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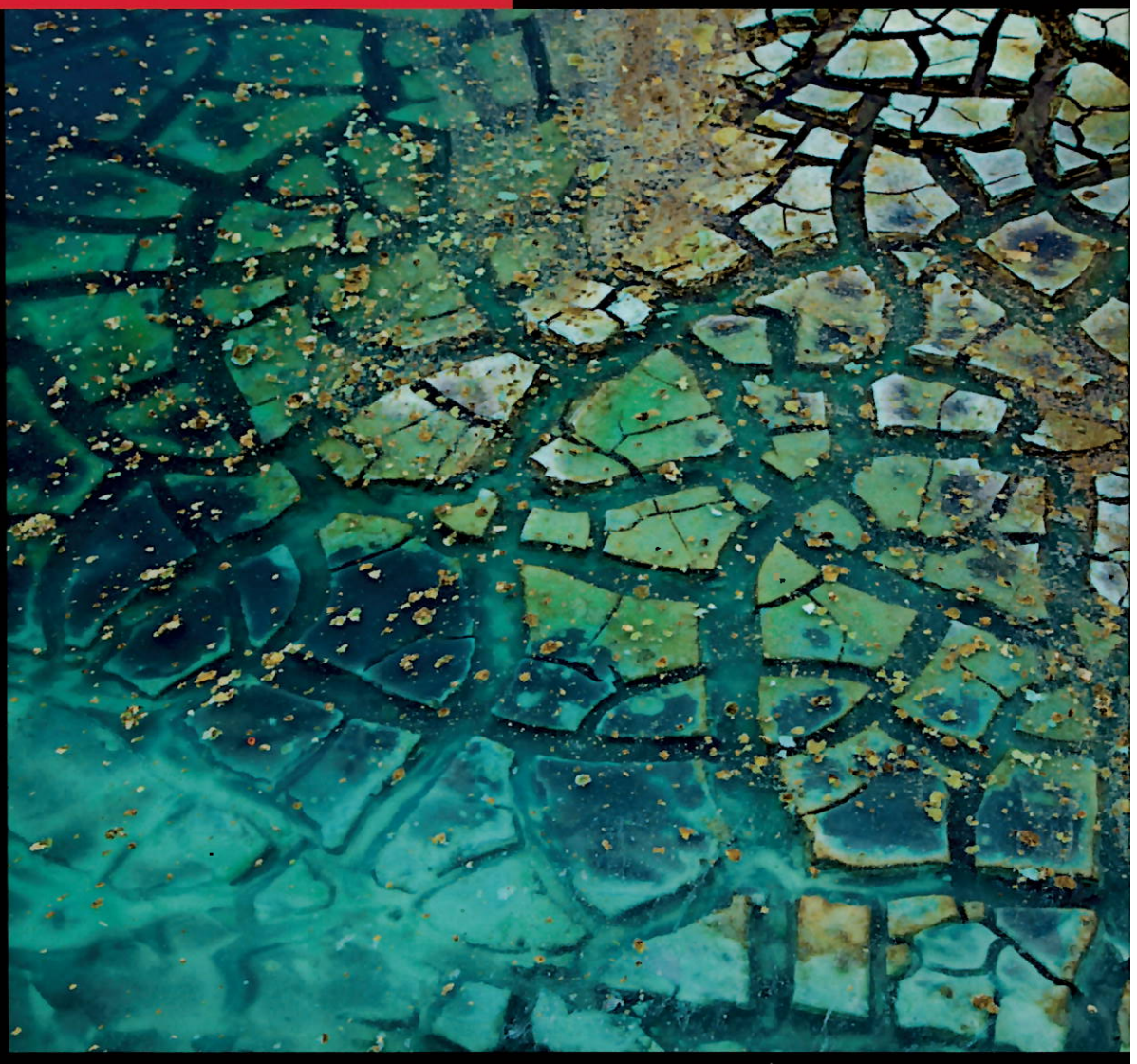

The Routledge Handbook of Law and Society

Edited by Mariana Valverde, Kamari Clarke, Eve Darian-Smith, and Prabha Kotiswaran

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JURISDICTION

Shiri Pasternak

Jurisdiction is a legal mechanism for organizing how political power is exercised, spatialized, and contested. Jurisdiction means the power to *speak the law*, bringing it into existence and defining *who* will be governed, as well as *how* and *where*. It is a fundamentally spatial concept that enacts the governance of law. It is a political, historical, and spatial concept essential for understanding the production of power in society, particularly in settler colonial successor states.

