

# **Comparatively Speaking: A Summary Paper for Objective 2**

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Robert Joseph

**Te Mātāhauariki Institute  
Occasional Paper Series**

Number 6  
2003

**TE MĀTĀHAUARIKI**



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## **COMPARATIVELY SPEAKING: A SUMMARY PAPER FOR OBJECTIVE 2**

***Robert Joseph***

For further information or additional copies of the  
Occasional Papers please contact the publisher.

Published by

Te Mātāhauariki Institute  
The University of Waikato  
Private Bag 3105  
Hamilton, New Zealand

<http://www.lianz.waikato.ac.nz>

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Facsimile 64-7-858 5032

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<http://www.lianz.waikato.ac.nz>

ISSN 1175-7256

**ISBN 0-9582343-6-1**



## ABSTRACT

Justice in the broad sense of fairness is respect for all peoples and for their laws and institutions. The ultimate justice for indigenous and minority groups depends on political power sharing through constitutional reform. Accordingly, a plural political-legal order may be necessary. A post-colonial future aimed at genuinely fusing two or more cultural identities into a dual, hybrid or plural social order requires the acceptance of differences and a building upon affinities. As this comparative work has shown, a post-colonial society may indeed be possible in Aotearoa / New Zealand, Canada, South Africa, Fiji, and elsewhere based on authentic transcultural, multicultural and bicultural relationships. Such developments could in turn assist in achieving a socially just reality. There is, therefore, a fundamental need for all members of society to seek out common ground and to establish a culture of public trust by a gradual process of constitutional, social, attitudinal and institutional change. The successful future of any nation-state depends on the commitment of all its citizens to a unified identity while still taking pride in the uniqueness of their individual and collective heritage.

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## FOREWORD

The establishment of socially inclusive laws and political and legal institutions in Aotearoa / New Zealand that actualise the partnership explicit and implicit in the *Treaty of Waitangi* are key outcomes of the Te Mātāhauariki Research Institute (the institute) program. In seeking to achieve those outcomes, institute members embarked on the task of identifying and evaluating models of laws and political and legal institutions that have attempted to reflect bicultural, multicultural and pluralist norms, principles, institutional arrangements and processes. This has inevitably required some international comparative explorations. The benefits of the comparative perspective cannot be stressed enough when we consider global developments in indigenous-state relations. When engaging in comparative research, methodological approaches must have regard to a series of interconnected choices to show that the models researched are comparable by emphasising similarities and differences in order to provide sufficient context.<sup>1</sup>

As part of objective 2<sup>2</sup>, comparative research was undertaken on Fiji, South Africa, Canada, Aotearoa / New Zealand, the Sudan, Australia and Belgium. The recurrent patterns underlying the restructuring processes in these jurisdictions while simultaneously grappling with the implications of new political realities for statehood, nation-building and pluralism may enable us to recognise shared experiences and common aspirations. Given that British colonial policy arose out of common legal and political traditions and these same common traditions formed the basis of the legal and political approaches in the former colonies of Fiji, South Africa, Canada, and Aotearoa / New Zealand, it is hardly surprising that they continue to influence contemporary indigenous policy. Efforts to find lasting and durable solutions should, therefore, commence with greater understanding of comparative indigenous/state dimensions and perspectives. The institute additionally explored contrasting models in Belgium, the Sudan and Quebec, Canada in order to provide further context. Drawing from these

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<sup>1</sup> For a methodological discussion of justifications for comparative research see Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, Auckland, 1999) at 2,3; Dogan, M & Pelassy, D (2nd ed.) *How To Compare Nations: Strategies in Comparative Politics* (Chatham House, New Jersey, 1990) at 111; and Donald Denoon, *Settler Capitalism: The Dynamics of Dependent Development in the Southern Hemisphere* (1983) at 8.

<sup>2</sup> See the Te Mātāhauariki Institute objectives on the Internet at [www.lianz.waikato.ac.nz](http://www.lianz.waikato.ac.nz).

papers and our general discussions this summary paper identifies some preliminary principles for inclusive laws and institutions for Aotearoa / New Zealand.

### IN SEARCH OF COMMON GROUND

One such preliminary principle is the search for common ground - the seeking out points of convergence - so that unity and difference may co-exist. This investigation of common ground is based on the premise that the only successful option available for Māori -Pakeha relations is that of coexistence. It also recognizes a certain history of coexistence and cross-cultural engagement that has produced affinity around a number of values and issues within the context of an Aotearoa / New Zealand identity and sensibility. Yet, this is not a unique phenomenon to Aotearoa / New Zealand.

Although all of the jurisdictions examined had ethnic groups with ideological, cultural and linguistic differences, each illustrated a shared desire for and commitment to common goals. Joseph in his investigation of biculturalism and multiculturalism in Canada<sup>3</sup> identified a number of recommendations for common ground including the promotion and preservation of human rights, the development of a Canadian identity, the reinforcement of Canadian unity, the improvement of citizenship participation, and the encouragement of cultural diversification within a bilingual, bicultural framework.

Common ground does not mean amalgamation or neo-assimilation. In her reflections on pluralistic conundrums in Belgium, Morgan noted ‘a united desire to maintain the respectively unique cultural and linguistic identities of both groups, which, in turn animated their form of nascent political pluralism.’<sup>4</sup> Iorns-Magallanes, in her review of the *Report of the Canadian Royal Commission on Aboriginal Peoples*,<sup>5</sup> cited the four principles of co-existence as articulated by the report: mutual recognition, mutual respect, sharing, and mutual responsibility. These are represented in a circular and continuing process of renewal and rediscovery of relations.

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<sup>3</sup> Joseph, R *Constitutional Provisions for Pluralism, Biculturalism and Multiculturalism in Canada and New Zealand: Perspectives From the Quèbècois, First Nations, and Maori* (Te Matahauriki Research Institute, Waikato University, 2000).

<sup>4</sup> Morgan, G ‘Belgium and (Nascent?) Political Pluralism’ in her ‘Reflections on Pluralist Conundrums’ in *the Yearbook of New Zealand Jurisprudence* (1998).

<sup>5</sup> Iorns-Magallanes, C *Report of the Canadian Royal Commission on Aboriginal Peoples* (Te Matahauriki Research Institute, Waikato University, 2000).

Quentin-Baxter identified the Compact in the 1997 Constitution as a convergence for nation building and a commitment to democracy, national unity, racial harmony, equality, legal certainty for economic development and the social advancement of all communities.<sup>6</sup> The subsequent civil crisis in Fiji, however, reminds us that despite the rhetoric, the achievement of finding common ground is no easy task.

### SUBTLE REVOLUTION

Essentially, this research project is seeking to successfully effect attitudinal change, even a paradigm shift, which inevitably involves gradualism and subtlety rather than ‘quick-fix’ solutions. For example, the achievement of any indigenous settlement is political and is achieved principally by direct negotiations between the Crown and the respective claimant groups. Professor Evelyn Stokes described the political rhetoric surrounding the treaty-making process in British Columbia as ‘unfinished business’ needing to be completed for historical, legal, economic and social reasons.<sup>7</sup> The pursuit of certainty for land and resource use, settling aboriginal issues with equality and finality, the protection of third party interests, social stability, and new hope for the future are integral goals of the settlement process which inevitably requires attitudinal change and time.

In Australia, his Honour Mr Justice Woodward enunciated a number of conclusions he had reached to settle indigenous issues that included compromise and flexibility. Referring to aboriginal claims, he stated:

Given the historical and political difficulties, there could be no ideal solution to the land rights problem; there was not even a good solution available to reconcile conflicting interests; but somewhere, in each situation, there was a best solution waiting to be identified – one which had fewer defects than any other.<sup>8</sup>

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<sup>6</sup> Quentin-Baxter, *A Ethnic Accommodation in the Republic of the Fiji Islands* (Te Matahauriki Research Institute, Waikato University, 1998).

<sup>7</sup> Stokes, E *The Treaty-Making Process in British Columbia* (Department of Geography, University of Waikato, Hamilton, New Zealand, 1998).

<sup>8</sup> Woodward J, Paper to the Twenty-Third Australian Legal Convention, Melbourne, 1985.

