Paradigmatic transition is the idea that ours is a time of transition between the paradigm of modernity, which seems to have exhausted its regenerating capacities, and another, emergent time, of which so far we have seen only signs. Modernity as an ambitious and revolutionary sociocultural paradigm based on a dynamic tension between social regulation and social emancipation. The prevalent dynamic of the sixteenth century has by the twenty-first century tilted in favour of regulation, to the detriment of emancipation. The collapse of emancipation into regulation – and hence the impossibility of thinking social emancipation consistently – symbolizes the exhaustion of the paradigm of modernity. At the same time, it signals the emergence of a new paradigm or new paradigms.

This updated 2020 edition is written for students taking law and globalization courses, and political science, philosophy and sociology students doing optional subjects.

Boaventura de Sousa Santos has written and published widely in Portuguese, Spanish, English, Italian, French, German, Chinese, Danish, Romanian and Polish. His current research interests are epistemology, sociology of law, post-colonial theory, democracy, interculturality, globalization, social movements, and human rights. Recent publications include The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South (2018).
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Toward a New Legal Common Sense

Law, Globalization, and Emancipation
Third Edition

BOAVENTURA DE SOUSA SANTOS
University of Coimbra, University of Wisconsin
For M.I.R.
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Preface to the Third Edition

Books written under the slow tempo of science are in trouble. They take a long time to mature and thus pretend to account for the past and feel sufficiently robust to announce possible futures. We live in an epoch that conceives of itself as discontinuous with previous epochs by the unprecedented acceleration of time that characterizes it. It purports to conflate past, present, and future as previously conceived of. In fact, this phenomenon is not new as it tends to happen in the first decades of every century. But it takes different shapes and different intensities at different times. In our time, the information and communication revolutions have made it possible that the acceleration of time, which is always an overdose of time consumption, manifests itself as an underproduction of time, whereby fast time becomes both the opportunity for multiple possibilities and the fatal lack of time to convert them into reality. This creates the sense of inertia to which I referred in the preface to the second edition of this book. At that time, the collapse of the sequences of time resulted in the gradual collapsing of social emancipation into social regulation. Almost twenty years later, the world seems to witness the collapse of modern social regulation itself. At its core, time acceleration continues to be the turbulent surface of an underlying stagnation. But now, rather than simple immobility, the world seems to be experiencing the paralyzing effect of a vertigo that nurtures a fatal urge for fast rewinding to an imagined past where social regulation was possible. The reemergence and rising of reactionary and extreme-right thinking and action is the most telling signal of such an urge. In the Western world at least, the reactionary ideology, unlike the conservative ideology, does not recognize the values of the French Revolution and aspires to go back to a pre-revolutionary time. The cunning of our time is that modernity survives only as a ruin. As a ruin, however, it is still highly operative. As the arrow of progress does not give the world much reason to see progress in progress, the reactionaries tend fatally to see progress in
regress. The rising of reactionary thinking and action is progress upside-down.

This book crossed successfully the passage between centuries. The impact of the abovementioned epochal transformation was however visible in the sequence of its editions. It is true that the second edition was mainly a bibliographical updating and a surgical operation to trim the size of the original edition and to strengthen its focus. But the tragic optimism of the first edition was already somehow muted. In retrospect, I consider the first edition as a vibrant sociology of emergences grounded on the contradiction between social regulation and social emancipation, on the tensions between the three principles of modern regulation (the state, the market, and the community) and finally on the confrontation between hegemonic globalization and counterhegemonic globalization. In the second edition, I cautioned against the consequences of the growing degradation of the aspiration of social emancipation as it morphed into some other form of social regulation. I ended the book with a new, agonistic, chapter that I titled as an interrogation: “Can Law be Emancipatory?” I gave a conditionally positive answer to this question and warned that, in the last instance, the question raised not only legal and political issues but also epistemological and ontological issues. Like the second edition, the third edition does some bibliographical updating, particularly concerning two issues that, in my opinion, are moving in opposite but equally challenging directions: legal pluralism and the role of courts. Legal pluralism has been increasingly recognized as a factor contributing to democratizing society as a whole. On the other hand, the role of courts was at the time of the second edition a highly contradictory institution in which both vocations of democracy enhancing and democracy restricting were present. However, in recent years such tension seems be eroding, as the output of courts seems to be aligning itself more and more with the needs of capitalism, even when they collide with the constitutional principles of democracy.

