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Law on the Continent: Judicial Histories and Constitutional Development in North America

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Introduction

This book traces how law on the North American continent has been imagined, written, argued, and lived—from the plural legal orders that predated European arrival to the constitutional frameworks that shape modern states. It follows the building of courts and constitutions, the eruption of landmark cases, and the everyday governance of land, labor, family, and belief. In doing so, it asks how legal ideas travel across empires and republics, how they take root in institutions, and how they are contested by communities seeking recognition, redress, and self-rule.

Before colonization, diverse Indigenous nations governed through their own laws—rooted in kinship, diplomacy, ecology, and ceremony. Contact with European powers did not erase these orders; it layered them. Colonial officials, missionaries, merchants, and settlers confronted systems they neither fully grasped nor controlled. The resulting legal pluralism—overlapping jurisdictions, competing forums, and negotiated accommodations—was not an anomaly but the ordinary condition of life across the continent. Courts and councils became sites where power was asserted, bargains were struck, and meanings of sovereignty, territory, and obligation were tested.

Imperial legacies mattered. Spanish, French, and British regimes brought distinct conceptions of authority, property, and procedure, from civil-law codifications and seigneurial tenure to common-law precedent and reception statutes. Each fashioned colonial courts and administrative structures to govern commerce, faith, and people, while relying on treaties and coercion to command land and labor. Yet imperial designs always met local realities: Indigenous diplomacy, settler resistance, and frontier pragmatism reshaped imported doctrines into hybrid regimes that endured long after flags changed.

State formation reoriented constitutional development but did not begin it. The United States entrenched written constitutionalism and judicial review; Mexico experimented with republicanism, federalism, and the transformative promises of the 1917 Constitution; Canada evolved from imperial oversight to a homegrown constitutional order culminating in patriation and a modern rights charter. Across these jurisdictions, courts negotiated the distribution of powers, the scope of rights, and the reach of administrative governance. The architecture of judicial authority—supreme courts, specialized tribunals, and transnational fora—became central to defining public power and restraining its excesses.

Substantive law reveals parallel struggles. Property regimes shifted from *encomienda* and *seigneurie* to *fee simple* and *ejido*; extractive economies remapped land and

waters, often at immense human cost. Slavery and emancipation, segregation and civil rights litigation, immigration and citizenship contests, and the regulation of family and gender relations each show how law mediated hierarchy and belonging. Criminal law and policing, too, moved from colonial codes to modern reforms, persistently raising questions about security, liberty, and equality.

Indigenous legal claims run through every period. Doctrines such as discovery and the cases that canonized them faced sustained critique from Indigenous nations and, increasingly, from courts reassessing title, treaty implementation, and self-government. Contemporary jurisprudence on Aboriginal and treaty rights, the duty to consult, and the recognition of inherent jurisdiction signals both continuity with older struggles and the possibility of new constitutional arrangements. International and transnational influences—from human rights norms to cross-border economic integration—further complicate and enrich domestic debates.

This is a work of comparative legal history. It reads statutes alongside stories, court opinions alongside customary norms, and constitutional text alongside constitutional practice. The chapters that follow proceed thematically and chronologically, moving from foundations to modern transformations while returning, when necessary, to earlier moments that illuminate enduring dilemmas. The goal is not to flatten difference but to show how jurisdictions converse, diverge, and sometimes converge as they grapple with pluralism, rights, and the rule of law.

By following courts and constitutions across North America, the book invites readers to see law as both an instrument of governance and a terrain of contestation—capable of entrenching inequality and of enabling reform. The continent's judicial histories do not yield a single narrative arc; they offer a set of intertwined pathways. Understanding those paths helps explain how we arrived at the present and what futures may yet be imagined through law.

CHAPTER ONE: Legal Traditions Before and Contact

The history of law on this continent did not begin with parchment and ink, or with robes and courtrooms. It began with people, place, and practice. Long before European ships appeared on the horizon, what we now call North America was a mosaic of distinct legal orders, each organizing life, land, and leadership in its own way. These were not informal customs drifting in the wind; they were structured systems of norm, procedure, and authority. They had methods for resolving disputes, for compensating harm, for making war and peace, and for holding power accountable. In the absence of written codes, law traveled through oratory, memory, and ritual, sustained by the social weight of obligation and the spiritual gravity of ceremony.