An example can be drawn from Iorns-Magallanes' research on the *Report of the Royal Commission on Aboriginal Peoples*.<sup>9</sup> Iorns-Magallanes noted that the judiciary could be influenced in the way it deals with indigenous people by the availability of informative, thorough, and respected texts. Rumbles concluded that this project might contribute to a subtle revolution within the judiciary by producing resources that could be used easily by decision-makers.<sup>10</sup> Such resources would necessarily be based on vigorous and robust scholarship in order to allow, for example, the judiciary to feel confident in using authoritative texts such as the institute's *Te Mātāpunenga*, a proto-compendium of Māori customary laws and institutions, to assist with the epistemological, translational, pedagogical and ontological concerns at the interface of common and customary law in New Zealand.

## SOCIAL JUSTICE

A key to attitudinal change and the development of an Aotearoa / New Zealand identity includes a sense of justice for not only past wrongs but also future relationships. Claims have been made in a number of nation-states that indigenous lands and livelihood were expropriated by states with institutions that discriminated and oppressed them in contravention of treaties and in violation of natural, municipal, constitutional, and international law. As we become aware of these injustices what are we to do? How is historic reparation to be balanced against claims based on present provision for need or against efforts that aim to make society more just in the future?

### Shared Justice

One assumption of justice is the principle of non-discrimination - equal treatment for equal cases before the law. Separate justice based on indigenous and minority cultural norms is thus, *prima facie*, discriminatory justice and poses some troublesome questions for well intending proponents of reconciliatory justice and institutional re-design. There are, however, alternative models of shared justice – separate justice amongst groups

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<sup>9</sup> *Supra*, n. 5.

<sup>10</sup> Rumbles, R *Cultural/Legal Pluralism and the Judiciary* (Te Matahauriki Research Institute, Waikato University, 2000).

within nations. Examples include the nascent political pluralism model in Belgium;<sup>11</sup> the Quèbècois French enclave in Quebec;<sup>12</sup> the First Nations self-government discourse in Canada;<sup>13</sup> the independent tribal justice of the American Indian in the United States;<sup>14</sup> and juridic pluralism in South Africa.<sup>15</sup>

### **Reconciliatory Justice**

People of varied political persuasions have argued that all people must have power over their own destinies. For this reason comprehensive reconciliatory justice must also be forward looking. In his research on multiculturalism in Canada and biculturalism in Aotearoa / New Zealand, Joseph concluded that the greater the diversity of the racial and cultural mix, the greater the need for tolerance, understanding and acceptance of one another as fellow citizens, which is an explicitly retrospective and implicitly forward-looking exercise.<sup>16</sup> Consequently, purely financial reparation for historic injustices may not serve this forward-looking end. In addition, it is unjust to continue to perpetuate injustices resulting from unjust laws and institutions. There must, therefore, be other elements involved in the reconciliatory process besides reparations. For indigenous peoples, the power to make decisions that affect their lives is paramount. Indigenous settlements and institutional re-design might serve to provide indigenous peoples some of this power. Moreover, a new relationship between the Crown and indigenous and other minority groups should be established based on trust, respect, and dignity. Professor Evelyn Stokes reminds us that the treaty-making process in British Columbia is about more than just settlements – it is about the construction of a new relationship.<sup>17</sup>

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<sup>11</sup> Supra, n. 4.

<sup>12</sup> Supra, n. 3.

<sup>13</sup> Idem and supra, n. 5.

<sup>14</sup> Hodge, B Justice: Unitary or Separate? in Novitz, D & Wilmott, B (eds) *New Zealand in Crisis* (1995) at 171.

<sup>15</sup> Rumbles, W *Africa: Received and Customary Law Under One Umbrella: Review of the South African Law Commissions' Project 90: The Harmonisation of the Common Law and the Indigenous Law: Report on Conflicts of Laws* (Te Matahauariki Research Institute, Waikato University, 2000).

<sup>16</sup> Supra, n. 3.

<sup>17</sup> Supra, n. 7.

Joseph commented on the complexities of the implementation process of the *James Bay and Northern Quebec Agreement 1975*.<sup>18</sup> He stated that effective implementation had not occurred at the macro-political level due to disputes over vague and imprecise wording and a lack of political will, and a lack of understanding of the cultural dynamics of the indigenous peoples. Joseph concluded that because settlement implementation is a moving and amorphous target, there is a requirement for a new relationship based on trust, respect and dignity. A new relationship was established constitutionally in Belgium between the Walloon and Flemish ethnic groups which Morgan stressed is based on both groups gradually creating a step by step bifurcated system aimed at preserving the unique identity of each.<sup>19</sup> Iorns-Magallanes also addressed the issue of self-determination in her summary of the *Report of the Canadian Royal Commission on Aboriginal Peoples*.<sup>20</sup> Aboriginal self-determination, she stated, emerges within the context of four principles for future relationships between the Crown and Aboriginal peoples: mutual recognition, mutual respect, sharing, and mutual responsibility.

#### **Change - Gradual Process Not Event**

A sense of justice and the building of appropriate relationships may be achieved by approaches that are pragmatic, gradual, and in the spirit of compromise. Durie stated that the settlement of indigenous claims requires broad and expansive thinking, ingenuity in long term planning, humanity and compassion, and vision.<sup>21</sup> His Honour Mr Justice Woodward of Australia also noted the importance of gradual change when he stated:

Planning should essentially be for the longer term. We should be prepared to plan for years and even decades ahead and not expect to have all our solutions in place immediately or to see immediate benefits from those that are; this also requires

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<sup>18</sup> Joseph, R *Biculturalism in a Post-Settlement Context* (Conference Address for Te Matahauriki Research Institute at Te Oru Rangahau Maori Research and Development Conference, School of Maori Studies, Massey University, 7-9 July, 1998) at 379.

<sup>19</sup> *Supra*, n. 4.

<sup>20</sup> *Supra*, n. 5.

<sup>21</sup> Durie, E *Waitangi: Justice and Reconciliation* (Second David Unaipon Lecture, School of Aboriginal and Islander Administration, University of South Australia, Adelaide, 10 October, 1991) at 11.

some flexibility to be built into all proposals, as experience or changing attitudes may require amendments.<sup>22</sup>

### SELF-DETERMINATION

Referring to social justice, Iorns-Magallanes concluded that a new framework of laws should be established based on the principle of indigenous self-determination.<sup>23</sup> She argued that the right of all people to self-determination is a fundamental principle and right at international law. Traditionally there has been a reluctance to admit indigenous claims of self-determination but Iorns-Magallanes noted that this position is changing with nation-states recognising that indigenous peoples and other minorities within their boundaries have rights that need protecting. There are an increasing number of international indigenous rights and standards that reflect the norms of self-determination that are primarily concerned with processes of consultation and decision making, but with a view to achieving the overarching substantive goals of maintenance of indigenous cultural identity and self-government in some spheres.

Furthermore, the international principles of political participation under democracy (including decentralization) and cultural pluralism have resulted in an acceptance that indigenous peoples are entitled to 'spheres' of governmental or administrative autonomy for their communities as well as effective participation and consultation on all decisions affecting them that are appropriated by the larger institutions of government. Although nation-states have not all been willing to accept a statement of a *right* to autonomy or self-government, they have increasingly expressed agreement that indigenous peoples are entitled to maintain and develop their traditional institutions and to otherwise enjoy autonomous spheres of governmental authority appropriate to their circumstances.

Iorns-Magallanes further recognised that in Canada, any inherent right to self-determination can only exist within the Canadian constitutional paradigm and thus there is not an absolute right of self-government. Indeed, Professor Stokes in her discussion of

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<sup>22</sup> *Supra*, n. 8.

<sup>23</sup> Iorns-Magallanes, C 'A New Zealand Case Study: Child Welfare' in Quentin-Baxter, *A Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) at 132; and Iorns-Magallanes, C

aboriginal self-government noted that while some First Nations have been granted self-government with constitutional recognition, it is to be achieved within the constitutional arrangements, fiscal restraints, and the larger interests of all Canadians.<sup>24</sup>

## PLURALISM

The commitment to seek out common ground and the building of new appropriate relationships is premised on a notion of co-existence that inevitably steers one towards pluralism. The nation-states of Belgium, Canada, South Africa, and Fiji have had to create a space for indigenous and minority communities recognising, albeit grudgingly, the plurality of identities and the need for accommodating them within their political, legal, and institutional systems. Morgan comprehensively discussed the nature of pluralism as arising in various contexts and having multiple nuances and she noted that it is an often-espoused term in the discourses of politics and jurisprudence.<sup>25</sup> Many if not all societies contain a plurality of legal orders and legal subsystems or fragments of these. However, the essence of pluralism is some sort of normative multiplicity in which two or more legal systems coexist in the same social field.<sup>26</sup> Each of the jurisdictions explored contained pluralistic orders where the nation-state has been and continues to engage in attempts to acknowledge and accept diversity.

