

Freedom and Indigenous Constitutionalism

John Borrows

Toronto: University of Toronto Press, 2016

Reviewed by Mark Walters*

At the beginning of his latest book, *Freedom and Indigenous Constitutionalism*,¹ John Borrows reveals that his great-grandfather, Charles Kegeedonce Jones, a respected Anishinaabe *ogimaa* and chief, was also a “runner”—someone who traveled great distances on foot throughout the Great Lakes region carrying official messages between Anishinaabe and other communities. The image brought to my mind the runners sent out with copies of the Royal Proclamation of 1763 and the invitation to different nations to attend the Treaty Council to be held at Niagara in the summer of 1764. That thousands of Indigenous people convened at this Council suggests an impressive network of communications.² The image also brought to my mind the Classical Greek story of Pheidippides running from Marathon to Athens to announce the Athenian victory over the Persians—though Anishinaabe runners may have been fitter than those in ancient Greece, for Pheidippides apparently expired upon delivering his message.

Borrows does not mention the Greeks, at least not directly, but there is a link. In *Freedom and Indigenous Constitutionalism*, Borrows offers a series of reflections upon Indigenous identity, tradition, law, and freedom oriented around the Anishinaabe practices of *dibenindizowin*, freedom as experienced within the person and in relationships between people, and *mino-bimaadizwin*, the good life forged through developing healthy relationships. These practices of Anishinaabe constitutionalism resonate, he says, with the understanding of freedom articulated by the philosopher Hannah Arendt, and

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1. John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) [Borrows, *Indigenous Constitutionalism*].

2. See John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 162–63.

in particular her assertion that “to *be* free and to act are the same”.³ Arendt’s theory of freedom as action or praxis was based in large part upon her understanding of political action in the ancient Greek *polis*.⁴

Freedom as action is central to the story about Indigenous constitutionalism that Borrows tells. The Anishinaabe runner is an individual who is free—free to move, to travel, to visit distant places, and, at the end of the odyssey, free to return home again. In non-Indigenous culture today, running is often associated with individual escape or defiance, an association famously captured by Allan Sillitoe’s story *The Loneliness of the Long-Distance Runner*.⁵ This image contrasts with the Anishinaabe runner Borrows describes. The Anishinaabe runner is a communicator and translator, travelling lightly and quickly, navigating through a shifting and dynamic world of diverse normative realities. The runner must rely upon the traditional knowledge of elders on how to survive and upon the network of communities that give the journey meaning. From the relationships developed at home and away, the runner gains a deeper sense of *dibenindizowin* and *mino-bimaadizwin*.

The themes of movement and mobility and of freedom through action and experience run through *Freedom and Indigenous Constitutionalism* from start to finish. It is within the exploration of these themes that a complex and challenging understanding of constitutionalism emerges. Borrows introduces the ideas of movement, freedom, and action in a powerful first chapter entitled “Physical Philosophy: Mobility and Indigenous Freedom”, in which he argues for an Indigeneity that is open, dynamic, and engaged with the world over one that is isolated, fixed, and exclusive. The ideas are developed further through the second chapter, “Civil (Dis)Obedience, Freedom, and Democracy”, in which Borrows explores Indigenous freedom as manifested through physical resistance to state power, refusing to condemn, though not personally condoning, those Indigenous peoples who may think that even violent resistance to Canadian law, in the name of Indigenous law, may, in rare cases, be justified. “Violence might not always diminish freedom and democracy,” Borrows writes, “though I reject it in my own practices” and he “strongly counsel[s] against its use”.⁶ The third chapter, “Indigenous Freedom and Canadian Constitutionalism”,

3. Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Toronto: Penguin Books, 2006) at 151 [Arendt, *Past and Future*]; Borrows, *Indigenous Constitutionalism*, *supra* note 1 at 6.

4. See e.g. Arendt, *Past and Future*, *supra* note 3 at 144–54; Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) at 13–17.