There was no single “Indigenous law,” any more than there was a single European law before the rise of nation-states. Thousands of distinct nations and confederacies populated the continent, from the Haudenosaunee (Iroquois) Great Law of Peace in the Northeast to the Anishinaabe governance systems of the Great Lakes, from the Pueblo councils of the Southwest to the complex chiefdoms of the Mississippian world and the Chinookan and Salish trade protocols of the Pacific Northwest. Each system was rooted in place and story. Legal authority often blended political, spiritual, and ecological dimensions, recognizing reciprocal relationships between human communities and the living world. Clans, councils, and elders maintained public order; winter ceremonies and seasonal gatherings enforced social norms; diplomacy and trade regulated relations between groups.

Dispute resolution across these societies ranged from restorative approaches to calibrated uses of force. Many systems prioritized restitution and balance—compensation for injury, adoption to replace lost kin, exchange of goods to restore social harmony. Public forums, often tied to council fires, allowed oral argument and the weighing of testimony. Among the Haudenosaunee, consensus decision-making anchored by clan mothers created checks on male leadership and required broad agreement for major policies. On the Northwest Coast, potlatch ceremonies functioned as legal theaters in which titles, property rights, and social status were affirmed, challenged, and redistributed through witnessed exchange. In the Southwest, Pueblo communities governed by rotating councils and ritual calendars, with religious leaders maintaining moral and legal order. These were not primitive arrangements; they were sophisticated mechanisms for coordinating collective action in diverse environments.

Kinship was a central legal institution. Membership in clans and houses defined rights and duties, including marriage rules, inheritance, and obligations of mutual defense.

Among Pacific Northwest nations, for instance, house groups held hereditary rights to fishing sites and ceremonial privileges, enforced through social recognition rather than coercion. In the Great Lakes, clan networks structured adoption and diplomatic protocols. Law was embedded in relationships: who you were, whom you belonged to, and what you owed to others. Property, in many places, was understood as a bundle of relationships—use rights to land and resources held collectively and governed by stewardship norms. Violations of these norms could incur social sanctions, restitution, or, in persistent cases, exclusion from community life.

Ceremony and ritual were integral to legal process. They performed a public, witnessed function: they marked obligations, recorded transfers, and sanctified agreements. A treaty between nations was not only a political compact; it was often a ceremonial event sealed with wampum belts that encoded meaning in patterns of shell and color. Wampum, in the Northeast, was a mnemonic device and a legal instrument: belts recorded agreements, served as evidence in disputes, and provided a shared reference for interpretation. The Two Row Wampum (Guswenta) symbolized parallel paths of Indigenous and European peoples traveling the river of life without steering each other's canoes—expressing a legal principle of non-interference and mutual respect that would echo through centuries of treaty relations. Similar ritual protocols structured diplomacy in other regions, from calumet ceremonies on the Plains to gift exchanges in the Great Lakes.

Across the continent, law was dynamic. It responded to environmental variation, migration, trade, and conflict. Inter-nation diplomacy created layers of legal obligation that could bind groups for generations. Disputes over hunting grounds or fishing sites were managed through negotiation, regulated access, and sometimes calibrated violence that aimed to avoid escalation. Courts, in the European sense, were not necessary for order; instead, law manifested in councils, councils of elders, councils of women, councils of warriors—each with recognized jurisdiction. The key was legitimacy: authority derived from community recognition, ancestral precedent, and the ability to secure compliance without relying on monopolized force.

All of this changed—and yet persisted—when Europeans arrived. Contact did not simply replace Indigenous law with European law; it created a complex layering of legal orders. Different European empires brought different legal traditions, and each adapted its approach to local realities. Spanish law, rooted in the civil law tradition, emphasized codification and royal authority. French law, also civil, developed flexible customary practices suited to frontier trade and alliances. English common law, reliant on precedent and statute, spread through colonization, settlement, and the extension of royal courts. Indigenous law continued to function, often through negotiation with colonial authorities or in areas where imperial power was thin. The result was legal pluralism: multiple systems operating simultaneously, sometimes overlapping, sometimes competing, sometimes cooperating.

