and Emancipation*. London: Butterworths.

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