### Juridic Pluralism

Juridic pluralism has received attention by Quentin-Baxter in Fiji,<sup>27</sup> Morgan in the Sudan,<sup>28</sup> and Rumbles in his discussion of African customary law and its harmonisation with 'received law.'<sup>29</sup> In Fiji and most of Africa, indigenous customary law was retained in some form, especially in terms of civil (private) law. As a result customary and common law operate as independent legal regimes. In both the South

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'International Human Rights and Domestic Law' in Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 1999) at 254.

<sup>24</sup> Supra, n. 7.

<sup>25</sup> Supra, n. 4.

<sup>26</sup> Supra, n. 3.

<sup>27</sup> Supra, n.6.

<sup>28</sup> Morgan, G 'Sudan and Juridic Pluralism' in supra, n.3

<sup>29</sup> Supra, n. 10.

African and Fijian pluralist models serious criminal offences are dealt with under one legal code. It appears criminal justice is an area where the country needs a unified system of law, while application of sentence may differ according to culture. Customary criminal law may be able to be applied in community based traditional courts/tribunals but this would be only in minor matters as once the case enters the formal court system the unified system would apply to all equally, regardless of cultural affiliation.

Although Morgan suggests that Sudan criminal law could be personalised with Sharia law applying to Muslims and statutory law applying to others, this is not the reality of the Sudan or any of the comparative case studies undertaken.<sup>30</sup> It appears that even if the system can theoretically apply personalised criminal law, the State requires a unified criminal law. Even in Belgium, which Morgan sees as a deeper form of pluralism than the Sudan, the criminal code is unified. However, Morgan emphasises that because juridic pluralism in the Sudan is limited to circumscribed areas of traditionally ‘private’ interest it shows willingness on the part of the larger community to foster, or at least to officially tolerate, the intimate ways of social ordering of the sub-groupings found within it. Furthermore, Morgan points out the necessity of a unified commercial code, as one of the outer limits of ‘economically functional juridic pluralism’ and that a uniform commercial law applying to persons of various legal traditions extends back into Roman times.

### **Political Pluralism**

Morgan on Belgium and Joseph on Canada discussed political pluralism. Morgan states that any possible solution to deep normative pluralism requires each paradigm to incorporate a fundamental and pervading commitment to pluralism itself. Belgium’s experiment in nascent political pluralism has developed over time, starting with formal linguistic commitments and informal power sharing conventions. Morgan concluded that a reflective commitment to a deeply institutionalised dualism, albeit more expensive than monism, could address legitimate moral claims to cultural self-definition by Māori and at

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<sup>30</sup> Supra, n. 28.

the same time prevent New Zealand's unique identity from gradually dissipating into a uniform global economic and cultural marketplace.<sup>31</sup>

Joseph states that official government policy in Canada has recognised that differences in history, ethnicity, and geography call for different treatment of people. Accordingly, Quebec is the only Canadian province with a system of French civil law as opposed to British common law, and a host of unique public and private institutions. In addition, the pluralistic notion of self-government has evolved as the preferred discourse for aboriginal rights and institutional design in Canada. Although varied, the key elements of self-government encompass control over the process and power of self-government as a third tier of government; territorial groundedness as a basis for the healing process; and the re-alignment of the political agenda to accommodate indigenous authority alongside federal and provincial jurisdictions.<sup>32</sup>

#### **PUBLIC TRUST**

A key political concern for legal, political, and institutional reform is the procurement of trust and confidence in state processes, systems, and institutions. Morgan queried whether political and juridic pluralism could be instituted without violence to public trust and confidence in one another's fulfilling of agreed upon group and individual roles and overall trust and confidence in the propriety of the plural institutions themselves. Morgan concluded that in Belgium, cultural and possibly nascent political pluralism seems to have maintained trust and confidence in the public institutions and to have promoted the possibility of intergroup trust through measures fostering intergroup confidence.

Trust and confidence must also be procured in the settlement processes for addressing indigenous grievances. A key political concern for the settlement of indigenous claims in British Columbia (B.C) has been the procurement of public trust and goodwill in the settlement process. The B.C provincial government has stressed that the treaty-making process must be fair, open, principled and community based, democratic, efficient and acceptable. Furthermore, integral to this policy is the availability of

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<sup>31</sup> Supra, n. 4.

<sup>32</sup> Supra, n. 3.

information and education, public consultation, a dispute resolution process, and pro-activity on the part of local governments.<sup>33</sup> Greater openness and a sense of participation by third party interest groups is an avenue that could perhaps be explored further with the treaty settlement process in Aotearoa / New Zealand.

#### CONSTITUTIONAL AND INSTITUTIONAL EVOLUTION

Aotearoa / New Zealand has recently concerned itself with issues of constitutional reform and institutional re-design. The constitutional recognition of pluralist systems has been instituted in Belgium, Canada, Fiji, South Africa and Aotearoa / New Zealand although in differing degrees. The Belgian constitutional model is a very informative model of co-existence and self-determination with laws and institutions that seem to adequately accommodate the Flemish and Walloon ethnic groups. This model illustrates a commitment to laws and institutions which are socially inclusive of the Walloon and Fleming identities and which actualises what seems to be an equitable and socially just partnership.<sup>34</sup>

The Quèbècois bicultural model in Canada has been partially eroded away through the neglect of Francophone political interests in the *Constitution Act 1982* and the leveling effects of the present multiculturalism discourse. The Quèbècois enclave, however, is a pluralistic constitutional model of co-existence and institutional design that seems to be socially just in Quebec but marginalised elsewhere throughout the Canadian nation-state.<sup>35</sup> Significant legal and institutional accommodations are incorporated in the *South African Constitution 1996*, which recognises customary and received law as part of the law of the country. A repugnancy clause qualifies any application of customary law, if it is repugnant to justice, equity, good conscience, or public policy, with the overriding principle being human rights. The legal and institutional systems of South Africa are pluralistic, socially inclusive, and liberally accommodative of customary and common law providing a firm platform for co-existence.<sup>36</sup>

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<sup>33</sup> Supra, n. 7.

<sup>34</sup> Supra, n. 4.

<sup>35</sup> Supra, n. 3.

<sup>36</sup> Supra, n. 15.

Significant constitutional and institutional accommodations have been conceded to the First Nations of Canada since the *Constitution Act 1982*. Aboriginal and treaty rights are now recognised and affirmed including negotiated self-government rights. The inherent right to self-government in effect establishes a third tier of government, one radical example being Nunavut which created a new Inuit Territory in Canada's isolated northern geo-political boundary. The Canadian government, it seems, is striving to establish a relationship of co-existence with aboriginal peoples based on partnership and the recognition of their special status with laws and institutions reflecting these policies.<sup>37</sup>

The 1990 Constitution of Fiji recognised customary law as part of the law of the country with received law and held that the interests of Fijians were paramount with special provisions provided.<sup>38</sup> Under the 1997 Fijian Constitution, however, these provisions were repealed. Still, the 1997 Constitution continued to provide for inclusive laws and institutions that are accommodative of the rights of indigenous Fijians but not to the same extent as the 1990 Constitution. This could have been perceived as a lowering of the status of customary law to customary morality and perhaps led to sectional dissatisfaction with the constitution. The recent civil crisis in Fiji highlights the fact that despite the rhetoric, institutional, legal, constitutional, and attitudinal change are difficult tasks.

#### **SOME FORMATIVE CONCLUSIONS**

This brief summary has highlighted that quite a lot of social engineering advocacy over disparate contexts has been and is currently taking place around the world. I do frankly acknowledge however that there is another view – that of historical jurisprudence – which may doubt that 'social engineering' can lead to social change in the way pre-supposed. I also acknowledge the assumptions about the universal role of law in society which are inherent in almost all of the papers discussed. The laws and institutions of all cultural and ethnic groups discussed are dynamic, fluidic, epistemologically pragmatic and therefore important.

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<sup>37</sup> Supra, n. 3.

<sup>38</sup> Supra, n. 6.