5. Allan Sillitoe, *The Loneliness of the Long Distance Runner* (London: WH Allen, 1959).

6. Borrows, *Indigenous Constitutionalism*, *supra* note 1 at 101.

examines the complex and paradoxical ways in which Indigenous freedom simultaneously rejects and accepts the Canadian constitution through (borrowing from Jeremy Webber) a form of “agonistic constitutionalism”⁷ that leaves legal and constitutional ideas constantly in motion and contested. The fourth chapter, “(Ab)Originalism and Canada’s Constitution”, offers a blistering attack on the failure of the courts in Canada to extend the “living tree” method of constitutional interpretation to aboriginal and treaty rights—another plea for constitutional dynamism and against Indigenous essentialism. Paradox is again the message in the fifth chapter, “Legislation and Indigenous Self-Determination in Canada and the United States”, in which Borrows turns to American examples in suggesting that federal legislation could actually assist Indigenous communities achieve aspirations of inherent self-determination. The sixth and final chapter, “Aboriginal and Treaty Rights and Violence against Women”, is a condemnation of the inability or unwillingness of Canadian judges to acknowledge Indigenous jurisdictional space and the tragic implications that this has had for vulnerable Indigenous girls and women.

Freedom and Indigenous Constitutionalism joins a series of important books that Borrows has written on Indigenous peoples, laws, and traditions in Canada.⁸ On display once again in this latest contribution is a firm, steady, eloquent, even poetic narrative that engages with ideas with an intense critical eye, an emphasis on pragmatism over conceptualism, and, most importantly, a truly imaginative spirit. It is a masterful performance. Like an elder telling a story, Borrows is not one to explain answers to hard questions in so many words. The meanings of the narratives that he weaves are offered in an Anishinaabe spirit. Borrows does not always provide answers—though on many points he makes his views perfectly plain—but rather encourages an approach to narrative in which ultimate meaning will be in constant, if subtle, motion, to be worked out by each person as they deliberate, compromise, resist, and cooperate with those around them. Instead of concluding his book with a synthesis of the broad range of ideas explored in its chapters, instead of giving us, in a nutshell, his account of what Indigenous constitutionalism really is, Borrows leaves us with the ancient Anishinaabe story of Pitchü—the story of a son who cannot become the person his father wishes but who remakes himself in a beautiful form that his father only recognizes after years of searching for the son he thought he knew.

7. *Ibid* at 105.

8. See e.g. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010); John Borrows (Kegeedonce), *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010).

What does this all mean? Borrows insists that the answer is one that each of us must look for ourselves. In doing so, we should listen to the storyteller carefully and intently and our answers should be given with humility and an openness for revision and sensitivity to the relationships that may be implicated, but, in the end, our answers will be valuable only if they are *our* answers. Constitutionalism implies a special responsibility for individuals to participate actively in the practices that instantiate healthy relationships.

For anyone looking for a firm and fixed constitutional architecture, the approach to constitutionalism offered by Borrows will be hard to accept. At one point in his book, Borrows writes: “[T]here is no one true foundation on which to base action when dealing with Indigenous issues. This is my thesis.”⁹ Borrows offers a *non*-foundational account of law, freedom, and constitutionalism. Laws and constitutions are not things but activities. If there is any sense of normative unity or coherence at all, it is certainly not to be found in the kind of single sovereign root for legality as contemplated by the legal positivist. But does constitutionalism without foundation mean constitutionalism devoid of any sense of normative unity or coherence? Not surprisingly, Borrows does not answer this question explicitly.

