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David M. Engel

University at Buffalo School of Law

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Transformations of Law and Place: Introduction to the Articles by Buchanan, Darian- Smith, Maurer, and Aman

DAVID M. ENGEL*

I. INTRODUCTION: SPATIAL AND INTERACTIONAL CONCEPTS OF LAW

The articles by Ruth Buchanan,¹ Eve Darian-Smith,² Bill Maurer,³ and Alfred Aman⁴ explore in rather different ways the theme of “law and place.” In years past, this topic might have produced a set of articles with a different emphasis: authors would probably have accepted more uncritically the assumption that the boundaries of nation-states mark out a territory—a “place”—within which law prevails. Law and place were thought to be mutually defining, and their interconnections seemed far less complex than they do now. The forces of globalization have cast doubt on such assumptions and have fundamentally transformed ideas about law and place. These four articles help us to understand how such transformations have occurred and where they might lead.

The assumptions of the past concerning the relationship between law and place have always been vulnerable to criticism. Sociologists and anthropologists have suggested for many years that the relationship between law and place is far more problematic than legal scholars or practitioners usually acknowledge. It is true that law’s first claim is spatial. Implicit or, more often, explicit in most western legal systems is an announcement of the territorial expanse within which a given law shall operate. “Place” in this sense refers to the town, county, state, or nation whose political institutions create and enforce laws; place is marked off by political boundary lines drawn on official maps, which carve the geographical

* Professor of Law, School of Law, State University of New York at Buffalo.

1. Ruth Buchanan, *Border Crossings: NAFTA, Regulatory Restructuring, and the Politics of Place*, 2 IND. J. GLOBAL LEGAL STUD. 371 (1995).

2. Eve Darian-Smith, *Legal Imagery in the “Garden of England”*, 2 IND. J. GLOBAL LEGAL STUD. 395 (1995).

3. Bill Maurer, *Law Writing, Immigration, and Globalization in the British Virgin Islands*, 2 IND. J. GLOBAL LEGAL STUD. 413 (1995).

4. Alfred C. Aman, Jr., *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention?*, 2 IND. J. GLOBAL LEGAL STUD. 429 (1995).

landscape into nested units and subunits. Within these legal-political places, law claims supremacy. The general tendency of law's spatial claim is to cut across social, racial, or cultural groupings within a given place. Law (with some significant exceptions) purports to control all persons and groups within the boundary lines of its designated space.

Sociolegal research has, however, revealed that the spatial claim of western law is often unsubstantiated in fact. Many of the most important forms of legal interaction in any society are based on interpersonal networks or social fields that are not necessarily regulated by official law. The basis of such informal legal systems is not spatial but social or interactional—they fall short of, or spill across, official boundaries and follow the contours of social interaction, cultural groupings, religion, or kinship. Malinowski, for example, pointed to the “concatenation” of reciprocal obligations that regulated the behavior of the Trobriand Islanders more powerfully than any system of formal law.⁵ Such obligations were based on patterns of social interaction rather than the law of a given geo-political place. Macaulay demonstrated that Malinowski's concatenation of reciprocities regulated exchanges among Wisconsin businessmen, who relied on customary norms rather than the state's formal law of contracts in their dealings with one another.⁶ Moore pointed to the “semi-autonomous social field” as a site in which rulemaking and rule-enforcement occur, often independent of official laws and legal institutions, yet subject at times to their control.⁷ “Social fields” are not spatial expanses but networks of interpersonal dealings and shared normative understandings.

These and countless other studies suggest that territorially-based legal systems operate in tension—or in conflict—with informal legal systems based on other principles. Such informal, interactional, legal systems function within or across the spatial boundary lines of official law; their reach is defined not by concepts of territoriality but by the social groups and social interactions that constitute them and which they, in turn, shape and reinforce. It would, therefore, be misleading to accept uncritically western law's territorial claim, its assertion that law and place are coextensive and

5. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 67-68 (1926).

6. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

7. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, in *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 57-58 (1978).

inseparable, although legal analysts, practitioners, and politicians have seldom heeded the insights of sociolegal scholars in this regard.