Still, a post-colonial future aimed at genuinely fusing two or more cultural identities into a dual or plural social order requires acceptance of differences and building upon affinities. Based on an authentic multicultural partnership in Canada and South Africa, and an authentic bicultural partnership in Belgium, Fiji, and Aotearoa / New Zealand, such a post-colonial society may indeed be possible. These developments may in turn assist in achieving a socially just reality. The ultimate justice for indigenous and minority groups depends on political power sharing through constitutional reform. Justice in the broad sense of fairness is respect for all peoples – and for their laws and institutions. Therefore, a plural legal order is necessary. The present political climate and other circumstances have never been more favourable to forge this new reality. In the end, the successful future of the nation-states examined and others depends on the commitment of all its citizens to a unified identity, while still taking pride in the uniqueness of their individual heritage.

**APPENDIX**  
**COMPARATIVELY SPEAKING: A SUMMARY REPORT**

Te Mātāhauraki Research Unit, July 2001

			<b>BELGIUM</b>				
<b>COUNTRY</b>	<b>Ethnic Groups Popn. %</b>	<b>1 Common Ground</b>	<b>2 Constitutional Recognition of Diversity</b>	<b>3 Political Devolution (Institutions)</b>	<b>4 Custom Law Provisions</b>	<b>5 Innovations</b>	<b>6 Problems</b>
<b>BELGIUM</b>	<p>Total population as at July 2001 – 10,241,506</p> <p>Flemish (F) 31%</p> <p>Walloons (W) 58%</p> <p><i>(All population statistics have been taken from the World Fact Book on the internet at www.yahooligans.com.)</i></p>	<p>United desire to maintain their respectively unique cultural and linguistic identities (Morgan, (1998) 34)</p> <p>Nation-building, national identity, legal certainty for economic development</p>	<p><i>Constitution Act 1980 (Const.)</i></p> <p>1898 – bilingualism official, 1914 bilingual education;</p> <p>Belgian ‘alarm bell’ shows national solidarity while proceeding along path of progressively more cultural autonomy. Bell provides that motions, giving reasons submitted by ¾ majority of Parliament claiming a proposed law before Parliament risks seriously impairing relations between linguistic communities, suspend the Parliamentary process. Constitution Art 38. Proposed law then referred to Council of Ministers (CMs) –divided equally linguistically – considers the matter, gives an opinion in 30 days, returns the matter to Parl. for further consideration. A language group can only ring alarm bell once. Constitution art 38.</p>	<p>High devolution of authority to W &amp; F’s.</p> <p>Formal Geographic Regions (GR)– mono-linguistic - W, F, Brussels (bilingual);</p> <p>Regional Assembly (RA) &amp; executive allotted 10% national budget</p> <p>Community Councils (CC) – authority not confined by geography but linguistic community – areas cultural matters, education, teaching, and international cultural cooperation. Regional Council (R.C) requires 2/3rds overall &amp; concurrent council’s linguistic majorities in the 2 Houses to pass legislation concerning CCs and their areas of authority. Const. Art 59</p> <p>Constitutional Court of Arbitration (CCA) conflict of laws in areas of over-lapping authority. ½ jurists, ½ politicians enable intercultural issues respected</p> <p>Constitution amended 1993 R&amp;CCs devolved authority generalised and central government authority limited to</p>	<p>Hybrid code – geographic regions governed by monolingualism and monoculturalism, except Brussels – bicultural, bilingual</p> <p>GR- Council decrees in area have standing of law (Morgan 37); national legislation for RCs required be passed by 2/3rds majorities and by concurrent majorities of each language group in Houses bicameral parliament Cons. Art 107.</p> <p>Jurisdiction of CCs extends to geographical regions &amp; linguistic community in officially bilingual Brussels, areas which CCs regulate (law) – language, culture, museums, education, media, leisure, some health areas, welfare policy, international treaties in areas of CCs competence. 1982 R&amp;CCs extended some powers of taxation, borrowing, and fund allocation from national government.</p>	<p>Formal Geographic Regions – mono-linguistic W, F, Brussels (bilingual); each region maintains a scrupulous monolingualism and monoculturalism</p> <p>Const. Court of Arbitration (CCA) established to settle conflicting claims of authority, and conflicts arising from conflicts of laws issues in areas over-lapping authority.</p> <p>Cultural and national ‘backgrounds’ respected and notion of ‘trust’ and ‘confidence’ in public institutions promoted possibility of intergroup trust through measures fostering intergroup confidence</p>	<p>Austinian nightmare!</p> <p>Costs, complexity of governing structures – overlapping but separate institutions to regulate both geographically separated and geographically mixed Brussels by linguistically separated communities; duplication of institutions for education, health, welfare in shared areas, national legislation being derailed by ‘alarm bells’, potential for at least 5 way conflicts of laws &amp; authority, constitutional arbitration of conflicts by courts comprised of politicians and judges with broad guidance.</p>

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			<b>CANADA - Québécois</b>				
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<b>CANADA</b>	<p>Total population as at 2001 – 29,639,030</p> <p>Québécois (Q) - 25%</p> <p>Canada 90% in Quebec</p>	<p>Charter of Rights and Freedoms 1982, human rights, fundamental freedoms – democracy, equality, mobility, biculturalism, social justice, employment equity,</p> <p>Protected French enclave in Canada - Quebec - distinct society</p> <p>Nation-building, , national identity, legal certainty for economic development</p>	<p><i>Constitution Act 1982 (Const.)</i></p> <p><i>Quebec Act 1774</i> – distinct society</p> <p>Quebec. – <i>British North America Act 1867</i> (BNA) Language and culture;</p> <p>s.133 guaranteed use of French and English in Federal courts, official languages,</p> <p>s.94 Quebec (Que.) civil law system instead of English common law in certain areas. Assumption was that Quebec's civil code would remain distinct from common law in other provinces</p> <p>Beyond law and language, Quebec has many different public and private institutions</p> <p>Linguistic rights – Official Language Act, bilingualism policies, French language majority status in Quebec, equal status in New Brunswick, special status in Ontario and minority status in other provinces,</p>	<p>Que. – ongoing dispute over ‘distinct society’ status</p> <p>Decentralization with harmonized national arrangements governing social policy –health care, income security, and unemployment insurance, financial equalisation, and legal rights.</p> <p>Quebec allotted 75 of 265 seats in Federal House of Commons, 3 of 9 members of the Supreme Court of Canada appointed from bench or bar of Quebec</p>	<p>Hybrid code in Quebec – Québécois political/legal enclave - bicultural</p> <p>Quebec. – Own civil law system and institutions in Quebec, bicultural legal system, language, juries, s.94 BNA 1867 uniformity of laws relative to property, civil rights, civil procedure, assumed Quebec's civil code and procedure would remain distinct from common law</p> <p>Therefore, mutual co-existence in same geo-political boundaries of nation-state</p>	<p>Royal Commission on Bilingualism and Biculturalism established to deal with constitutional crisis ie Quebec's ‘quiet revolution. ‘Result – Official Language Act 1969</p> <p>Equality but Constitution recognises that differences of history, ethnicity &amp; geography call for different provincial treatment</p> <p>Multiculturalism ss15.1, 27, commission, best practices in civil service including respect for diversity, language and understanding promotions, equal opportunities</p>	<p>Constitution failed Quebec. Government excluded from constitutional negotiations 1981-82, the Const formulated in its absence, not consented to by Quebec. Charter restricted Provincial powers limiting the capacity of Quebec National Assembly to implement French-language policy, new amending procedures denied a prior veto to Quebec Hence Quebec's powers have diminished, resulting in a profound sense of grievance.</p> <p>Multiculturalisms leveling effect on Quebec's special status</p>