Borrows is unequivocal in denying certain approaches to normative order. Normative community is not something to be found in abstract or a priori concepts. It is not a product of pure reason. Borrows writes: “Since dependence, independence, and interdependence are part of all Indigenous relationships, I submit that we must better learn how to pursue our varied traditions through a continuously interactive process of compromise, resistance, rejection, negotiation, deliberation, and dissent.”¹⁰ It would seem then that for Borrows it is through practices or processes that unsettle or disrupt established assumptions, both within Indigenous communities and between Indigenous communities and the non-Indigenous state within which they find themselves, that genuine Indigenous constitutional traditions may find their lives. For today’s Indigenous peoples, vibrant constitutional identities mean that the inward- and outward-looking dimensions of these practices cannot really be separated. Those who know John will know that he is himself a runner, that he runs almost every day, but we may also say that he is, like his great-grandfather, an Anishinaabe runner in the fullest sense, one who offers insights about the practices of *dibenindizowin* and *mino-bimaadizwin*, for the benefit of Indigenous *and* non-Indigenous peoples alike, gained through his journeys through and engagement with different

9. Borrows, *Indigenous Constitutionalism*, *supra* note 1 at 104.

10. *Ibid* at 40.

normative realities that are distant both intellectually and geographically from those of his own community. “I am still Anishinaabe”, Borrows writes, “despite, and maybe even because of, my wandering ways. While there may be generally accepted understandings, there is no conceptual purity or abstract authenticity to be found in any Indigenous person or community.”¹¹

Grasping this sense of fluidity and contingency is important to grasping the practice of Indigenous constitutionalism and its relationship with Canadian constitutionalism. Borrows says:

In striving for freedom, it is not necessarily inconsistent to pursue varied relationships and simultaneously reject and embrace state, corporate, and other forms of power. . . . Indigenous peoples live in the midst of complex circumstances. They participate in cross-cutting, parallel, contradictory, and intersectional activities, which appear to be troubling only if judged by theoretically pure conceptions of Indigeneity or ‘Indianness’.¹²

Freedom and subjugation are, he insists, “relational”, thus explaining the importance of “simultaneous resistance and engagement with Canada’s constitutional values, structures, and traditions”.¹³

It is in this context that Borrows alludes to Webber’s important argument that Canada’s constitution is characterized by an “agonistic constitutionalism”.¹⁴ We are thus returned to the ancient Greeks. “Agonism” is derived from the Greek word *agon*, meaning conflict or strife, and within moral and political philosophy it has come to represent a conflict-focused account of democracy within pluralistic societies.¹⁵ Agonistic constitutionalism appears to celebrate the absence of normative unity within constitutional values, it celebrates the presence of a constant sense of tension between discordant constitutional visions. Is Canadian constitutionalism agonistic? Is Indigenous constitutionalism agonistic?

Throughout his book, Borrows returns again and again to the Anishinaabe ideas of *dibenindizowin* and *mino-bimaadiziwin*—freedom and the good life made possible through practicing healthy or harmonious relationships. We will each see different things in the ancient Anishinaabe story of Pitchii found at the end of the book. To my mind, it is like a Greek tragedy. Through the best of motives, a loving father suppresses his son’s own identity and provokes a form

11. *Ibid* at 24.

12. *Ibid* at 103.

13. *Ibid* at 104.

14. *Ibid* at 105, citing Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015) at 8.

15. See generally Mark Wenman, *Agonistic Democracy: Constituent Power in the Era of Globalisation* (Cambridge: Cambridge University Press, 2013).

of resistance. The son takes on a new form, that of a colourful bird, and tries desperately to communicate with his father year after year. Although there is reconciliation in the end, for the father finally sees his son as the robin that he has become, there is an aching sense of loss in knowing of the many years wasted in the failed attempts at reunion. Division, conflict, and resistance will be inevitable in a pluralistic society, but they are not really ends in themselves. They are manifestations of freedom and strategies for freedom, but they are not the long sought-after state of freedom that only relationships characterized by health, harmony, coherence, and integrity can bring. Our differences are never wholly unresolvable, though the search for reconciliation may seem never-ending. It is in this sense then that the story of Pitchii makes me wonder whether agonistic constitutionalism may be, at some level at least, a contradiction in terms. Perhaps the disruption that resistance to authority brings can only really be an aspect of constitutionalism if we hold out hope that there are shared truths about the human condition that resistance will help us to see.