II. DYNASTIC REALMS AND SOVEREIGN STATES

The tension between spatial and interactional ideas of law is not new, nor is it confined exclusively to western societies. Benedict Anderson, referring to Asia and Africa as well as Europe and North America, contrasts two forms of legal-political organization. The "dynastic realm" centers around kingship and reaches as far as the king's divine authority commands respect and obedience. Law and political power are more a matter of belief and of interpersonal obligation than of territoriality. The modern nation-state, on the other hand, attempts to extend law and political authority evenly across population groups throughout the entire territory of the State:

Kingship organizes everything around a high centre. Its legitimacy derives from divinity, not from populations, who, after all, are subjects, not citizens. In the modern conception, state sovereignty is fully, flatly, and evenly operative over each square centimetre of a legally demarcated territory. But in the older imagining, where states were defined by centres, borders were porous and indistinct and sovereignties faded imperceptibly into one another.⁸

Does either of Anderson's conceptualizations—the dynastic realm or the sovereign State—apply to the world of the 1990s and to the global financial networks and regional trading communities described in these four articles? While the concept of the dynastic realm may have a quaint and archaic ring to it, Ruth Buchanan suggests that the concept of the sovereign nation-state has also become an anachronism, at least among international law specialists who have "for some time been debating the transformation or even the end of sovereignty."⁹ Paradoxically, the concept of State sovereignty organizes the thinking of international specialists, even as they acknowledge its inapplicability to the modern world.¹⁰

8. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 19 (2d ed. 1992).

9. Buchanan, *supra* note 1, at 378.

10. Buchanan quotes David Kennedy's characterization of contemporary international law analysis as a "continuation of the terrain upon which law participates in ongoing social, cultural, and economic conflicts and negotiations." *Id.* at 382-83.

III. PLACE AND THE QUESTION OF LAW

In these four articles, the idealized model of sovereign States, each exercising exclusive legal and political authority within clear, sharp boundaries, is not very apparent. Buchanan describes the borderlands between the United States and Mexico in terms that closely resemble Anderson's characterization of the dynastic realm, where boundaries are "porous and indistinct." Eve Darian-Smith describes strong British apprehensions about the porosity of boundaries between England and France (and Europe as a whole) as a result of the Channel Tunnel. Bill Maurer suggests that even in the British Virgin Islands, where physical boundaries should seem less problematic by virtue of topography, there is concern about maintaining symbolic boundaries that differentiate the British Virgin Islands from other Caribbean societies, preserve political independence from the United States, and connect the islands to British sovereignty while leading toward an imagined independence that may never actually arrive.

Alfred Aman suggests that issues of sovereignty still animate political discourse in U.S. debates over global trade, but he also shows that a second—and related—set of boundaries is contested in such debates: the boundaries between the United States government and the industries and markets it regulates. In the past, the government sought to portray itself as an independent force, aloof and above the fray, but the "reinvention of government" under Clinton and Gore has proposed a different model. Now, it is suggested, the government can be a sort of hybrid, in part a player in the market and in part independent. Does this blurring of boundaries necessarily lead to a blurring of state sovereignty as well? Not necessarily. Even Clinton and Gore view the government as a robust and active player, not shrinking and withering away but shaping the very domestic and international markets in which it participates. In any case, domestic politics impose constraints on the extent to which the government could shed its sovereign authority even if Clinton and Gore were so inclined: Newt Gingrich and others opposed approval of GATT on the grounds that its binding dispute settlement procedures would lead to a loss of U.S. sovereignty.¹¹ A U.S. president who ventures too far out on this limb may find congressional opponents ready to chop it off.

11. Aman, *supra* note 4, at 464 n.97.

Concerns about loss of sovereignty are sometimes juxtaposed in seemingly contradictory ways with the rhetoric of transnational integration. Buchanan shows how U.S. backers of the NAFTA cited lofty, region-wide legal norms that transcended State law on *some* issues, such as Mexico's allegedly inadequate intellectual property laws or its human rights behavior. For these issues, narrow concerns about the laws of individual States, it was said, should yield to the broader regional standards. With respect to *other* issues, however, State sovereignty was characterized as supreme. Thus, the policing of United States borders was said to be exclusively a matter of domestic immigration law and was not subject to region-wide regulation. Similarly, U.S. pesticide and food safety standards should remain untouched by international rulemaking.¹² Thus, the issue of sovereignty, like the Cheshire Cat, appears and disappears in discussions of regional trading communities, depending on whose interests are threatened in particular instances by the creation of a regional legal order.