The current third edition ends with a new and also agonistic chapter, titled “Postface as Disquietude.” The turbulent and often disconcerting social and political experiences of the last twenty years lead me to engage in a sociology of absences vis-à-vis my own work as laid out in this book1. In other words, I highlight the issues that were invisible, irrelevant or marginal as I wrote this book, and which were forced on me in the course of my political activism with social movements in the last twenty years. They were

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1 On the concepts of sociology of absences and sociology of emergences, see lastly Santos 2014, 2018.
the energy impelling me to engage in new and, in my view, more comprehensive theoretical explorations. In light of the latter, the current book suffers from some insolvable theoretical shortcomings as it stands. On the one hand, this book is now more precious to me than ever, since without it my new theorizing would be impossible or incomprehensive. On the other, it becomes clear that this new edition completes the life of this book. Whatever new I have to say, I will say it in another book, the forthcoming The Pluriverse of Law, also to be published by Cambridge University Press.

This new edition would not be possible without the generous, and highly professional collaboration of my research assistant Patrícia Branco, one of the most brilliant sociologists of law of her generation. A very special thanks to her. My colleague Maria Paula Meneses contributed to this new edition in more ways than I am able to mention. For many years, all my manuscripts are submitted to the rigorous scrutiny of my research assistant Margarida Gomes. All my thanks to her.
Preface to the Second Edition

Perhaps no book has ever been so deeply revised for its second edition as this one. Suffice it to say that four chapters were eliminated and four others added. The changes in the title indicate the extent and orientation of the revisions.

Most readers, commentators, and critics agreed almost unanimously that the book was too long, dealt with too wide a range of topics, and was difficult to grasp as a whole. Only the most persistent and resilient of my readers succeeded in handling the book in its entirety. In this second edition, I did not manage to come up with a much shorter book, but I did force myself to focus on some of the topics and to subject them to the development they require and had not received in the first edition.

My broad definition of the book’s problematic in the first edition is kept intact. What is changed in the second edition is the fact that now I only pursue one of the two large topics into which the problematic unfolds. Let’s first consider the problematic. The subject of this book is the paradigmatic transition, the idea that our time is a time of transition between the paradigm of modernity, which seems to have exhausted its regenerating capacities, and another, emergent time, of which so far we have only signs. The signs are unmistakable, and yet so ambiguous that we don’t know if the paradigm of modernity will give rise to one or, rather, to more paradigms, or indeed if, in lieu of new paradigms, we are approaching an age whose novelty consists in not being paradigmatic at all.

The idea that we live between historical inertia, on the one hand, and the “ascending vibrations” (vibrations ascendants) of the new, as Fourier called the signs of emergent realities, on the other, is therefore central to this book, both in its previous edition and the present one. From the sixteenth and seventeenth centuries onward, modernity emerged as an ambitious and revolutionary sociocultural paradigm based on a new dynamic tension between social regulation and social emancipation. By the mid-nineteenth
The collapse of emancipation into regulation, and hence the impossibility of thinking social emancipation consistently, symbolizes the exhaustion of the paradigm of modernity. At the same time, it signals the emergence of a new paradigm or new paradigms. Times of transition are difficult to characterize and even to name. Such times are half blind and half invisible, in as much as they represent a transition between what is old and familiar, on the one hand, and what is new and strange, on the other. To bring them under one sole designation, such as postmodernity, for example, is thus necessarily inadequate. But precisely because the inadequacy is necessary, the designation itself has a grain of truth, and hence its use is legitimate, provided it is duly specified.