			<b>CANADA - First Nations</b>					
<b>COUNTRY</b>	<b>Ethnic Groups Popn. %</b>	<b>1 Common Ground</b>	<b>2 Constitutional Recognition of Diversity</b>	<b>3 Political Devolution (Institutions)</b>	<b>4 Custom Law Provisions</b>	<b>5 Innovations</b>	<b>6 Problems</b>	
<b>CANADA</b>	Total population as at 2001 – 29,639,030  First Nations (FN) 1.5-3%	Charter of Rights and Freedoms 1982, 'equality, social justice'  'Lets face it, we are all here to stay' RT. HON. Antonio Lamer, Chief Justice, Supreme Court of Canada, <i>Delgamuukw v The Queen</i> , Dec. 11, 1997  'What we are facing in the current treaty negotiations runs far deeper and far more complex than the simple legalities of land ownership and self-government. We must find a way to live together and to share, in an equal and fair manner, in the resources of this province ...' B.C. M.L.A. Gordon Wilson, British Columbia  Nation-building, , national identity, legal certainty for economic	BNA Act 1867, <i>Constitution Act 1982</i> (Const.)  The <i>Constitution Act 1982</i> affirmed the 'existing aboriginal and treaty rights' without specifying their magnitude or scope.  Section 25 ensures Charter rights and freedoms guarantees do not abrogate or derogate from existing Aboriginal and treaty rights or any aboriginal rights acquired by way of comprehensive land claims settlements. Because s.25 is part of the Charter of Rights it is not to be construed as derogating from aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. This makes clear that the equality guarantee in s.15 of the Charter does not invalidate native rights. Thus, a fishing rights program negotiated as part of a land-claims agreement cannot be successfully appealed by non-indigenous peoples on the ground that – following the Charter's equal rights principles – it would be unfair to exclude the appellants from similar rights.  Section 35 gives constitutional recognition (but not definition) to 'aboriginal and treaty rights,' and protects them from legislative attack. Section 35(1) declares that constitutional amendments to the native rights provisions of the Constitution Acts, 1867 and 1982 will not be made without prior constitutional conference involving participation by representatives of the aboriginal peoples of Canada. These three provisions – ss., 35, 25, 35(1) – reinforce s.91(24) in their recognition of special status for the aboriginal peoples.  Constitutional provisions not vulnerable to alteration by the unilateral action of the federal or	FNs – settlements - self-government, joint ownership land resources, service delivery. Political-Legal Devolution - Self-government. Key elements of reform are varied but encompass control over the process and power of self-governance as a third tier of government and the re-alignment of the political agenda to accommodate indigenous authority alongside federal and provincial jurisdictions. In the south, First Nation (FN) bands are taking control of the design and delivery of government programs to overcome discrimination and neglect. In the Pacific provinces of BC federal and provincial authorities are negotiating treaties for joint ownership of land and resources, service delivery and regional government. In the north, land and political settlements on a regional basis including the home-rule arrangement in the eastern Arctic region known as 'Nunavut.' The Canadian government is striving for a relationship based on partnership and the recognition of an inherent right to Aboriginal self-government. The <i>Nisga'a Settlement Agreement 2000</i> provides fair opportunity for Nisga'a to manage their affairs in a fashion similar to local governments, subject to overarching laws and principles of the Charter of Rights and Freedoms.	Self-government provisions in comprehensive settlement agreements. The Nisga'a Settlement Agreement provides fair opportunity for Nisga'a to manage affairs in a fashion similar to local governments, and subject to the overarching laws and principles of the Canadian Charter of Rights and Freedoms and the Criminal Code of Canada. Nisga'a laws will have priority, but they are limited and defined. Concerns matters that are internal and local such as culture, or include a condition that the laws meet existing government standards. Everyone subjected to Criminal Code of Canada. The settlement addresses the relationships of Nisga'a laws with the laws of Canada & B.C and identifies the specific areas in which Nisga'a law will prevail. Nisga'a Constitution pursuant to the Settlement will provide for Ayuukh Nisga'a (customs), creation of Nisga'a law in areas eg citizenship, culture, language, lands, assets, aboriginal healers, child custody – Nisga'a government has standing in any judicial proceedings in Nisga'a child custody disputes, court will consider evidence in respect of Nisga'a laws and customs (s.94 Settlement), devolution of cultural property, court will consider Nisga'a laws and customs (s.119	Because of s.24(1) judiciary given very strong defining powers – In <i>Delgamuukw v B.C</i> [1998] Supreme Court of Canada instructed governments to negotiate with FNs to settle outstanding claims;  Tacit then inherent right to self-government recognised; provisions part of existing constitutional aboriginal rights, self-government part of comprehensive land claims agreements and where agreed constitutionally protected.  Hybrid code in Nass Valley – isolated geographic region, bicultural region	<i>Indian Act</i> - Indian affairs placed under federal jurisdiction, paternalistic, assimilationist;  Const 1982, s.24(1) judiciary given a free hand to remedy infringed constitutional rights and freedoms according to what they deem to be appropriate and just in the circumstances. Very high costs to get to Supreme Court, long, drawn out. Wide ranging power granted to judiciary.  Judicial tests for recognising aboriginal rights –distinctiveness test, right must be defining feature of culture prior to contact – reifies culture,  Multiculturalisms leveling effect of First Nations' special status.	

		development	a provincial government.		settlement).		
			<b>FIJI</b>				
COUNTRY	Ethnic Groups Popn. %	1 Common Ground	2 Constitutional Recognition of Diversity	3 Political Devolution (Institutions)	4 Custom Law Provisions	5 Innovations	6 Problems
<b>FIJI</b>	Total population as at 2001 – 832,494  Fijians (F) 50.7% Fijian-Indians (I) 43.7%	Compact, chapt.2 Constitution 1997, social justice, improvements to meet needs of multi-ethnic, multi-cultural society, promote racial harmony, national unity, economic and social advancement of all communities (Bax, 10). Reconcile interests of all communities  Nation-building, , national identity, legal certainty for economic development	<i>Constitution Act 1990</i> ('90 Constitution)  <i>Constitution Act 1997</i> ('97 Constitution)  '90 Constitution – interests of Fijians paramount  The 90 Constitution provided for the establishment of special Fijian courts (s 122) and entrenchment of any laws which effect Fijian land customs or customary rights (other than by altering any of the listed Acts).  '97 Con contains provisions expressly protecting rights of Indigenous Fijians (Fijian, Rotumans, and the Banaban) which pertain to land, fisheries, minerals, chiefly titles, community governance, dispute resolution and other customary law	The '90 Constitution provided for the establishment of special Fijian courts (s 122) and the entrenchment of any law that effects Fijian land customs or customary rights.  '97 Con contains provisions expressly protecting rights of Indigenous Fijians (Fijian, Rotumans, and the Banaban) which pertain to land, fisheries, minerals, chiefly titles, community governance, dispute resolution and other customary law. These do not have the paramount position in the '97 constitution as they had in the '90 constitution.  Traditional chiefly institution, Bose Levu Vakaturaga – Great Council of Chiefs, established s.116, '97 Const. has administrative roles, eg. advisor to government	Hybrid code in '90 Constitution where customary law (c.l) was law but in '97 Const .c.l relegated to customary morality, marginalised biculturalism  The recognition of customary law as part of the law of the country on par with received law has been constitutionally recognised in the 1990 Fijian Constitution. s100 (3) of the 1990 Constitution, stated that ... until such time as an Act of Parliament otherwise provides , Fijian customary law shall have an effect as part of the Laws of Fiji: (as cited in Reeves: 1996, 610).	Great Council of Chiefs – Bose Levu Vakaturaga – advisory role to government.	Sections 122, 100(3) excluded in '97 Constitution. ie Fijian customary law no longer automatically part of the law of country; no special Fijian Courts; and there is no special procedure required for the enactment of statutes that affect the customary law of Fijians. Even though the '97 Constitution contains provisions expressly protecting rights of Indigenous Fijians (Fijian, Rotumans, and the Banaban) which pertain to land, fisheries, minerals, chiefly titles, community governance, dispute resolution and other customary law, these do not have the paramount position in the '97 Constitution as they had in the '90 Constitution. This could have been perceived as a lowering of the status of customary law, and lead to dissatisfaction with the constitution.  People not consulted properly, '97 Constitution perceived as a 'foreign' document, imposed on

