Comment on Santos

World Legal Science, Paradigmatic Competitions, and Empirical Research

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Even in this "adapted and simplified" package, Boa Santos (1995) makes a powerful case for a new legal theory able to survive and prosper in "the forthcoming paradigmatic competitions" (p. 574). I have not yet read the extended argument in Santos's book, but I am already persuaded that his cosmopolitan learning and encompassing synthesis has the power to inform and challenge legal scholars in all parts of the globe. His argument is admittedly utopian, and he is well aware of the possibilities that what he offers will require some remarkable societal changes—and can, in any event, be "coopted." But that does not detract from the power of the vision. Rather than comment on the vision itself, however, I will use his analysis to focus on a slightly different research agenda and theoretical perspective. I think the approach discussed in this comment is complementary, but it requires that I begin with a disagreement about the framing of the issue.

Santos begins with a crisis of modern science and modern law. As I understand it, the crisis stems from the failure of the fragmented science of government to solve our problems, which implies also the failure of "legal management," which was supposed to handle problems that escaped scientific management. The idea was that either science or law could provide mechanisms to depoliticize social conflict, and now neither can. The question, in other words, is whether legal science can survive the crisis of the fall of positivistic social science. Legal science, in my opinion, is up to the task—whether or not new paradigms emerge. The law, a legitimating authority produced by legal academics, practitioners, and judges in particular, characterized by aspirations toward autonomy, formalism (e.g., Fish 1991), and universalism (against, as Santos states, "fragmenting" and "technical solutions" (p. 572)), thrives on crises. It has probably never been more hegemonic, conquering new domains and bringing

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in new groups. Legal science uses crises by importing voraciously from all kinds of modern and postmodern disciplines and discourses to translate social conflict increasingly into the language of law. Indeed, Santos's essay is itself an excellent effort to update, make more universal, even to "modernize" the law to take into account and address the problems of what might be called "northernism."

One question about any proposed new and universal paradigm is whether it is possible or desirable to have a "reinvention" of law that would apply around the world. Of course, the answer depends on the paradigm, but, in any event, we might suggest some issues worth exploring. Most obviously, it is clear that to develop a world law, we need to have importers who make it their business to promote it in new national terrains. In addition to importers, it may also be important to gain control of—or at least have substantial influence in—the major exporters of law, including universities and such institutions as nonprofit foundations and nongovernmental organizations (NGOs) (on the change in the leading source of imports from Europe to the United States, see Mattei 1994). The importers are likely to come from the more cosmopolitan or foreign-oriented of the national sectors, since they must have some access to the ideas to be imported and the languages of the experts or theorists who develop the ideas. The importation of law, therefore, tends to strengthen the social position of some cosmopolitan fraction of lawyers (or others using law) within the importing society. The focus on law may also affect or come at the expense of other modes of authority and ways of solving problems, which might encompass the military, families, political parties, ethnic traditions, legal nationalism, or even a kind of technocratic rationality.

The point is not that the importation of cosmopolitan legal ideas or world legal science should be discouraged, only that it necessarily involves people and institutions. The processes of importation are not neutral with respect to national hierarchies and authority structures, and they affect which ideas are imported and how they happen to change local hierarchies and approaches. We have found in studies of the internationalization of legal practices, whether in relation to commercial arbitration or human rights, that the impacts of legal importation vary considerably from place to place. Whatever the quality of the ideas being imported, it is important to see how and by whom those ideas are used in various settings. It does not require too much observation, for example, to see that reformers who have gained power and international allies under the banner of human rights do not always maintain those ideological commitments after they have succeeded in gaining power. To repeat, that does not mean that universalist ideologies of human rights should be discour-

aged, only that their impact depends on local contexts that can and should be studied.

In order to suggest more specifically some of the issues involved in internationalization, it may be useful to build on some of Santos's observations. We may begin with the three metaphors that organize his argument. The frontier image, as he suggests, fosters the idea of "an empty space, in a time between times," distant from the "centers of power, law, or knowledge," and where "[t]radition must . . . be imagined to become what you need" (p. 574). If we think about "frontier" areas in today's world, however, we tend to find "emerging markets." The frontiers are characterized by an intense and unequal competition in which many of the key competitors come from the "centers" or from strategic alliances with particular centers. Santos recognizes this problem. He wants the frontier image to be used to "displace" the center in order to create "a better position to understand the oppression that the center reproduces and hides by hegemonic strategies" (p. 575). The point, however, is that empirical research about the competition is one key tool for getting behind "hidden hegemonies." And struggles about terms and meanings are part of the competition, as Santos clearly sees in his ironic use of a term—the frontier—that can still be employed to legitimate imperialist strategies.

The image of the baroque takes seriously the development of "an eccentric form of modernity" whereby "the center reproduces itself as if it were a margin" (p. 576). Certain devices associated with the baroque, in addition, show the possibilities for "cross-cultural dialogues" and "the creation of new forms of constellations of meaning" (p. 578). Further, it "becomes stronger as we go from the internal peripheries of the European power to its external peripheries" (p. 576). It may be useful to note that—to a greater extent than before—we now have an international art market that helps to assign value to new forms and images, whether baroque, modern, or postmodern. The market in legal ideas likewise must be studied and explained. Also, I am not sure that the thriving of the baroque outside the center—its transplantation and growth as a foreign import—is directly proportional to the weakness of the center as manifested by distance or otherwise. Again, it depends on the existence of local structures for importing and transforming the ideas from the center.