According to my definition, the paradigmatic transition has two main dimensions: an epistemological and a sociopolitical dimension. The epistemological transition occurs between the dominant paradigm of modern science and an emergent paradigm that I call the paradigm of a prudent knowledge for a decent life. The sociopolitical transition occurs between the paradigm of global capitalism – broadly conceived of as a mode of production, a system of norms and institutions, a model of consumption and lifestyles, a cultural universe, a regime of subjectivities – and the signs of a different future contained in the alternatives to this paradigm, which are emerging variously in various fields of social activity.

These two transitions abide by distinct logics and rhythms but they share the fact that they start from the same paradigm. For this reason, they share something else as well. They both question the two factors that, although having been responsible for modernity’s extraordinary development, are likewise responsible for this paradigm’s final crisis: modern science and modern law. This is where the second edition swerves from the first. Whereas in the first edition I dealt with science and law together, in the second edition I focus entirely and elaborate further on law. The relevance of modern law in our time and the specificity of the crisis it undergoes, convinced me of the need to devote myself exclusively to law for the time being, and leave further analysis of modern science for later studies.

Before I proceed to present this book’s different chapters and their arguments, I must clarify my stance vis-à-vis the two central issues that provide the book with its global coherence: the theoretical-political issue
and the political-methodological issue. The theoretical-political issue concerns the construction of the theory that best accounts for our time and is capable of identifying in it both the risks and the opportunities it contains. For the past decades, this issue has been formulated in terms of the binary opposition between modernity and postmodernity or modernism and postmodernism. According to the modernist stance, our time is not a time of transition toward something that is beyond modernity (or, by antonomasia, beyond Western modernity). Our time is problematic because many of modernity’s promises of social emancipation are still unfulfilled, therein residing the modern problems of our time. According to this theoretical stance, however, the paradigm of modernity has plenty of resources available to fulfill the promises of modernity and solve the modern problems. In other words, there are modern solutions for the modern problems. Modernity is but an incomplete project, as Habermas says, and it is susceptible of being radicalized in such a way as to render possible the total fulfillment of its objectives, as Roberto Unger argues.

According to the postmodernist stance, our time is probably not even one of transition, since we are already in a new condition, the postmodern condition. This condition is characterized by the deconstruction of all the modern promises and hence of all the modern problems that resulted from the idea that the promises remained unfulfilled. Together, they are accountable for our incapacity to live in good terms with the contingency, fragmentation, irony, deessentialization, pragmatism, and even irrationally of our time. We can only celebrate our time, the only one we have after all, if we are not constantly measuring it by the criteria of other exhilarating, utopian, and emancipatory times that only exist in our arrogant imagination. According to this theoretical-political stance, the modern problems are as illusory as the promises whose unfulfillment gives rise to them.

My theoretical stance, which I develop in this book as far as law is concerned, does not recognize itself in either of the theoretical fields described above. I am not a modernist; nor am I a postmodernist in the sense stated above (I call it celebratory postmodernism), although I do argue that we are undergoing a period of postmodern transition. Between modernism and celebratory postmodernism, I propose a third stance: oppositional postmodernism. According to this stance, it is as important to acknowledge the historical and political actuality of the modern problems, as the impossibility of finding answers for them in the paradigm of modernity. According to oppositional postmodernism, there are modern problems with no modern solutions. Herein lies the transitional nature of our time. The paradigm of modernity may contribute to the solutions we
look for, but it can never produce them. Indeed, its contribution consists merely in retrieving the fragments of alternative forms of modernity that were marginalized, disqualified or suppressed, as modernity’s dominant version went on consolidating itself.