While sometimes dismissed as a simple function of sovereignty – the thing that determines which authority is triggered to act on specific issues – jurisdiction is better understood as the apparatus through which sovereignty is rendered meaningful. In Western political contexts, the relationship between people, place, and the law has changed considerably over time. The meaning of jurisdiction, in particular, has been deeply shaped by imperialism and in relation to territorial expressions of sovereignty. Whereas jurisdiction was understood in Europe for centuries as the legal means to claim authority over people in local places or over those engaged in specific activities, in the late 19th century through settler colonialism jurisdiction became fused with state sovereignty claims to authority over national space. But these territories were not unoccupied, empty space. Therefore, the meaning of jurisdiction has been shaped in equal measure by counter-assertions of jurisdiction grounded in Indigenous legal orders across the globe.

Everywhere we look, the world is governed and shaped by negotiations around jurisdiction; its ubiquity makes it easy to miss. A national border appears to be the hard line where one state's jurisdiction cannot be exercised in another's territory. And yet, there are many ways for state law to reach over into another place: in Canada, U.S. Custom and Border Services is operational, for example, in Toronto's Pearson International Airport. Guantánamo Bay is part of the United States, but based in the country of Cuba, and exists in a realm of multiple, competing, and colluding jurisdictional claims regarding the application of domestic and international law. Jurisdiction is spatial, but it is not necessarily territorial in the way we imagine. And there is often incredible complexity in determining the paramountcy of one set of laws over another.

Jurisdiction is the legal mechanism also used to manage divisions of internal power within states. Where an area of jurisdiction is grey, it leaves open opportunities for governments to claim or evade legal obligations. For example, when a status 'Indian' (a state-designation for First Nations people in Canada) who falls under section 91(24) of the federal head of power for 'Indians and the lands reserved for Indians' requires homecare on an Indian reserve, who

should provide the necessities of life to the family? Healthcare is technically a provincial responsibility in Canada under the constitutional divisions of power. A young Cree boy, Jordan River Anderson, perished in Canada waiting for the governments to decide. Lives are often held in the balance of jurisdictional disputes between multiple levels of government over the provision of funding for social services. Jurisdictional powers may be defined by respective authorities, but the world does not easily fall into stark legal categories, creating a wide terrain for contestation.

Finally, jurisdiction determines how individuals, groups, and nations are constituted as subjects. Global migration highlights the way people can be rendered 'illegal' when fleeing states and seeking refuge in countries where they do not hold citizenship. Detentions centres and camps that house refugees can linger when states refuse to absorb asylum seekers for years, even decades, into the citizenry of a nation. People are marked as inside/outside the jurisdiction of host states based on their countries of origin, religion, the colour of their skin, their economic status, and the conditions of arrival in new lands.

Historically, sovereignty has been defined by its claims to an absolute form of political authority and has dominated modern society as the central organizing principle of political order in modernity. But authority is not pre-given to sovereignty. Sovereignty requires legitimacy and conviction of its authority; forming national law is one way in which this legitimacy is sought. And though the common law, or the civil law, comes to take the shape of the state, the fit is never total or complete. The common law has no mystical or transcendental authority that connects it to territory.

In settler colonies, the state's claims to jurisdiction over Indigenous lands assume the authority to inaugurate law where law already exists and presume the new forms that law will take. These presumptions preclude posing pertinent questions about *which* laws should apply on these lands. In *Two Families*, Nehiyaw scholar Harold Johnson explains to non-Indigenous people the authority by which settlers were offered a place in Indigenous territory: 'When your ancestors came to this territory, Kiciwamanak [cousin], our law applied. When your ancestors asked to share this territory, it was in accordance with our law that my ancestors entered into an agreement with them. It was by the law of the Creator that they had the authority to enter treaty'. From this perspective, the condition for shared jurisdiction is the treaty relationship between Indigenous peoples and newcomers that governs the use and settlement of territory. Around the world, contested terrains of authority and plurality define the jurisdictional struggles between competing political orders.