							them (Bax. (1998) 6).
			<b>SOUTH AFRICA</b>				
COUNTRY	Ethnic Groups Popn. %	1 Common Ground	2 Constitutional Recognition of Diversity	3 Political Devolution (Institutions)	4 Custom Law Provisions	5 Innovations	6 Problems
<b>SOUTH AFRICA</b>	<p>Total population as at 2001 – 43,421,021</p> <p>Afrikaans – Dutch-French and Anglo descent minority? – 13.6%</p> <p>Africans – numerous different groups but main ones are Zulu and Xhosa – 75%</p> <p>Others – 11%</p>	Maintenance of law and order, public safety, deterrence of crime, social justice, equality, Nation-building, national identity, legal certainty for economic development	<p><i>Constitution Act 1996</i></p> <p>South Africa Constitution, s.15(3)(a)(ii) recognition of systems of personal and family law under any tradition</p> <p>s.211(3) courts apply customary law</p>	Not discussed explicitly in the research.	<p>Hybrid code – complex, carry law with them, not based on race, court discretion</p> <p>The recognition of customary law as part of the law of the country on par with received law has been constitutionally recognised in the 1996 South African Constitution</p> <p>Sections 30, 31 guarantee of rights to pursue culture of choice, can invoke customary law, ss.15, 211</p> <p>Discarded assumption that only Africans could be subject to customary law (c.l) – appropriate link between litigant &amp; system of personal law, sometimes link is membership of political or cultural community, other times association with a community in which c.l rules established, sometimes simply being subject to African c.l. Most viable solution seems to be a reference to litigant's membership of a community observing c.l.</p> <p>Repugnancy clause – Courts provision power to qualify any application of c.l if repugnant to justice, equality, or good conscience, or public policy.</p> <p>Choice of law rules – judicial discretion decided on its merits</p> <p>s.8(2) Constitution c.l legal relationship governed by Bill of</p>	<p>Customary law recognised in conjunction with received law - overlapping system. -that's where the system shares jurisdiction and choice of law becomes an issue. Where differences between two legal systems persist, legal dualism and the need for choice of law rules persists. Purpose of choice of law rules is to select the law that will do justice in the case. Court's power (and responsibility) decide which law to apply, paying due regard to the parties' interests and their choice of legal system. Hence, although the courts must respect the parties' interest, choice of legal system, must not do so at the expense of the other party, or public policy considerations. Where the system has a choice of law, the Court's decision to apply customary or common law must be in harmony with the supervening value system of the country- in South African Bill of Rights.</p>	<p>Judges frequently declare norms of c.l, precedents, nascent 'lawyers customary law' not same as c.l.– cannot reproduce circumstances or context in which social norms operate and by which they are enforced. Thus, creating new type of c.l. Courts require claims, remedies, enforcement to be expressed in categories of common law. Ct cannot prevent action such as marriage or land sale rather only question validity of marriage or sale; remedies available at late stage of conflict;</p> <p>Court cannot recognise all norms as legal, so legal system selects some to be c.l some relegated to customary morality – follows creation of new body of norms. Extent of modification determined by resources available (documented &amp; personal – experts) conflict of systems</p> <p>Vague when c.l applies</p>

					Rights – human rights.		
			<b>New Zealand – Maori</b>				
<b>COUNTRY</b>	<b>Ethnic Groups Popn. %</b>	<b>1 Common Ground</b>	<b>2 Constitutional Recognition of Diversity</b>	<b>3 Political Devolution (Institutions)</b>	<b>4 Custom Law Provisions</b>	<b>5 Innovations</b>	<b>6 Problems</b>
<b>NEW ZEALAND</b>	Total Population as at 2000 - 3,819,762 Pakeha (non-Maori) (P) 87% Maori (M) 12.9%	Social justice, equity, neither group is going away, co-existence  Nation-building, national identity, legal certainty for economic development	<i>Treaty of Waitangi 1840</i> - Art.II protected lands, forests, fisheries, governance, customary law, other cultural treasures, constitution-like status in <i>NZMC v AG</i> [1987] ‘document of fundamental rights’  <i>Constitution Act 1852</i> s.71 native districts where customary law prevailed but never implemented de jure.  <i>Maori Representation Act 1867</i> , allocated 4 Maori seats in House of Representatives  <i>Constitution Act 1986</i> repealed 1852 Act and s.71 native districts provision  <i>Bill of Rights Act 1990</i>	Central government has jurisdiction over Maori development. New Zealand manages relations with Maori through units in ‘mainstream’ departments guided by policy formulated in the Ministry of Maori Development and four specialist policy commissions.  Treaty of Waitangi settlements provide for governance structures to be free from the paternalistic shackles of the Maori land court, Tainui have a new indigenous governance institution – Te Kauhanganui – but political power not fully devolved, no constitutional power per se to Maori eg. no authority to make laws, minute inclusion of custom law	No provisions for the inclusion of customary law per se.  The inclusion of the Treaty of Waitangi in the <i>New Zealand Bill of Rights Act 1990</i> was rejected because of opposition from civil servants, lawyers, and even Maori.	Waitangi Tribunal – inquisitorial bicultural institution in both its make-up and processes. Commissions research on Maori claims, makes recommendations to government; only binding recommendations on the return of lands subjected to s.27B <i>Treaty of Waitangi Act 1975</i> memorials on lands – made one such recommendation in the Turangitukua Claim but later rescinded.  Te Kauhanganui – indigenous institution created by Tainui settlement	s.71 native districts never legally, politically or morally implemented ,  constitutional provisions not entrenched so vulnerable to legislative whim

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**APPENDIX**  
**COMPARATIVELY SPEAKING: A SUMMARY REPORT**

Te Mātāhauraki Research Unit, July 2001

			<b>BELGIUM</b>				
<b>COUNTRY</b>	<b>Ethnic Groups Popn. %</b>	<b>1 Common Ground</b>	<b>2 Constitutional Recognition of Diversity</b>	<b>3 Political Devolution (Institutions)</b>	<b>4 Custom Law Provisions</b>	<b>5 Innovations</b>	<b>6 Problems</b>
<b>BELGIUM</b>	<p>Total population as at July 2001 – 10,241,506</p> <p>Flemish (F) 31%</p> <p>Walloons (W) 58%</p> <p><i>(All population statistics have been taken from the World Fact Book on the internet at www.yahooligans.com.)</i></p>	<p>United desire to maintain their respectively unique cultural and linguistic identities (Morgan, (1998) 34)</p> <p>Nation-building, national identity, legal certainty for economic development</p>	<p><i>Constitution Act 1980 (Const.)</i></p> <p>1898 – bilingualism official, 1914 bilingual education;</p> <p>Belgian ‘alarm bell’ shows national solidarity while proceeding along path of progressively more cultural autonomy. Bell provides that motions, giving reasons submitted by ¾ majority of Parliament claiming a proposed law before Parliament risks seriously impairing relations between linguistic communities, suspend the Parliamentary process. Constitution Art 38. Proposed law then referred to Council of Ministers (CMs) –divided equally linguistically – considers the matter, gives an opinion in 30 days, returns the matter to Parl. for further consideration. A language group can only ring alarm bell once. Constitution art 38.</p>	<p>High devolution of authority to W &amp; F’s.</p> <p>Formal Geographic Regions (GR)– mono-linguistic - W, F, Brussels (bilingual);</p> <p>Regional Assembly (RA) &amp; executive allotted 10% national budget</p> <p>Community Councils (CC) – authority not confined by geography but linguistic community – areas cultural matters, education, teaching, and international cultural cooperation. Regional Council (R.C) requires 2/3rds overall &amp; concurrent council’s linguistic majorities in the 2 Houses to pass legislation concerning CCs and their areas of authority. Const. Art 59</p> <p>Constitutional Court of Arbitration (CCA) conflict of laws in areas of over-lapping authority. ½ jurists, ½ politicians enable intercultural issues respected</p> <p>Constitution amended 1993 R&amp;CCs devolved authority generalised and central government authority limited to</p>	<p>Hybrid code – geographic regions governed by monolingualism and monoculturalism, except Brussels – bicultural, bilingual</p> <p>GR- Council decrees in area have standing of law (Morgan 37); national legislation for RCs required be passed by 2/3rds majorities and by concurrent majorities of each language group in Houses bicameral parliament Cons. Art 107.</p> <p>Jurisdiction of CCs extends to geographical regions &amp; linguistic community in officially bilingual Brussels, areas which CCs regulate (law) – language, culture, museums, education, media, leisure, some health areas, welfare policy, international treaties in areas of CCs competence. 1982 R&amp;CCs extended some powers of taxation, borrowing, and fund allocation from national government.</p>	<p>Formal Geographic Regions – mono-linguistic W, F, Brussels (bilingual); each region maintains a scrupulous monolingualism and monoculturalism</p> <p>Const. Court of Arbitration (CCA) established to settle conflicting claims of authority, and conflicts arising from conflicts of laws issues in areas over-lapping authority.</p> <p>Cultural and national ‘backgrounds’ respected and notion of ‘trust’ and ‘confidence’ in public institutions promoted possibility of intergroup trust through measures fostering intergroup confidence</p>	<p>Austinian nightmare!</p> <p>Costs, complexity of governing structures – overlapping but separate institutions to regulate both geographically separated and geographically mixed Brussels by linguistically separated communities; duplication of institutions for education, health, welfare in shared areas, national legislation being derailed by ‘alarm bells’, potential for at least 5 way conflicts of laws &amp; authority, constitutional arbitration of conflicts by courts comprised of politicians and judges with broad guidance.</p>