The Spanish regime in the Americas was built on the *Recopilación de las Leyes de Indias*, a vast compilation of colonial statutes governing everything from the treatment of Indigenous peoples to the administration of mines and missions. Spanish law included the *Siete Partidas*, a medieval code that influenced colonial jurisprudence. Royal authority was concentrated in viceroys and audiencias—regional high courts that combined judicial and administrative functions. The Crown issued the New Laws of 1542 and later the *Leyes de Indias*, which, on paper, regulated the *encomienda* system and recognized Indigenous communal property (*ejidos*). In practice, enforcement was uneven. Missionaries and colonial officials operated within a complex legal framework that aimed to integrate Imperial structures while preserving certain local autonomy. The *Real Audiencia* in Mexico City and other capitals served as appellate courts, blending civil law procedure with colonial pragmatism.

French law in North America took a different shape. The *Coutume de Paris* provided the baseline for civil matters in New France, while royal ordinances and governor's decrees addressed frontier governance. French colonial law was comparatively more flexible in dealing with Indigenous nations, relying heavily on alliances and trade partnerships. The *droit de la grande pêche* and fur trade regulations structured economic life, but the French presence was sparse, and Indigenous legal orders remained robust in much of the territory. When disputes arose, French authorities often worked through councils and gift ceremonies, recognizing Indigenous sovereignty in practice while asserting royal oversight. The result was a hybrid legal environment where Indigenous diplomacy and French colonial administration coexisted in an uneasy but functional balance.

English common law arrived through settlement colonies and reception statutes. The British Crown claimed territory via the Doctrine of Discovery—later articulated in cases like *Johnson v. M'Intosh* (1823), which will be discussed in Chapter 13—and implemented systems of land tenure based on royal charters and grants. In colonies like Virginia, Massachusetts, and later the Carolina territories, English law was adopted by statute or judicial practice. Courts of assize and sessions dispensed justice in the common law style, with juries, precedent, and writs. The British also relied on treaties and military force to negotiate relations with Indigenous nations, a practice that recognized de facto sovereignty while asserting imperial supremacy. The common law's procedural rigor—writs, pleadings, jury trials—contrasted with the more discretionary and administrative style of Spanish courts and the conciliatory approach of French authorities, but each empire faced the same reality: Indigenous law could not be ignored.

Land was a primary site of legal contestation. In many Indigenous systems, land was held collectively, with use rights tied to stewardship and kinship. European property regimes—whether Spanish *ejidos* and *mercedes*, French seigneurial grants, or English fee simple estates—treated land as alienable private property subject to royal

disposition. These differences were not merely conceptual; they shaped the mechanics of transfer, inheritance, and dispute resolution. Colonial courts often recognized Indigenous occupancy in principle but constrained it in practice, limiting standing, imposing colonial definitions of title, and enforcing deeds and grants that many Indigenous communities never consented to. The result was a mismatch of legal languages, producing disputes that colonial judges struggled to resolve with doctrines that frequently favored imperial interests.

Family law further illustrates the layered nature of legal orders. Indigenous marriage and divorce practices varied widely, with matrilineal and patrilineal systems and distinct rules for kinship and adoption. European missions and colonial courts attempted to impose ecclesiastical or state-sanctioned marriage forms, often under the banner of moral reform. In Spanish territories, Catholic marriage law interacted with Indigenous customary practices; in French regions, the church and colonial administrators sought to regulate unions; in English colonies, common-law doctrines of marriage and inheritance were applied selectively. These interactions created hybrid family regimes that could differ from one valley or river system to the next, producing legal pluralism in everyday life. Children, inheritance, and property within marriage became sites where multiple legal orders met, sometimes harmoniously, sometimes in conflict.

Trade law also served as a crucible for legal pluralism. From the fur trade of the Great Lakes to the coastal commerce of the Atlantic and Pacific, rules governing exchange, liability, and partnership blended Indigenous protocols with colonial regulations. In the Northeast, wampum belts served as legal tokens in commercial and diplomatic transactions. On the Plains, calumet ceremonies sealed trade agreements and established safe passage. On the Pacific Coast, potlatch redistributed wealth and affirmed titles that structured commercial relationships. European authorities imposed monopolies, licenses, and tariffs, but local practices shaped outcomes. Disputes over debts, quality, and fraud were resolved in mixed forums—colonial courts, council fires, and informal arbitration—reflecting the pragmatic reality that commerce depended on trust across legal systems.