Throughout this book, the contribution of the paradigm of modernity toward the solutions we look for concerning law, will become clear; but so will the reasons why such solutions can only be reached outside and beyond this paradigm. As a strong critique of the dominant paradigm, this book situates itself in the critical tradition, but it swerves from it in two fundamental ways. First, modern critical theory is subparadigmatic, that is to say, it tries to develop the potential for social emancipation within the dominant paradigm itself. On the contrary, the assumption of this book’s argument is that the dominant paradigm has long exhausted all its potentialities for emancipation, as is quite manifest in the voracity with which it transforms them into as many forms of social regulation. Critical thought must therefore assume a paradigmatic stance for a radical critique of the dominant paradigm from the standpoint of an imagination sound enough to bring forth a new paradigm with new emancipatory horizons. The critique’s radicalism is justified only in as much as it allows for the formulation of radical alternatives to the mere repetition of “realistic” possibilities. Otherwise, the critique will lose all efficacy and tend towards Phyrronism, closing all alternative gateways and choking itself to death in the confined space thus created by itself. This has been the tragic (or farcical) destiny of the critical legal studies movement in the USA. So, the paradigmatic critique must be critical of the critical tradition itself. Secondly, the paradigmatic critique distinguishes itself from the subparadigmatic critique in that, unlike the latter, it does not wish to stop at the oppositional, centrifugal, and vanguardist moment. To be sure, all critical thought defamiliarizes. But the mistake of modernist vanguardism was to indulge in the belief that defamiliarization is a goal in itself, whereas, on the contrary, defamiliarization is but the moment of suspension necessary to create a new familiarity. To live is to become familiar with life. The true vanguard is transvanguardist. The goal of postmodern critical theory is, therefore, to turn into a new common sense, in this particular case, into a new legal common sense.

The second central issue is the theoretical-methodological issue. In this domain as well, this book does not recognize itself in either of the two conventional fields: theoreticism and empiricism. In this book, I engage in deep theoretical work that, however, is not based on deductive reasoning, nor is it exclusively articulated in dialogue with the theoretical tradition. Its underlying theoretical energy is based on empirical, often minutely
Preface to the Second Edition

empirical, research. Furthermore, as I have just said, although this book takes into account a lot of empirical research, it does not conceive of empirical research as the proper site of scientific “truth,” nor does it think that empirical research alone defines the range and merit of the theory that it is possible to construct. Between theoreticism and empiricism, I argue in this book for a grounded theory, a theory that has its feet on the ground while refusing to be tied down and prevented from flying. I know that this my stance runs the risk of displeasing theoretical Greeks – who will get impatient with the empirical details to which they ascribe no relevance at all – and practical Trojans – who see no reason to “complete” the richness of the analyses with theoretical exercises considered to be hermetic and even arbitrary. Although I am fully aware of these risks, I present this kind of work in this book because it clearly reflects my life as an intellectual and as a citizen. I have conducted research projects in various countries and continents, and exchanged ideas with people of many different cultures, professions, and lifestyles, be they intellectuals, activists of social movements, or simply ordinary people. I never aimed to transform this wide experience into a “controlled experiment” that might give me access to privileged knowledge. But my experience was always by my side when, in the solitude of my office, I developed the theories I present in this book. In a word, I hereby offer a kind of knowledge that is made of experience, though not entirely based on experience alone.

The plan of this book is not very conventional, and as such, it requires an explanation. Theoretical “moments” and empirical “moments” alternate in this book. The three first chapters are theoretical chapters in which the need for a new sociological and political theorization of law is grounded. Chapters Four, Five, and Six are empirical chapters; they aim to unveil a vast legal landscape that does not find itself reflected in the available conventional theory, and thus underscores and justifies the theoretical lacks identified in the three first chapters. The next two chapters (Seven and Eight) present the prolegomena of a theory – an oppositional postmodern theory of law. Finally, in Chapter Nine I return to an empirical register, although distinct from the previous one. In this chapter, the theoretical and empirical analyses conducted in the previous chapters converge to define a new politics of law.

My subtitle – Law, Globalization and Emancipation – clearly reflects the analytical trajectory of this book. The title, in its turn – Toward a New Legal Common Sense – suggests the political orientation that sustains and gives coherence to the theoretical and empirical analyses. The aim is to contribute to a new legal common sense capable of devolving to law its emancipatory
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potential. Here is, chapter by chapter, how this analytical and political path is trodden.

