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**Women's Rights in India in-between Transnational Law and Custom
A Pluralist and Dialogical Challenge**

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Even though human rights have originated in the Western world, the relativist position claiming that the ideals they incarnate are only relevant to the Western world seems doubtful. In any case, the Indian state has made commendable efforts in order to achieve the ideals of human rights in India and thus they have become part of the Indian reality. At the same time, the approach adopted to achieve those ideals, although quite pluralistic in its implementation mechanisms, has not been really responsive to the specific demands of the Indian situation. The State's well-intentioned statutes, though in conformity with the international human rights' treaties, have not been able to bring about the desired changes, an important reason being the lack of will and the general attitude of the implementing authorities.

At the core of the failures of the current approaches towards women's rights, lies their connection to the formal legal system, which still aims at getting hold of the monopoly of social regulation. The

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different social actors (communities, individuals) are treated as objects of law which have to be regulated through external interference and are not really taken seriously, as equal partners for dialogue and action. Focus on the traditional communities highlights the fact that the efforts made by the State to take care of diversity have not been able to meet the demands of traditional societies who continue to nurture their own culture based legal systems and keep the State at a distance, forcing it to tolerate them. It is especially relevant that these traditional groups by virtue of their positive characteristics keep on demonstrating their vitality and their ability to challenge the state legal system. But the relative superiority of these non-state legal systems as compared to the formal ones should not lead to an idealization of “tradition” and communities¹ and the complexity of the interaction patterns between different kinds of laws should not be ignored.

In order to contribute to ameliorate women’s situations in India, it seems necessary to enter the complex paradigm of the “in-between” of state law (national as well as transnational) and non-state law, of “tradition” and “modernity”. The interaction between these two poles, which at first sight can appear as being opposite, is on rise, mainly with the coming into existence of informal state institutions for the protection and the promotion of women's rights in India. While this increasing interaction of communities, especially in respect to the practices concerning women, with non governmental organizations and other national and regional bodies like the National Commission for Women or the State Women's Commissions have brought in some positive results, the progress is much slower than

¹ Gurpreet Mahajan (1998 : 26) notes that « The two most striking shortcomings of the community-centred perspective on democracy are that it valorizes traditional community structures and believes that the political should reflect the social. Like the secularists, the adherents of this perspective associate liberalism with individualism. Consequently, when they question the validity of liberal concepts and emphasize their non-applicability to the Indian context, they justify the continued existence and dominance of existing community structures. In fact their writings imbue traditional community structures almost exclusively with positive features ; for instance , the caste system is represented as a support structure prescribing merely ‘duties’ and ‘functions’ of each unit within the organic whole (...) The oppressive practices of the caste system on which the entire edifice of stratification and domination is based are thus relegated to the periphery of social and political discourse. What is also not recognized is that the reactivation of traditional institutions, such as the caste system, for political participation and mobilization has also increased their influence in other domains of life. (...) Thus, even though community structures are being used for the purpose of democratic politics, the social orthodoxies and hierarchies embedded in these structures have not been dismantled by the new context of experience. Since advocates of the community-centred perspective are inattentive to the ways in which caste and other traditional structures are being used for socially conservative ends, they do not consider alternative modes of political mobilization and participation. » (Mahajan 1998 : 26)

expected. In addition to this, a skeptical attitude of the traditional communities against these informal state institutions can be observed.

It is time now to move towards an explicitly dialogical and pluralist approach (see Eberhard 1999), which could permit to break out of oppositions such as “modernity” versus “tradition” or “universalism” versus “relativism”. This approach does not keep any room open for such dichotomical constructions and according to it rejection of legal centralism does not entail a choice between the acceptance of either official legalities such as those stemming from international human rights’ discourse, the state, the federal government, or of “unofficial legalities” stemming from traditions, customs etc. Instead, it will be argued that all situations must be approached as dynamic² « in-betweens » where different worldviews, logics and practices meet and interact and where it is paramount to move from a logic of the exclusion of contraries to a logic of complementarity of differences permitting to articulate “traditional” as well as “modern” resources in order to help the realization of women’s well being. Let us note that although starting from the Indian experience, the aim of this article is to draw more insights that are general on the issue of legal pluralism and its challenges³.

We will start by presenting the State’s initiatives for the promotion of women’s rights in line with international human rights’ law (1). This will make us aware of the highly pluralist approach to Law by the Indian State, as compared to more centralizing and uniformising European states such as, *par excellence*, France - but it will also highlight the shortcomings of even this, seemingly, very pluralist approach. We will then present the question of women’s rights in India as they appear in the “in-between” of Indian traditions and modernity (2). This will introduce us to the necessity to get a deeper understanding of the traditional communities Law (3) and to move towards its recognition so that a truly dialogical and intercultural approach to women’s rights, deeply embedded in a pluralist approach to Law can emerge (4).