IV. LAW AND THE QUESTION OF PLACE

As concepts of "place" change, the authors of these four articles suggest, traditional understandings of law and legal institutions must be reevaluated and, in many instances, transformed. Yet these articles show not only how place defines law but also how concepts of law can help to define place. Eve Darian-Smith, for example, suggests that traditional garden imagery in England has long been associated with English understandings of "civilization" and of a neat, ordered legality at the heart of English culture. Kent, in particular, characterized itself as the "garden of England," an embodiment of the distinctive virtues historically protected and maintained by English law. Yet, ironically, it is this very garden that has now become the site of the entrance to the Channel Tunnel, the "gateway to Europe." The garden is now threatened by dark influences rising from beneath the earth: terrorism, fires, rabies.¹³ It is not simply that the French and other Europeans emerging from the Tunnel into the garden of Kent have never experienced the civilizing effects of English law, but the Tunnel connection blurs the boundary defining England as a separate social and legal entity. The Channel Tunnel symbolizes broader concerns about the undermining

12. Buchanan, *supra* note 1, at 378.

13. Darian-Smith, *supra* note 2, at 409.

(literally and figuratively) of English legal and political sovereignty and the loss of control in many instances to regulation by the European Community. It is this latter form of loss that shapes English perceptions of “place” and transforms a garden into a port of entry for alien and threatening forces.

Similarly, Bill Maurer suggests that, in the British Virgin Islands, concepts of law and legality help to define place even as they cast doubt upon the integrity of the boundaries separating the British Virgin Islands (BVI) from other countries and cultures. The British Virgin Islanders are proud of their “law and order” society, which they believe distinguishes them from their less legally oriented Caribbean neighbors and even from the United States.¹⁴ Yet, ironically, their devotion to law is understood to be British in origin, so that the very feature of their culture that makes them distinct and different is also a vestigial reminder of their colonial status, of their political subordination to a European power. Maurer suggests that this irony is part of a broader paradox: that political independence for British Virgin Islanders is always at the forefront of their imaginations, always just beyond reach, never actually desired or to be achieved.¹⁵ A related irony can be found in the major legislative achievement of the British Virgin Islands, the International Business Companies Ordinance of 1984.¹⁶ This statute demonstrated the law-writing genius of BVI society, thus affirming the British Virgin Islands as a unique and autonomous “place.” Yet, by turning the British Virgin Islands into a tax-haven for international businesses, it actually reinscribed the BVI’s subordinate position in an international financial community dominated by wealthy multinational companies based outside the islands. Law and law-writing help to define a place yet also help to undermine the integrity of the boundaries separating that place from the world outside.

V. CONCLUSION

These articles suggest that, in the late twentieth century, there is a complex and paradoxical relationship between law and place. Law retains its mythical power to define place (England as a neatly ordered garden; the British Virgin Islands as a unique law-and-order society) at the very moment

14. Maurer, *supra* note 3, at 419-20.

15. *Id.* at 428.

16. *See id.* at 422-23.

that many of law's actual operations weaken the territorial basis of State sovereignty. Global forces and international legal systems exert an unprecedented force; law seems less and less territorial and based more and more on patterns of transnational interaction and communities of regional trading partners. The "places" that are thought to be defined by law are more mythic than real, romantic travel-poster symbols of the past or of present yearnings for a simpler and less threatening world. The reality is one of boundaries being blurred or breached, of startling new juxtapositions of peoples, products, and financial arrangements, and of legal orders that sometimes transcend the authority of State law.

The four articles remind us that the connection between law and place is undergoing a radical transformation. We must drastically revise the longstanding—and flawed—assumption that law extends evenly over the territorial space of the nation-state, stopping only at its clearly defined borders. What Anderson describes as the older concept of the dynastic realm, although archaic in many ways, has a new relevance in its emphasis on communities that are not necessarily territorially based, whose borders are porous, and whose authority is based on interactional networks and shared beliefs (religious, economic, and political). The tension between interactional law and territorial law is as old as the nation-state, perhaps older, but it has taken on radically new forms in the changing global order of the late twentieth century. These global transformations require us to take a new look at problems that are, in some ways, already familiar.