The image of the South is a powerful metaphor to signify "the form of human suffering caused by capitalist modernity" (p. 579). And it is a vivid challenge to "let the South speak up" (p. 580), to "learn how to learn from the South" and to produce knowledge "from a nonimperial standpoint" (ibid.). Santos recognizes here, too, that this ideal is utopian. The questions, of course, are who is empowered to speak for the South and in which languages will they speak. In order to produce a discourse

that will be more universal, they will have to speak in a way that will be heard and recognized in the North. We return to the problem of the unequal market—unequal in who has the credentials to speak for the South in the North and in which language they must speak to be heard.

None of the preceding observations are news to Santos. He emphasizes the problem of "being coopted by the modernist canon" and that of using "modern terms without modern solutions." Indeed, his utopian theory and references to Gandhi and "defamiliarization" boldly seek to show the importance of transcending—even if only through an act of imagination. Nevertheless, it is crucial to develop a complementary research strategy that focuses on some of the very processes that Santos seeks to transcend. First, we cannot understand the role of law in the North or the South without studying and seeking to understand the competition, found between individuals and between and within institutions, over the "rules of the game" or the paradigms used to govern the state and the economy. Second, while legal theory is important, it is necessary also to situate it empirically in relation to social and economic power and to changes in those fields. Third, the potential role of law as a new symbolic imperialism and/or emancipatory tool—Santos's concern about the relationship between "emancipation" and "regulation" (p. 570)—requires careful study of both national and international spheres and how they relate. And fourth, there may be spaces for emancipatory practices that would not be readily detected except through empirical research. These spaces may not be seen through a focus on North-South or center-periphery issues. For example, strategic alliances may develop to take advantage of the competitive struggles between various approaches to law and to regulation in what is considered the (capitalist) North, such as "Asian approaches" versus U.S. approaches, North America versus Europe; and some emancipatory practices that are not capable of being expressed in universal terms, or legal terms, may also be recognized and even promoted. Law is, of course, not the only potential language for social struggle and progress.

This is not the place to elaborate a complementary research strategy designed to explore these issues of law and internationalism (for our efforts, see Dezalay & Garth 1995; Dezalay & Garth, forthcoming), but perhaps a few very general remarks will help put these comments in some context. Our recent research focuses on the "international legal field" as a contested space—a symbolic terrain—that presents strategic opportunities to national actors. Tapping into the international networks of people and institutions may affect national legal fields by contributing to a reshuffling of local hierarchies. The local who becomes seen as an "international" commercial arbitrator may use that status and the accompanying connections to promote changes in hierar-

chies and institutions at the national level (which also must be studied). Similarly, the local human rights activist who taps into international organizations and grant givers may help promote substantial local changes in part through the use of cosmopolitan connections and capital (Brysk 1994; Sierra 1995; Sikkink 1993).

At the same time, we must explore the competition and conflict that takes place in the international space over the institutions and rules of the game in the international sphere—for example, over whose vision of international commercial arbitration, or whose vision of international human rights, will gain ascendancy. The national actors tend to compete in this sphere on behalf of what they bring from their national experiences and approaches. It is an unequal competition, favoring the metaphorical "North," but it is not simply between North and South. Further, the competition and the values of the relative entries change in relation to events and struggles that are best understood as outside the legal field—among them, the end of the Cold War, decolonization, the oil crisis.

We can also suggest that there is an effect of distancing characteristic of both the law itself and the relations of center and periphery. Those from the relative peripheries who become players in the center tend to shift their ideas and approaches to the center. Partly as a phenomenon of distancing, but partly because of the structure of the legal field generally, the idealism of human rights may be converted into the profits of business representation. Indeed, there may be more idealism in some of the business spheres, such as international commercial arbitration, than is normally conceded; and there may be more competition and business in international human rights (referred to in a number of our interviews as "the human rights industry"). The point for present purposes is that "cooptation"—and noncooptation—are aspects of a social process that merits empirical inquiry.

In sum, Santos's ambitious and appealing analysis invites further empirical research on the internationalization of legal practices and the impact in national settings. Such research, ideally, would contribute to social theory and our understanding of the dynamics of internationalization in law and how it affects—*and is affected by*—local hierarchies and structures of authority. In addition, a better understanding of the unequal markets in, among other things, the production and exportation of law and legal theory can be a liberating tool that can help prevent cooptation and lead to the construction of important strategic alliances. By revealing obstacles that impede the success in the North of genuine voices from the South, it may also open up new opportunities. Finally, it is important to try to situate our own research in relation to the hierarchies and structures in which we find ourselves. As Santos also recognizes, we need to investigate the "insti-

tutional production of knowledge" (p. 569) and how we define which subjectivities are "competent enough to face the forthcoming paradigmatic competitions" (p. 574).

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