

Opening address



PRESENTED BY

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Towards an Indigenous constitution for Canada

In this presentation, Professor John Borrows returns to an idea examined and defended in his book *Canada's Indigenous Constitution*: how to work towards a constitution that is Indigenous as opposed to colonial. The Constitution must be renewed using a multijuridical approach that builds bridges between different legal traditions.

Colonialism as the foundation of the Canadian Constitution

Borrows begins by explaining how Canadian law is fundamentally based on the concepts of hierarchy and superiority. From the earliest contacts between the Indigenous peoples and Europeans, the latter justified their unilateral declarations of sovereignty by relying on the doctrine of discovery and “terra nullius”. This undermined the governance of the Indigenous peoples and simultaneously ignored both their occupation of the land and their relationship to the land. Canada’s colonial constitution is characterized by the exclusion of the Indigenous perspective.

Indigenous law as an alternative viewpoint

However, in Borrows’ view, there are other ways to conceive of the law in Canada. The Indigenous peoples have a conception that is essentially based on their relationship to the land and their understanding of the natural world. The norms of Indigenous law come from a range of sources—positivist, of course, but also customary, sacred, natural and deliberative. Borrows argues that if we approach the law from a functional standpoint (in other words, considering it as a provider of criteria, principles, precedents, markers, etc.), we will have no difficulty recognizing Indigenous law. He gives the example of the potlatch, which can provide an opportunity for a shared reflection on environmental assessments.

Multijuridism as a path towards reconciliation

From this point of view, Canada’s indigenous constitution should be understood as the way in which we constitute ourselves and find ways to live together. Borrows insists on the use of the verb “constitute” to describe the living, participative nature of the exercise, and highlights ways in which we can draw inspiration from bijuridism (which is inadequate because it excludes Indigenous legal traditions) to affirm the importance of multijuridism, an approach that still needs to be developed. This exercise in reconciliation requires us to combine the Indigenous, common law and civil law perspectives to bridge all possible gaps.

Working towards a living, rather than a colonial, constitution

We must shape and assemble our constitution as an Indigenous constitution in both meanings of the term: arising from this country, but also integrating the contribution of the Indigenous peoples to the formation of law in Canada. This is what differentiates an Indigenous from a colonial constitution: it is a living constitution that permits the coexistence, in a conversation, of co-determination, self-determination, and alter-determination.