² We are thus rooting ourselves in a processual and dynamic approach to Law such as advocated by Sally Falk Moore (1983) or Étienne Le Roy (1999) more directly related to an application to human rights see Eberhard 2000 : 305 ss ; 2001c, or in English 1997 : 69 ss ; 2001b.

³ For an illustration of the more general analysis developed in this article through a concrete case study see Eberhard & Gupta 2001.

1. Women's rights and the Indian State: Tackling the challenge of pluralism

Plurality and diversity are the inherent characteristics of life in India. Accommodating the same has always been a priority of the State. The diverse options that the Indian State has adopted to be responsive to the needs of the pluralistic society will be briefly described below. Moving ahead of its colonial legacy, where the religious laws were given explicit recognition along with modern formal law, the State in India has tried to establish a unique mechanism of adjudicatory pluralism. In spite of the fact that India attracts considerable international criticisms for the relatively lower status of women in the country, it must be recognised that the state has been making considerable efforts and has developed various specific mechanisms to deal with the cases of abuse against women including those that have their source in tradition and customs. India's adjudicatory mechanisms, especially in the domain of women's rights can be summarized as follows:

- (1) The special courts and tribunals are meant for supplementing formal state courts. These courts and tribunals dispense state law but are guided by the various specific purposes behind their creation. There are special courts for dealing with atrocities against women. There is also a special tribunal established under *Sati*⁴ (Prohibition) Act, which deals with atrocities against women under the guise of the traditional practice of *Sati*.
- (2) In addition to the network of formal courts there is a wide network of informal courts, which are connected to or are dependent upon the state legal system⁵. These can be categorized as:
 - (i) Family courts, to deal with family matters only⁶. These courts are constituted with an aim to provide a speedy, easily accessible forum to women for dealing with family matters and to provide a friendly atmosphere to people to amicably resolve their family disputes. These courts are created by legislative act. In order to create the informal friendly atmosphere, lawyers are not allowed in these courts and parties are supposed to present their cases in

⁴ A tradition which leads to the burning of widows. For an illustration of such a case see Khare 1998c : 212 ss.

⁵ They can be called informal court in spite of the fact that they are recognised by the state since they are supposed to be devoid of technical, procedural formalities of formal state courts.

⁶ These courts apply the personal laws recognized by the State for different religious communities but are informal in their methods of adjudication.

lay manner. Also, the fee for these courts is almost negligible. Judges in these courts, thus, rather act as mediators, conciliators and at times as negotiators rather than as formal judges.

- (ii) People's Courts (*Lok Adalats*) are informal courts authorized by the state, again as a speedy, cheap and accessible alternative to state courts aimed at reducing the pressure on the state system and at helping people to resolve their disputes through negotiation, mediation, conciliation or arbitration. *Lok Adalats* and family courts are constituted on the same pattern, that is, no lawyers for representing parties and minimal court fees. They deal with all kinds of civil matters.
- (iii) Introduction of women's courts by semi-state organizations such as *Mahila Samyakha* which has been set up under an Indo-Dutch program for women's empowerment and gender justice. This courts mainly deal with sundry issues concerning women and work with an aim of combating gender discrimination in the society.
- (iv) National and State level Women's Commissions, which are expected to play an important role in seeking to resolve family disputes in accordance with diverse sets of norms mainly attempting to resolve conflict through mediation and conciliation. Most of these Commissions have been given the powers of a civil court according to the Civil Procedure Code of India to facilitate performance of their judicial functions. This category along with the third one above draws attention to the rapid shifts in the boundaries between public and private issues concerning women. They are also demonstrative of the relativized role of the State in the wake of globalization.

While the efforts of the State in India to answer the claims of pluralism are commendable, it is also true that these efforts have only met with partial success. In fact, the limited success of the efforts made so far forces us to question the approach of the State. Why have the efforts of the government, which are in conformity with the demands of international treaties and conventions concerning human rights and women rights, not been able to meet the general public expectations and to achieve the desired objectives? The easiest and most often used explanation is that human rights, and more so women's rights, are western concepts and that thus the desired objectives related to them are difficult to achieve

since they are supposed not to be of relevance for the non western world. Even though present human rights treaties have originated in the Western world, it is doubtful that the incorporated ideals aiming to ensure a dignified and respectful life to everybody can be called applicable only to the Western world. One should be careful not to slip from a “right to difference” to a “right to indifference” (Abou 1992 : 37) that would justify all violations of human dignity by the alibi of cultural difference. However, while admitting the relevance of human rights ideals it is extremely important to be attentive towards the approaches that need to be adopted for achieving and translating these ideals, an endeavour for which great cultural sensitivity is necessary.