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			<b>CANADA - Québécois</b>				
<b>COUNTRY</b>	<b>Ethnic Groups Popn. %</b>	<b>1 Common Ground</b>	<b>2 Constitutional Recognition of Diversity</b>	<b>3 Political Devolution (Institutions)</b>	<b>4 Custom Law Provisions</b>	<b>5 Innovations</b>	<b>6 Problems</b>
<b>CANADA</b>	<p>Total population as at 2001 – 29,639,030</p> <p>Québécois (Q) - 25%</p> <p>Canada 90% in Quebec</p>	<p>Charter of Rights and Freedoms 1982, human rights, fundamental freedoms – democracy, equality, mobility, biculturalism, social justice, employment equity,</p> <p>Protected French enclave in Canada - Quebec - distinct society</p> <p>Nation-building, , national identity, legal certainty for economic development</p>	<p><i>Constitution Act 1982 (Const.)</i> <i>Quebec Act 1774</i> – distinct society</p> <p>Quebec. – <i>British North America Act 1867</i> (BNA) Language and culture;</p> <p>s.133 guaranteed use of French and English in Federal courts, official languages,</p> <p>s.94 Quebec (Que.) civil law system instead of English common law in certain areas. Assumption was that Quebec’s civil code would remain distinct from common law in other provinces</p> <p>Beyond law and language, Quebec has many different public and private institutions</p> <p>Linguistic rights – Official Language Act, bilingualism policies, French language majority status in Quebec, equal status in New Brunswick, special status in Ontario and minority status in other provinces,</p>	<p>Que. – ongoing dispute over ‘distinct society’ status</p> <p>Decentralization with harmonized national arrangements governing social policy –health care, income security, and unemployment insurance, financial equalisation, and legal rights.</p> <p>Quebec allotted 75 of 265 seats in Federal House of Commons, 3 of 9 members of the Supreme Court of Canada appointed from bench or bar of Quebec</p>	<p>Hybrid code in Quebec – Québécois political/legal enclave - bicultural</p> <p>Quebec. – Own civil law system and institutions in Quebec, bicultural legal system, language, juries, s.94 BNA 1867 uniformity of laws relative to property, civil rights, civil procedure, assumed Quebec’s civil code and procedure would remain distinct from common law</p> <p>Therefore, mutual co-existence in same geo-political boundaries of nation-state</p>	<p>Royal Commission on Bilingualism and Biculturalism established to deal with constitutional crisis ie Quebec’s ‘quiet revolution. ‘Result – Official Language Act 1969</p> <p>Equality but Constitution recognises that differences of history, ethnicity &amp; geography call for different provincial treatment</p> <p>Multiculturalism ss15.1, 27, commission, best practices in civil service including respect for diversity, language and understanding promotions, equal opportunities</p>	<p>Constitution failed Quebec. Government excluded from constitutional negotiations 1981-82, the Const formulated in its absence, not consented to by Quebec. Charter restricted Provincial powers limiting the capacity of Quebec National Assembly to implement French-language policy, new amending procedures denied a prior veto to Quebec Hence Quebec’s powers have diminished, resulting in a profound sense of grievance.</p> <p>Multiculturalisms leveling effect on Quebec’s special status</p>

			<b>CANADA - First Nations</b>					
<b>COUNTRY</b>	<b>Ethnic Groups Popn. %</b>	<b>1 Common Ground</b>	<b>2 Constitutional Recognition of Diversity</b>	<b>3 Political Devolution (Institutions)</b>	<b>4 Custom Law Provisions</b>	<b>5 Innovations</b>	<b>6 Problems</b>	
<b>CANADA</b>	Total population as at 2001 – 29,639,030  First Nations (FN) 1.5-3%	Charter of Rights and Freedoms 1982, 'equality, social justice'  'Lets face it, we are all here to stay' RT. HON. Antonio Lamer, Chief Justice, Supreme Court of Canada, <i>Delgamuukw v The Queen</i> , Dec. 11, 1997  'What we are facing in the current treaty negotiations runs far deeper and far more complex than the simple legalities of land ownership and self-government. We must find a way to live together and to share, in an equal and fair manner, in the resources of this province ...' B.C. M.L.A. Gordon Wilson, British Columbia  Nation-building, national identity, legal certainty for economic	BNA Act 1867, <i>Constitution Act 1982</i> (Const.)  The <i>Constitution Act 1982</i> affirmed the 'existing aboriginal and treaty rights' without specifying their magnitude or scope.  Section 25 ensures Charter rights and freedoms guarantees do not abrogate or derogate from existing Aboriginal and treaty rights or any aboriginal rights acquired by way of comprehensive land claims settlements. Because s.25 is part of the Charter of Rights it is not to be construed as derogating from aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. This makes clear that the equality guarantee in s.15 of the Charter does not invalidate native rights. Thus, a fishing rights program negotiated as part of a land-claims agreement cannot be successfully appealed by non-indigenous peoples on the ground that – following the Charter's equal rights principles – it would be unfair to exclude the appellants from similar rights.  Section 35 gives constitutional recognition (but not definition) to 'aboriginal and treaty rights,' and protects them from legislative attack. Section 35(1) declares that constitutional amendments to the native rights provisions of the Constitution Acts, 1867 and 1982 will not be made without prior constitutional conference involving participation by representatives of the aboriginal peoples of Canada. These three provisions – ss., 35, 25, 35(1) – reinforce s.91(24) in their recognition of special status for the aboriginal peoples.  Constitutional provisions not vulnerable to alteration by the unilateral action of the federal or	FNs – settlements - self-government, joint ownership land resources, service delivery. Political-Legal Devolution - Self-government. Key elements of reform are varied but encompass control over the process and power of self-governance as a third tier of government and the re-alignment of the political agenda to accommodate indigenous authority alongside federal and provincial jurisdictions. In the south, First Nation (FN) bands are taking control of the design and delivery of government programs to overcome discrimination and neglect. In the Pacific provinces of BC federal and provincial authorities are negotiating treaties for joint ownership of land and resources, service delivery and regional government. In the north, land and political settlements on a regional basis including the home-rule arrangement in the eastern Arctic region known as 'Nunavut.' The Canadian government is striving for a relationship based on partnership and the recognition of an inherent right to Aboriginal self-government. The <i>Nisga'a Settlement Agreement 2000</i> provides fair opportunity for Nisga'a to manage their affairs in a fashion similar to local governments, subject to overarching laws and principles of the Charter of Rights and Freedoms.	Self-government provisions in comprehensive settlement agreements. The Nisga'a Settlement Agreement provides fair opportunity for Nisga'a to manage affairs in a fashion similar to local governments, and subject to the overarching laws and principles of the Canadian Charter of Rights and Freedoms and the Criminal Code of Canada. Nisga'a laws will have priority, but they are limited and defined. Concerns matters that are internal and local such as culture, or include a condition that the laws meet existing government standards. Everyone subjected to Criminal Code of Canada. The settlement addresses the relationships of Nisga'a laws with the laws of Canada & B.C and identifies the specific areas in which Nisga'a law will prevail. Nisga'a Constitution pursuant to the Settlement will provide for Ayuukh Nisga'a (customs), creation of Nisga'a law in areas eg citizenship, culture, language, lands, assets, aboriginal healers, child custody – Nisga'a government has standing in any judicial proceedings in Nisga'a child custody disputes, court will consider evidence in respect of Nisga'a laws and customs (s.94 Settlement), devolution of cultural property, court will consider Nisga'a laws and customs (s.119	Because of s.24(1) judiciary given very strong defining powers – In <i>Delgamuukw v B.C</i> [1998] Supreme Court of Canada instructed governments to negotiate with FNs to settle outstanding claims;  Tacit then inherent right to self-government recognised; provisions part of existing constitutional aboriginal rights, self-government part of comprehensive land claims agreements and where agreed constitutionally protected.  Hybrid code in Nass Valley – isolated geographic region, bicultural region	<i>Indian Act</i> - Indian affairs placed under federal jurisdiction, paternalistic, assimilationist;  Const 1982, s.24(1) judiciary given a free hand to remedy infringed constitutional rights and freedoms according to what they deem to be appropriate and just in the circumstances. Very high costs to get to Supreme Court, long, drawn out. Wide ranging power granted to judiciary.  Judicial tests for recognising aboriginal rights –distinctiveness test, right must be defining feature of culture prior to contact – reifies culture,  Multiculturalisms leveling effect of First Nations' special status.	