Violence and criminal law were similarly hybrid. Colonial authorities sought to assert a monopoly on punishment, but coercion remained a shared instrument of law across orders. Indigenous systems often emphasized restitution and social repair; European regimes leaned toward corporal punishment, incarceration, and execution. In frontier zones, the line between criminal conduct and political conflict blurred: raiding, retaliation, and enslavement existed in multiple traditions, and colonial law criminalized Indigenous practices while defending its own coercive measures. Missionaries and officials attempted to regulate behaviors deemed immoral or dangerous, leading to conflicts over jurisdiction and legitimacy. The result was a patchwork of punitive approaches, where the severity of sanctions depended as much on who was judging as on what was done.

Slavery further complicated legal landscapes. Indigenous societies practiced various forms of servitude and captivity, distinct from the racialized chattel slavery developed by Europeans. The transatlantic slave trade transformed legal regimes in colonial North America, embedding slavery in property law, criminal codes, and family status. Spanish and French colonies had complex relationships with slavery, influenced by Catholic doctrines and local economies; English colonies developed rigid racial statutes that denied enslaved people legal personhood. Law both enabled and constrained the institution, with courts adjudicating disputes over ownership, manumission, and resistance. Indigenous nations engaged with slavery in varied ways—adopting captives, negotiating with colonial slavers, and sometimes contesting colonial jurisdiction over enslaved people—adding yet another layer to plural legal orders.

Legal education and transmission differed across traditions. Indigenous law was carried through oral instruction, ceremony, and apprenticeship. European law moved through formal institutions: Inns of Court in England, universities and royal training in Spain, and the French system of royal administration. In colonial settings, legal professionals—barristers, notaries, judges—arrived with imperial baggage, adapting their practices to frontier needs. Notaries played a particularly important role in French and Spanish territories, drafting contracts, recording titles, and creating documentary evidence that shaped future disputes. In English colonies, attorneys and judges built a common law tradition that would later become a foundation for national legal systems. The interaction between these professional cultures and Indigenous oral diplomacy created a distinctive North American jurisprudence: pragmatic, plural, and often contested.

Language itself was a legal instrument. Oral arguments, speeches, and ceremonies performed legal functions; written documents served colonial record-keeping and evidentiary purposes. Wampum belts, calumet pipes, and potlatch regalia carried meaning that could be interpreted across cultures, but European authorities often discounted or misunderstood these forms. Treaties signed in European languages rarely captured Indigenous understandings, producing disputes that would span centuries. The tension between oral and written law shaped evidentiary rules, the authority of precedent, and the capacity of courts to adjudicate claims. It also influenced how communities remembered and enforced agreements, with oral traditions providing resilience against colonial reinterpretation.

Geography mattered. Legal orders in the dense woodlands of the Northeast differed from those in the arid Southwest, the coastal rainforests of the Pacific, or the grasslands of the Plains. Environmental constraints shaped property rules, trade routes, and conflict resolution. European law, imported as a one-size-fits-all imperial toolkit, had to adapt. Spanish missions required different governance than French trading posts or English farming settlements. Colonial authorities learned, often

painfully, that ignoring local legal norms could lead to unrest, economic failure, or military defeat. The continent's ecological diversity fostered legal diversity, and both Indigenous and colonial systems evolved to meet the demands of place.

Time and rhythm influenced legal process as well. Seasonal cycles structured Indigenous governance—councils convened at particular times of year, ceremonies marked key transitions, and trade flows followed ecological calendars. Colonial courts operated according to imperial timetables—terms of court, harvest schedules for tax collection, and military seasons. These different temporalities sometimes clashed, producing misunderstandings about deadlines, obligations, and the urgency of disputes. The intersection of legal calendars reflects a broader pattern: law is not just about rules, but about timing, ritual, and the orchestration of collective life.

Across this complex terrain, law mediated relationships between humans, and between humans and the land. It encoded responsibilities and defined entitlements. It set boundaries for acceptable behavior and provided avenues for redress. It was, and remains, a living system—one that European empires attempted to standardize but could never fully contain. The introduction of codified statutes and professional courts did not erase the older orders; it layered them, creating the legal pluralism that defines North American history.

