

Book Review

The emperor's new clothes: an attempt at an epistemic conquest of legal invisibility

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I. Introduction: the 'emperor's new clothes' problem

'Law' is taught at faculties around the Western world – their curricula often emulated blindly by their counterparts in the Global South – as though, by analogy with the laws of the natural sciences, describing universal phenomena. Yet, this canon describes only a small fraction of the diversity and complexity of the working of the law, more broadly, on a global scale. The result of this chasm – as in the case of my own personal adventures with epistemologies of the South – is an acute intellectual schizophrenia: on the one hand are legal realities plainly obvious to anyone on the ground (everything, for instance, included in the catchall phrase 'legal informality') and, on the other, a highly vaunted technical vocabulary lacking the capacity to analyse, or even render visible, much of legal practice – certainly in the Global South, but even in the Global North (especially in what is being referred to as the 'South in the North'). I call this the 'emperor's new clothes' problem: the existence of a commonly perceived phenomenon that – due to either the sheer lack of a lexicon, or inequities in power balance – cannot be, or is not, acknowledged in the mainstream discourse or scholarship. The result is that both the 'legal experience' of significant swathes of the globe and the systematic irrelevance of law, narrowly and formally defined, in many regions of the world go unacknowledged. The problem is typically relegated to the realm of the 'empirical'. But, when the skew between the purportedly global 'theory' of law and what is dismissed as 'empirical' aberration is so great that it does not provide even a rough approximation of legal reality, does the problem not become one that is epistemic?

II. Towards a new legal common sense: an alternative lens illuminating the invisible

In these brief comments on Boaventura de Sousa Santos's seminal text, *Toward a New Legal Common Sense*, I will focus on a theme that connects my own scholarship with that of Santos – 'legal invisibility': the theoretical blind spot that creates it, the empirical magnitude of the phenomenon and, on a more hopeful note, the potential for its epistemic conquest.

The book sets out to provide an epistemic nudge to a tired legal scholarship – that has, according to Santos, traded its shot at emancipatory potential for mere regulation – in the direction of a 'new common sense' designed to reclaim this lost opportunity (Santos, 2002, pp. 2–9). The book situates itself against the backdrop of a crisis – the 'exhaustion of the paradigm of modernity' (Santos, 2002, p. xvi). It is somewhat unclear what the magnitude of the 'crisis', or 'transition', which Santos (2002, pp. xvi, 9–10) refers to is or, indeed, whether it is taking place at all. It is in its wake – and the question of whether modernism or post-modernism provides the most compelling account of our times – that he proposes his own lens of 'oppositional postmodernism' (marshalling the analytical insight of modernism, but combining it with the imaginative potential

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of postmodernism) (pp. xvii, 12) and seeing it as an opportunity to 'turn such disjunction into the urge to ground theories and practices capable of reinventing social emancipation out of the wrecked emancipatory promises of modernity' (p. 14). The source of the crisis, according to Santos, is the complete domination of 'rationality, theory, and logic' over 'reasonableness, practice and rhetoric', thereby fetishising 'abstract concepts, universal laws and general, timeless, decontextualized and neutral formal arguments'; the attempt to reestablish emancipatory potential thus lies in reclaiming these lost elements (Santos, 2002, p. 15). In the net, for Santos, 'the modernist conception of law led to a great loss of legal experience and practice, and indeed legitimated a great *juricide*, that is to say the destruction of legal practices and conventions that did not fit the modernist legal canon' (Santos, 2002, pp. 15–16, emphasis in original) – 'a narrow and reductionist legal canon that arrogantly discredits, silences, or negates the legal experiences of large bodies of the population' (p. 494). Indeed, so fundamental was the damage done, according to Santos, that it calls for a 'radical unthinking of modern law' (Santos, 2002, p. 21) – both as an act of deconstruction, but also one of reconstruction. Thus, while operating within the critical tradition, Santos differs from the critical literature both in seeking a fundamentally different paradigm and in having a constructive agenda.

A central theme of the book is the obliteration from the conversation of the everyday person – the line that is drawn between the 'truth' and everyday legal events (Darrian-Smith, 1998, p. 103). The artificiality of this distinction raises, for Santos, several fundamental epistemic questions – about the relationship between empirics and theory, the subject–object distinction and the importance of 're-embedding in the near'. Much follows from this, but in terms of the established tropes of law and society scholarship – and central to my own project – are the implications of deploying this lens to look at the formality–informality question, and the unsubstantiated fetishisation within mainstream scholarship of state law. A related – but separate – question is that of the underdeveloped idea of community.