In the settler colonies, the common law's universalist principles of equality were and have been intentionally articulated against the local and particular formations of Indigenous legalities. Citing case law from America and Australia, Lisa Ford traces the transition from a settler legality that claimed jurisdiction over Indigenous bodies only in the case of personal violence toward non-Indigenous people to the period when territorial jurisdiction became a necessary exercise of sovereignty at the turn of the 19th century. Until this later period, an uneasy legal pluralism had existed between overlapping Indigenous and settler social orders. Ford's research shows that the emergence of territorial state sovereignty was introduced in colonial courts through a generalization of the common law as the singular national law.

This fusion of sovereignty, jurisdiction, and territory is a global pattern inhering in the Anglophone settler polities. The assertion of sovereignty over Indigenous lands in the British settler colonies was disengaged for centuries from colonial officials' capacity to *exercise authority* over Indigenous peoples in their territories. Long after the ceremonies of possession, the granting of Royal Charters, and a bewildering parade of imperial performances of power that bore only the slightest relevance to their supposed subjects, Indigenous peoples' social and political orders remained intact, even as they adapted to the influx of European and other settlers on their

lands. The ongoing exercise of Indigenous jurisdiction over land, resources, and bodies on their homelands today reveals the continuity of this suspended space between settler assertions of sovereignty and the vitality of Indigenous territorial jurisdiction.

From an Indigenous perspective, jurisdiction is the authority to speak their own laws, articulated as responsibilities rather than simply delegated state rights. Powerful Indigenous movements today clash with settler law on the frontlines of every social, political, and economic issue they face, but most visibly around resource development, where they have the power to grind the economy to a halt. For example, all along the Trans Mountain pipeline that runs from the tar sands in Alberta to the Salish Sea at the Burnaby terminal near Vancouver, British Columbia, First Nations have asserted their inherent laws – those of the Dene, Cree, Secwepemc, Nlaka'pamux, Tsleil Waututh, Squamish, to name a few – to contest the state's authorization of massive, invasive infrastructure on their lands. In Northern Ontario, the Kitchenuhmaykoosib Inninuwug released a Watershed Declaration that nationalized all resources on their homelands protecting the watershed from the impacts of development. In Manitoba, the Sagkeeng Lawmakers Assembly rejected settlement monies from the public hydro facility, asserting their jurisdiction in the face of provincial authority.

Jurisdiction is both a spatial and a legal concept: to render jurisdiction visible, we must place it in the context of geographical studies, otherwise we risk understanding both law and space as non-political categories. A critical legal, geographic perspective insures an interdisciplinary approach to jurisdiction, allowing us to see beyond the standard representation of jurisdiction as a tiered structure that ranks power from the highest to the lowest authority, or in which certain issues are under the exclusive domain of particular authorities. More often, when we really look at the spatial context of jurisdiction, we see a dense patchwork of institutional bodies crowding every place, often governing largely in isolation from each other despite overlaps and contradictions in mandate, authority, and geographic oversight. For example, in the territory of the Algonquins of Barriere Lake, although the Grand Lac Victoria reserve was created to protect wildlife and Indigenous livelihood on their territory, it is superimposed by provincial park legislation that allows for relatively uninhibited resource exploitation, despite the park's creation under the legislative auspices of the Wildlife Conservation Act.

To engage in the question of what it means to decolonize law, we must ask by what authority a law has the authority to be invoked and to govern. Jurisdiction derives its power to allocate authority from many sources. A reconciliation of relations between Indigenous and settler societies requires the radical deconstruction of the authority by which states invoke sovereignty and a re-examination of the jurisdictional orders that underpin Indigenous forms of entitlement to their lands. The source of jurisdiction within Indigenous legal orders is always rooted in place and in the orders of care that renew this legal responsibility for place from one generation to the next. Colonialism was legal in European law, and its principle of discovery remains imprinted on the legal systems of settler colonies today. The contestation of this doctrine and, the questions surrounding the state's authority to liberate itself from earlier law, can be called into question by struggles in the register of jurisdiction.

By disentangling jurisdiction from sovereignty, I do not mean to argue that sovereignty is an illusion: it is the dominant political-territorial ideal of the nation-state, which has had an incalculable effect on Indigenous legal orders. What has been done in its name to protect containerized borders and exclusive claims to authority highlights the violent history of white settlement on these lands. Sovereignty is not simply an assumption made by settler nation-states like Canada that can be dismissed by virtue of competing discourses and assertions of power. But the *legitimacy and legality* of sovereignty can be called into question in the register of jurisdiction.

Further readings

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