In Chapter One, I trace the general profile of the paradigmatic transition and try to characterize my stance in some detail. My objective is to avoid the misunderstandings that resulted from readings of the first edition, particularly as regards the attention given to some key words (such as modernity and postmodernity) without a careful consideration of their context. Chapter One is new, particularly as concerns the characterization of oppositional postmodernism and how it is distinguished both from modernist stances and the stances of celebratory postmodernism.

In Chapter Two, I engage in a theoretical-historical analysis of law in modernity, a modernity that in the case of law is long lasting and can actually be traced back to the twelfth century. My aim is to show how law kept alive, for a long historical period, the tension between social regulation and social emancipation, from the reception of Roman Law to the theories of the social contract. I then proceed to analyze the way in which such tension kept decreasing from the nineteenth century onward with the consolidation of the liberal state. The present situation is that modern law does not respond adequately either to the demands of social regulation or the demands of social emancipation. This paradoxical situation symbolizes the theoretical and analytical lacks of our present legal time. With these lacks in mind, I propose a vast process of law unthinking. The second chapter is a revised version of the correspondent chapter in the first edition.

In Chapter Three, I start from a conventional conception of anthropology and sociology of law – legal pluralism – to construct a new legal landscape capable of encompassing different scales of law, be they local, national, or global. This is a new chapter, even though it draws somewhat from scattered analyses in several chapters of the first edition.

In Chapter Four, I engage in a detailed empirical analysis of a nonofficial legal system – Pasargada law. My objective is to reveal many legal experiences that, because they do not fit the legal modernist canon, are ignored, marginalized, silenced, in a word, wasted. This chapter is a shortened version of Chapter Three of the first edition. A detailed analysis of legal rhetoric has been eliminated and the theoretical framework reduced to what is strictly necessary for the development of the chapter’s argument.

In the long Chapter Five, I broaden the legal landscape by means of a global scale – the globalization of law. As I understand it, however, the globalization of law includes the translocal networks of local laws as well as the complex interaction between the national state and its law, on the one hand, and the imperatives of globalization, on the other. In this chapter also,
I swerve from conventional conceptions, in the case in point, the conventional conceptions of globalization. I submit that there is not one kind of globalization alone, but rather two, and I draw a crucial distinction between hegemonic globalization and counter-hegemonic globalization.

In Chapter Six, the tension between the global and the national scale of law is further studied through an analysis of the court reforms that are occurring a little everywhere. I inquire into the recent protagonism of courts in handling political conflicts and restructuring economies according to the Washington Consensus (the judicialization of politics), and analyze the impact this transformation has had on the judicial system itself (the politicization of courts). The globalization of the reform of the judicial system is thus understood as a form of globalization of law, particular attention being given to the contribution that the reformed courts may bring to democracy. This is a new chapter, partly based on articles written after the book’s first edition came out and published in quite different form.

In Chapter Seven, I return to theory. My aim is no longer to criticize the conventional theory, a task undertaken in Chapters One and Two, but to present a new theoretical proposal based on the distinction among several modes of production of law that operate in society in articulation with as many modes of production of power and knowledge. This chapter is a revised version of the correspondent chapter in the first edition.

In Chapter Eight, I continue my theoretical endeavors, this time drawing on a conception of law as a map and offering an analysis of law from the point of view of cartography and its procedures (scale, projection, and symbolization). This chapter is but a slightly revised version of the correspondent chapter in the first edition.

Finally, in Chapter Nine – a new chapter – I attempt to answer the following question: Can Law Be Emancipatory? The answer takes into account the previous analyses, and aims to give political-juridical content to the oppositional postmodern conception of law. Drawing on examples of concrete political-juridical practices occurring in various parts of the world, I formulate the conditions for an emancipatory use of law. The set of these conditions and the practices into which they translate themselves, I designate as subalteran legal cosmopolitanism.