		development	a provincial government.		settlement).		
			<b>FIJI</b>				
COUNTRY	Ethnic Groups Popn. %	1 Common Ground	2 Constitutional Recognition of Diversity	3 Political Devolution (Institutions)	4 Custom Law Provisions	5 Innovations	6 Problems
<b>FIJI</b>	Total population as at 2001 – 832,494  Fijians (F) 50.7% Fijian-Indians (I) 43.7%	Compact, chapt.2 Constitution 1997, social justice, improvements to meet needs of multi-ethnic, multi-cultural society, promote racial harmony, national unity, economic and social advancement of all communities (Bax, 10). Reconcile interests of all communities  Nation-building, , national identity, legal certainty for economic development	<i>Constitution Act 1990</i> ('90 Constitution)  <i>Constitution Act 1997</i> ('97 Constitution)  '90 Constitution – interests of Fijians paramount  The 90 Constitution provided for the establishment of special Fijian courts (s 122) and entrenchment of any laws which effect Fijian land customs or customary rights (other than by altering any of the listed Acts).  '97 Con contains provisions expressly protecting rights of Indigenous Fijians (Fijian, Rotumans, and the Banaban) which pertain to land, fisheries, minerals, chiefly titles, community governance, dispute resolution and other customary law	The '90 Constitution provided for the establishment of special Fijian courts (s 122) and the entrenchment of any law that effects Fijian land customs or customary rights.  '97 Con contains provisions expressly protecting rights of Indigenous Fijians (Fijian, Rotumans, and the Banaban) which pertain to land, fisheries, minerals, chiefly titles, community governance, dispute resolution and other customary law. These do not have the paramount position in the '97 constitution as they had in the '90 constitution.  Traditional chiefly institution, Bose Levu Vakaturaga – Great Council of Chiefs, established s.116, '97 Const. has administrative roles, eg. advisor to government	Hybrid code in '90 Constitution where customary law (c.l) was law but in '97 Const .c.l relegated to customary morality, marginalised biculturalism  The recognition of customary law as part of the law of the country on par with received law has been constitutionally recognised in the 1990 Fijian Constitution. s100 (3) of the 1990 Constitution, stated that ... until such time as an Act of Parliament otherwise provides , Fijian customary law shall have an effect as part of the Laws of Fiji: (as cited in Reeves: 1996, 610).	Great Council of Chiefs – Bose Levu Vakaturaga – advisory role to government.	Sections 122, 100(3) excluded in '97 Constitution. ie Fijian customary law no longer automatically part of the law of country; no special Fijian Courts; and there is no special procedure required for the enactment of statutes that affect the customary law of Fijians. Even though the '97 Constitution contains provisions expressly protecting rights of Indigenous Fijians (Fijian, Rotumans, and the Banaban) which pertain to land, fisheries, minerals, chiefly titles, community governance, dispute resolution and other customary law, these do not have the paramount position in the '97 Constitution as they had in the '90 Constitution. This could have been perceived as a lowering of the status of customary law, and lead to dissatisfaction with the constitution.  People not consulted properly, '97 Constitution perceived as a 'foreign' document, imposed on

							them (Bax. (1998) 6).
			<b>SOUTH AFRICA</b>				
COUNTRY	Ethnic Groups Popn. %	1 Common Ground	2 Constitutional Recognition of Diversity	3 Political Devolution (Institutions)	4 Custom Law Provisions	5 Innovations	6 Problems
<b>SOUTH AFRICA</b>	<p>Total population as at 2001 – 43,421,021</p> <p>Afrikaans – Dutch-French and Anglo descent minority? – 13.6%</p> <p>Africans – numerous different groups but main ones are Zulu and Xhosa – 75%</p> <p>Others – 11%</p>	Maintenance of law and order, public safety, deterrence of crime, social justice, equality, Nation-building, national identity, legal certainty for economic development	<p><i>Constitution Act 1996</i></p> <p>South Africa Constitution, s.15(3)(a)(ii) recognition of systems of personal and family law under any tradition</p> <p>s.211(3) courts apply customary law</p>	Not discussed explicitly in the research.	<p>Hybrid code – complex, carry law with them, not based on race, court discretion</p> <p>The recognition of customary law as part of the law of the country on par with received law has been constitutionally recognised in the 1996 South African Constitution</p> <p>Sections 30, 31 guarantee of rights to pursue culture of choice, can invoke customary law, ss.15, 211</p> <p>Discarded assumption that only Africans could be subject to customary law (c.l) – appropriate link between litigant &amp; system of personal law, sometimes link is membership of political or cultural community, other times association with a community in which c.l rules established, sometimes simply being subject to African c.l. Most viable solution seems to be a reference to litigant's membership of a community observing c.l.</p> <p>Repugnancy clause – Courts provision power to qualify any application of c.l if repugnant to justice, equality, or good conscience, or public policy.</p> <p>Choice of law rules – judicial discretion decided on its merits</p> <p>s.8(2) Constitution c.l legal relationship governed by Bill of</p>	<p>Customary law recognised in conjunction with received law - overlapping system. -that's where the system shares jurisdiction and choice of law becomes an issue. Where differences between two legal systems persist, legal dualism and the need for choice of law rules persists. Purpose of choice of law rules is to select the law that will do justice in the case. Court's power (and responsibility) decide which law to apply, paying due regard to the parties' interests and their choice of legal system. Hence, although the courts must respect the parties' interest, choice of legal system, must not do so at the expense of the other party, or public policy considerations. Where the system has a choice of law, the Court's decision to apply customary or common law must be in harmony with the supervening value system of the country- in South African Bill of Rights.</p>	<p>Judges frequently declare norms of c.l, precedents, nascent 'lawyers customary law' not same as c.l.– cannot reproduce circumstances or context in which social norms operate and by which they are enforced. Thus, creating new type of c.l. Courts require claims, remedies, enforcement to be expressed in categories of common law. Ct cannot prevent action such as marriage or land sale rather only question validity of marriage or sale; remedies available at late stage of conflict;</p> <p>Court cannot recognise all norms as legal, so legal system selects some to be c.l some relegated to customary morality – follows creation of new body of norms. Extent of modification determined by resources available (documented &amp; personal – experts) conflict of systems</p> <p>Vague when c.l applies</p>

					Rights – human rights.		
			<b>New Zealand – Maori</b>				
<b>COUNTRY</b>	<b>Ethnic Groups Popn. %</b>	<b>1 Common Ground</b>	<b>2 Constitutional Recognition of Diversity</b>	<b>3 Political Devolution (Institutions)</b>	<b>4 Custom Law Provisions</b>	<b>5 Innovations</b>	<b>6 Problems</b>
<b>NEW ZEALAND</b>	Total Population as at 2000 - 3,819,762 Pakeha (non-Maori) (P) 87% Maori (M) 12.9%	Social justice, equity, neither group is going away, co-existence  Nation-building, national identity, legal certainty for economic development	<i>Treaty of Waitangi 1840</i> - Art.II protected lands, forests, fisheries, governance, customary law, other cultural treasures, constitution-like status in <i>NZMC v AG</i> [1987] ‘document of fundamental rights’  <i>Constitution Act 1852</i> s.71 native districts where customary law prevailed but never implemented de jure.  <i>Maori Representation Act 1867</i> , allocated 4 Maori seats in House of Representatives  <i>Constitution Act 1986</i> repealed 1852 Act and s.71 native districts provision  <i>Bill of Rights Act 1990</i>	Central government has jurisdiction over Maori development. New Zealand manages relations with Maori through units in ‘mainstream’ departments guided by policy formulated in the Ministry of Maori Development and four specialist policy commissions.  Treaty of Waitangi settlements provide for governance structures to be free from the paternalistic shackles of the Maori land court, Tainui have a new indigenous governance institution – Te Kauhanganui – but political power not fully devolved, no constitutional power per se to Maori eg. no authority to make laws, minute inclusion of custom law	No provisions for the inclusion of customary law per se.  The inclusion of the Treaty of Waitangi in the <i>New Zealand Bill of Rights Act 1990</i> was rejected because of opposition from civil servants, lawyers, and even Maori.	Waitangi Tribunal – inquisitorial bicultural institution in both its make-up and processes. Commissions research on Maori claims, makes recommendations to government; only binding recommendations on the return of lands subjected to s.27B <i>Treaty of Waitangi Act 1975</i> memorials on lands – made one such recommendation in the Turangitukua Claim but later rescinded.  Te Kauhanganui – indigenous institution created by Tainui settlement	s.71 native districts never legally, politically or morally implemented ,  constitutional provisions not entrenched so vulnerable to legislative whim