This pluralism was not simply about coexistence; it was about negotiation. Indigenous communities engaged colonial law as active participants—appearing in courts, signing treaties, invoking diplomatic protocols. Colonial officials, in turn, recognized the practical need to accommodate Indigenous law, at least in certain domains. The result was a dynamic equilibrium: shifting balances of power, evolving doctrines, and hybrid practices that varied from region to region. Law became a shared language, imperfectly translated, but capable of enabling cooperation as well as conflict.

One hallmark of this early period was the emergence of forum shopping—parties selecting the legal system most favorable to their claims. Indigenous plaintiffs might choose between a council fire and a colonial court; merchants might move disputes from admiralty to common law; missionaries might invoke ecclesiastical jurisdiction. This was not a sign of chaos; it was evidence that multiple systems functioned simultaneously. The choice of forum reflected strategy, identity, and the nature of the dispute. It also created precedents for cross-cultural adjudication that would later inform formal doctrines of jurisdiction and comity.

Another enduring feature was the role of intermediaries. Interpreters, translators, traders, and diplomats acted as bridges between legal systems. Their competence and integrity could determine outcomes. Misinterpretations—sometimes deliberate, sometimes accidental—could derail negotiations or provoke conflict. The legal history of contact is filled with figures who navigated these boundaries: Indigenous orators fluent in European legal rhetoric, colonial officials who learned local protocols, traders

who mastered multiple commercial customs. These intermediaries shaped the substance of agreements and the evolution of legal norms.

Law under these conditions was necessarily pragmatic. Colonial authorities needed trade to flourish and borders to remain stable; Indigenous nations needed to protect their lands and sovereignty. The result was a series of accommodations: marriage recognized across lines; property use negotiated rather than imposed; crimes punished through a mixture of restitution and incarceration. These accommodations were not always just or durable, but they reflected the constraints of pluralism. European law could claim supremacy, but it relied on the cooperation of Indigenous communities and the acceptance of local norms.

The daily experience of law before and after contact was thus one of translation—between languages, between customs, between worldviews. Legal education happened in councils and courts, in missions and markets, in kitchens and camps. People learned what counted as evidence, how to present a claim, how to enforce a decision. They learned which authorities were legitimate and which were merely powerful. This learning was uneven and often painful, but it produced a continent-wide repertoire of legal practices that persist in modified form today.

In this early period, the building blocks of constitutional development took shape. The idea of negotiated authority—whether through clan mothers' consent, council consensus, or treaty diplomacy—prefigured later debates about checks and balances, federalism, and the separation of powers. The recognition of multiple jurisdictions and overlapping obligations foreshadowed the complex legal systems that modern states would adopt. The interplay of oral and written law anticipated contemporary disputes over interpretive method and the authority of precedent. In short, the legal traditions before contact—and the layered systems that emerged after it—provided the foundation for everything that followed.

To trace this history is to see law as a living practice rather than a static set of rules. It is to understand that the continent's legal architecture emerged through encounter, adaptation, and contest. Indigenous orders were not vanquished; they were forced to operate within imperial frameworks, and they influenced those frameworks in turn. European doctrines were not simply imposed; they were reshaped by local realities. The result was a legal landscape characterized by pluralism, negotiation, and pragmatic coexistence. This landscape would be tested and transformed by the rise of empires, the formation of states, and the struggles for rights and recognition, but its essential features were already in place before the first colonial court convened its first session.

The chapters that follow trace how these features evolved across jurisdictions and eras. They examine how courts and constitutions were built, how rights were defined and denied, how property regimes shifted, and how Indigenous claims were

addressed—or ignored—by successive legal orders. They also explore the ways in which law mediated the continent’s most profound transformations: the movement from colonies to republics, from empires to federations, from pluralism governed by negotiation to pluralism managed by modern courts and administrative agencies. The goal is not to produce a single narrative but to illuminate the multiple pathways that have shaped North American law.

In pursuing this history, we must read statutes alongside speeches, treaties alongside ceremonies, court records alongside oral traditions. We must recognize that law was not only a tool of empire but also a means of resistance and survival. We must account for the humor and the tragedy, the ingenuity and the injustice, that mark legal life on the continent. Before contact, law gave shape to communities; after contact, it became a language of encounter. Through both periods, it remained a practice of power and persuasion, capable of both harm and repair. This is the story of how law on the continent was imagined, argued, and lived—and how it continues to evolve.

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