III. An empirical illustration of illumination

The analytical illumination afforded by the Santosian lens – particularly in contrast with conventional theory – is illustrated by an empirical example that I examine in some detail in my own scholarship.¹ In the late 1990s and early 2000s, two extremely prominent development programmes emerged in parallel that shared striking similarities – the Peruvian land-titling programme associated with Hernando de Soto and the micro-finance experiment spearheaded in Bangladesh by Muhammed Yunus and the Grameen Bank. The Peruvian land-titling programme – based on de Soto's work, identifying dead capital as a major source of global underdevelopment (see de Soto, 2000) – was premised on the idea of providing titles to land already occupied by squatters in Peru on the assumption that they would then be able to use these deeds as collateral to enter into credit contracts with the formal banking system, thereby both helping to alleviate their poverty and stimulate the economy more generally. This was a classic formalisation programme of the type that has been attempted across the developing world in the post-colonial era, seeking to transpose Western-style institutions onto the Global South – deploying state of the art academic thinking that held that Western-style property and contracts were an essential prerequisite for, if not a guarantee of, growth.² In contrast, the Bangladeshi micro-finance programme bucked the reformist zeal in the institutional sphere at the time, as well as the received institutional wisdom – and gave loans to women in Bangladeshi villages without either

1 The in-depth fieldwork-based case-studies that I conducted are very much like Santos's Pasarayada.

2 These have been dominant themes in law and economics scholarship; see e.g. Acemoglu *et al.* (2002).

formal written contracts or collateral. Over 3.5 million titles were distributed in Peru – with no appreciable increase in access to credit for titled communities.³ On the other hand, the Grameen Bank in Bangladesh alone entered into lending contracts with over 9 million borrowers and boasted repayment rates of over 90 per cent. The reasons for the differential performance of the two programmes is discussed at length elsewhere (Haldar and Stiglitz, 2013; Haldar, 2014), but the critical issue for present purposes is that, while the Peruvian programme relied reflexively on state-enforced law, the Bangladeshi programme rested on community enforcement – variously interpreted in the economic literature as peer-monitoring, information economies in monitoring and preference shifting (Haldar and Stiglitz, 2015; 2016). But what is fundamental is the *epistemic leap* that the micro-finance programme makes in deploying a type of local institutional, or even legal, knowledge neglected by programmes of the land-titling type: the insight that it is a more meaningful sanction for a woman living in a remote Bangladeshi village to be told that she will not be invited to her neighbour's Eid celebration than it is to threaten to take her to court, especially when a bus service may not even exist between her village and the town in which the court is located!

This example illustrates many Santosian themes. It is based on the idea of a 'grounded theory' that is a blend of experience and imagination – 'a theory that has its feet on the ground while refusing to be tied down and prevented from flying' (Santos, 2002, p. xviii) or 'a kind of knowledge that is made of experience, though not entirely based on experience alone' (p. xviii). Thus, the micro-finance programme deploys readily available local knowledge of social ties but uses it for a novel purpose. It seeks to forge a link between 'scientific knowledge' and 'common sense' through the reinsertion of local knowledge and the acknowledgement of multiple rationalities (Darrian-Smith, 1998, p. 88) – and makes an effort to include within frames of analysis 'everyday legal events' or to 're-embed in the near'. It thereby attempts to respond to the 'epistemicide' or 'juricide' of the last few centuries by 'rediscovering the knowledge of the South' and makes a move to create a dialogic epistemic relationship between North and South, formal and informal. It is an invocation of the idea of 'law as a map' – that (in order to perform its social and epistemic function) law must bear some resemblance to, or be an approximation of, social reality. But, in its essence, this strain of work represents a refutation to what Santos calls 'abyssal thinking' that institutes hierarchies of knowledge based purely on geographical pedigree – 'that operates by establishing and radicalizing distinctions between knowledge elaborated in the North and in the South' (Baretto, 2014, p. 396). It also demonstrates the kind of economic and political injustice (millions of dollars in misspent legal reform efforts of the type of the Peruvian programme) resulting from 'Western false universals' (p. 404) and from cognitive injustice – hence the idea that 'the struggle for global justice includes the search for epistemic justice' (p. 397).

IV. Conclusion

Toward a New Legal Common Sense illuminates a world consigned by standard scholarship to legal invisibility – a world that the majority of the human race inhabits. The secondary literature around the text raises many important questions and points of clarification: on 'scale', or the question of whether structural transformation is possible in the absence of conventional law; on the absence of an adequately nuanced account of power in the theory presented (the structural imbalances that Santos so accurately identifies – North–South, formal–informal, etc. – are far from arbitrary and rooted, instead, in fundamental imbalances of power) and the *mechanics* by which the rectification of these fundamental skews may come about; on the merits of calling 'non-state

³ This is widely accepted in the academic literature; see e.g. Field and Torero (2004).

law' law.⁴ The appeal of Santos's book, however, lies in mounting an empirically grounded and theoretically rigorous challenge against what is, at best, a sheer paucity of imagination within the current legal discourses – and, at worst, a wilful refusal to engage with the richness of empirical experience evidenced in the deployment of the law on the ground. This includes, as Santos points out, both forms of law that are not acknowledged ('informal, non-official forms of law') and unconventional uses of the law (often using 'illegality' as a means of striving for an 'alternative legality') (Santos, 2002, pp. 494–495). By drawing into its descriptive fold, the missing millions, or the 'legally invisible' – and situating the site of the battle for global justice in the epistemic domain of legal knowledge – Santos already embarks on the emancipatory, and has the courage to call the emperor out on his 'new clothes'.

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4 See Darrian-Smith (1998) for an excellent discussion of several of these critiques.