This second edition would not have been possible without the enthusiasm and obstinacy of two young men – a young man more or less my own age, and a young man more or less of my sons’ age: William Twining and César A. Rodríguez. William Twining is one of the most distinguished and best-known known legal theorists in the Anglo-Saxon world. A widely acclaimed comparatist, unquestionably among all theoreticians of
Western law William Twining is most aware of the global vastness of the experiences of law, and hence of the limits of conventional Western legal theory to grasp such vastness. The idea of this second edition was his; he outlined its profile and encouraged Butterworths to undertake its publication. He did everything with great intellectual generosity, subtlety, and complicity, even though he is quite critical of some aspects of my work, as witness his excellent book *Globalization and Legal Theory* (London, Butterworths, 2000). While insisting that the book was mine and the options should be mine as well, William Twining managed to be persuasive enough to make me attempt a better book in this second edition. If the book happens to fall short of the desired outcome, the fault is certainly not his.

The other young man without whom this edition would not have been possible is César A. Rodríguez, a young Colombian legal scholar who is now completing his Ph. D. in Sociology at the University of Wisconsin–Madison. In my many travels around the world, I have encountered many brilliant young people full of promise. None of them, however, comes close to the extraordinary gifts of César Rodríguez. Endowed with exceptional intelligence, he combines a most stringent intellectual and professional discipline with a gentle character, woven of deep feelings and demanding political solidarity with all those who fight for a better world. The scholarly world will hear of him in due time. William Twining’s proposal was demanding. By myself, I could never accomplish it in so short a period of time. César made it all possible by helping me to revise and update the several chapters of the book. To work with him for the past few months was a privilege and a high-level scientific experience.

Nonetheless, there is no question but that this book is the second edition of a previously published book. The writing of this book took shape in the course of many years, and benefited immensely from the generous support of so many institutions and individuals that it would be impossible for me to name them all here. But even running the risk of omissions, I would like to express my gratitude to a few. Two universities, one Portuguese, the other American, are my greatest institutional creditors. I am first of all deeply indebted to the University of Coimbra, the School of Economics and the Center for Social Studies in particular, for their enduring support for a project that lasted many years and required prolonged stays abroad. I am likewise grateful to the University of Wisconsin–Madison, particularly the Law School and the Institute for Legal Studies, but also to the Sociology Department. A very warm word of thanks to the Deans of the Law School, first Daniel Bernstine and then Kenneth Davis, and the Directors of the Institute for Legal Studies, first David Trubek, then Marc Galanter, and
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A large portion of this book was written in Madison, where I have always found a most congenial intellectual climate, an atmosphere built on a human scale, demanding yet free from arrogance, cosmopolitan yet with a strong sense of place. Besides the enabling milieu that this scholarly community provided me with, I must thank the Law School for its precious logistic support. In the course of my research, I benefited greatly from the generous availability of the excellent facilities of the University of Wisconsin–Madison libraries. Mike Morgalla and Telle Zoller, of the Law Library, were indefatigable in their efforts to procure books that were sometimes quite out of the ordinary and hard to come by; as this book was reaching its completion, Telle Zoller, the foreign law librarian, provided precious aid with citations and bibliographical references. I am once again indebted to Mike and Telle for their precious assistance in the preparation of this second edition. Theresa Dougherty took great pains with the word processing of the manuscript of the first edition in its various versions along the years with unsurpassable professionalism, graciousness, and good cheer. In the final stages of preparation of the manuscript, Lynda Hicks provided her invaluable computer skills to solve all the technical problems resulting from the length of the entire document. I am also pleased to acknowledge the kind support I received from Joy Roberts, of the Institute for Legal Studies. Several other institutions are my creditors as well. On more than one occasion, the London School of Economics and the Institute for Advanced Studies of the University of São Paulo provided me with the right kind of stimulation for the development of my ideas. Though all the above-mentioned institutions have also assisted me financially at one time or another, this project could not have been completed without the substantial support of the Gulbenkian Foundation, the British Council, Luso-American Foundation for Development, Luso-American Educational Commission (Fulbright), and Foundation for Science and Technology, the Portuguese institution for financing scientific research.

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