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Book Notes: Canada's Indigenous Constitution, by John Borrows

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CANADA'S INDIGENOUS CONSTITUTION, by John Borrows[1]

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IN ***CANADA'S INDIGENOUS CONSTITUTION***, John Borrows argues for recognizing Indigenous legal traditions as a third source of law in Canada, equal to that of common and civil law. He asserts that the present bijuridical system inaccurately reflects Canada's legal foundations, resulting in an unstable constitutional structure that "risk[s] harming all who depend upon it for security and protection."[2] He proceeds by educating his readers about a variety of Indigenous legal traditions and presenting strategies for how these traditions can inform legal decision making in the hope of "put[ting] Canadian law on a stronger footing."[3]

In chapters two and three, Borrows familiarizes the reader with different sources and specific examples of Indigenous legal traditions. He suggests there is a common misconception that all Indigenous laws find their source in custom—a misconception that reduces the complexity of these laws. Borrows reveals the complexities of Indigenous legal traditions by pointing to their sacred, natural, deliberative, positivistic, and customary sources. An account of Indigenous legal traditions across the country is also provided, including the natural law of the Mi'kmaq people on the east coast, the customary and positivistic laws of the prairie Métis people, and the laws of the Nisga'a people in British Columbia that have been modified by a contemporary treaty, among other examples. By examining each legal tradition in its specific cultural, historical, and political context, Borrows dismisses the notion that Indigenous legal traditions are frozen

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1. (Toronto: University of Toronto Press, 2010) 427 pages.
2. *Ibid.* at 15.
3. *Ibid.*

in the past and encourages lawmakers to incorporate these traditions into legislation and court decisions.

Chapters four and five describe the historic and current legal culture in Canada as one that can facilitate this inclusion. The cooperation of common and civil law in Canada is provided as an example of the state's ability to accommodate different legal systems. Further, Borrows argues that "[t]he operation of multiple legal systems is a Canadian tradition,"[4] and demonstrates that Indigenous law has long operated alongside common law. Given that Indigenous legal traditions permeate historic and contemporary treaty processes, Borrows asserts that the constitutional entrenchment of treaties through the *Constitution Act, 1982*[5] similarly entrenches the legal traditions informing these agreements. In his view, multi-juridicalism is a tradition in Canada, and it informs the contemporary constitutional text.

Chapter nine highlights that section 2(a) of the *Canadian Charter of Rights and Freedoms*[6] may fall short of protecting Anishinabek religious beliefs and practices. Likewise, section 35(1) of the *Constitution Act, 1982* on Aboriginal Rights may fail to protect Anishinabek spirituality. Borrows asserts that "Canadian constitutional law has much greater difficulty recognizing [Indigenous practices] because of its different cultural sources, commitments, receptiveness, and institutional interpretive framework."[7] Borrows calls on Canadian and Indigenous governments to enact recognition legislation that would identify "Indigenous law as a primary source of regulation, decision-making, and dispute-resolution powers."[8] Subsequent to the enactment of recognition legislation, harmonizing statutes would illuminate the nature of the relationship between Indigenous laws and common and civil law, and would signal the equal authoritative value of Indigenous law. According to Borrows, Canadian courts must play a role in interpreting this legislation in a way that sustains this equality.

Another strategy that Borrows proposes to enhance understanding of Indigenous legal traditions is for law societies to develop continuing legal education

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4. *Ibid.* at 125.
5. Being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
6. Part I of *ibid.*
7. *Supra* note 1 at 269.
8. *Ibid.* at 181.

programs in Indigenous law. Additionally, he calls for the development of Indigenous law societies organized according to their legal structures and traditions, in the hope of reforming the legal system from within. In pursuit of a similar goal, Borrows provides a sample curriculum that incorporates Indigenous law into a common law legal education, with courses specifically focused on Indigenous legal traditions as well as common law courses that include Indigenous perspectives.

The book concludes by acknowledging the challenges that may meet these efforts, but Borrows is adamant that both Indigenous and non-Indigenous Canadians would be better served by a legal system where common law, civil law, and Indigenous legal traditions operate harmoniously. Borrows is careful not to leave his readers without solutions to what may seem like an insurmountable challenge. Throughout the book, his suggestions provide readers with a starting point from which they can create workable solutions within their political and social organizations. He calls on all Canadians to be part of this process and gives us the tools to build a healthier constitutional order.