The efforts of the Indian state in the direction of achieving the ideals of human rights are definitely encouraging but at the same time, it cannot be denied that they have not been responsive enough to the specific demands of the Indian situation. If the reasons for the failing approaches vary, some common characteristics can nevertheless be discerned, which point to their common connection to, or rather to their integration into, the formal legal system. Most of the informal systems established by the State have eventually turned out to be state or formal courts in a different robe. Perpetuating the insidious power game of the formal law and legal system, they have not been able to escape the barriers of distinctions between regulators and regulated. They continually treat disputing parties as objects of law, which have to be regulated by some external source. A closer look at the interaction patterns of the traditional legal systems with the other legal systems (international or national) will help us understand better the shortcomings of the pluralistic approaches adopted so far in India. The interaction between traditional legal systems and other legal systems is not limited to the state legal system only. There are indeed very complex patterns of interaction and the efforts made by the Indian State in order to accommodate pluralism has added to the complexity of the situation.

In India, there has always been a considerable stress to use legal measures to bring about social change. Thus, the statute books in India are ordained with formal laws to deal with derogatory practices against women and to ensure their dignity. Each new statute has added to the power of the state and its implementation machinery but in most circumstances, they have not been able to bring about the desired change. Besides other reasons for their failure, an important one is the lack of will and the attitude of the implementing authorities. Generally speaking, state officials are well aware of the deep impact of the various customs and traditional practices in the diverse communities, which cannot be easily uprooted by any external pressure. Convinced of the futility of their tasks they often find

satisfaction in using the power given to them by the formal law as a means for exploitation. Implicitly it seems to provide a tacit satisfaction to help communities to manage their affairs in their own way. Ironically this exploitation finds favour even with the communities, as for them it represents a relatively low price to pay to save them from the excesses of the state.

The local police officials often negotiate with the community members for not highlighting such issues in order to save them from the clutches of the formal law. The local authorities are often bribed and are appeased in all other possible ways on a regular basis, to keep exercising this unofficial law under the cover of formal, state law. This machinery of the state, at local levels adequately pictures what Sally Falk Moore (1973) has described as a working of semi-autonomous social fields. Surprisingly enough, the fear of an encounter with the formal law is the most effective device for the machinery of the informal legal orders developed by the state to maintain their semi-autonomous field.

It was this realization about the limitations of the law and formal legal system to take account of pluralistic situation, which led the State to devise various mechanisms to increase the expanse of justice in India. With the introduction of rather innovative methods to deal with the complex situations, the interaction between the diverse communities and the State is increasing. Autonomy of the communities has been certainly effected by this, but not much sought for impact can be perceived as every occasion of interaction with the State helps the community devise new ways to keep asserting their authority.

The interaction is mainly on rise with the coming into existence of the (iii) and (iv) category of the informal state institutions for the protection and the promotion of women's rights in India. [Given the presence of a strong women's movement in India and the enhanced sensitivity of the media, the interaction patterns of the traditional communities with the varying legal regimes are experiencing a significant change. Many stories rapidly find a place of prominence in national as well as in international media. Every time such incidence is brought to limelight, the whole informal state machinery is activated. This has resulted in the erosion of the autonomy of the semi-autonomous social fields of the local authorities. While this increasing interaction of communities, especially in respect to the practices concerning women, with non governmental organizations and other national and regional bodies like the National Commission for Women or the State Women's Commissions have brought in some positive results, the progress is much slower than expected. Even these rather independent,

“ombudsman type” of authorities have not been able to bridge the gap. Having generated their own symbolisms, they significantly fail to correspond to the concerned women’s reality⁷.

The skeptical attitude of the traditional communities against the informal institutions is partly a reaction against this symbolism and partly a reaction against their connection with the State. Communities usually attempt to minimize the interference of the State and of its various institutions as far as possible. This resistance is informed by past encounters, which have brought nothing more than disturbance and reinforcement of the power of the local authorities. Even the dissatisfied members of the group contribute in this resistance in the absence of any other alternative. Considering the fact that there are dissatisfied and dissenting voices within the communities, the apparent uniformity of the response strongly underlines the shortcomings in the approaches undertaken so far. The latter can be analyzed at two levels. First at the surface level, where they can be attributed to social, political and economic reasons. Poverty, illiteracy, inadequate implementation machinery, scarce resources with various institutions are some of the very general reasons responsible for failures. We are more concerned here with the analysis at the second deeper level. Absence of thorough introspection of our approaches in dealing with pluralistic situations perpetuates the hindrances on the first level. Interaction patterns reveal that the State, along with its formal as well as informal institutions, is no less bound with the traditional beliefs than the traditional societies. The former is as much constrained by this dominant conception of law and formalistic approaches as the latter is with its religious and customary beliefs (compare Fitzpatrick 1992; Singh 2000).

Despite of being well intentioned, the State has not been innovative in the true sense in its approaches of dealing with the complex problems concerning traditional societies. Marching ahead with its

⁷ R.S Khare (1998b : 180-181 ; 195-196) writes «Though exasperating to a modern social reformer and a human rights advocate, this deeply-ingrained cultural lexicon of karma-dharma and divine justice complex is shared widely by ordinary Hindus, Buddhists, Jains, and Sikhs in India. It is the people’s jurisprudence, shaping the prevalent notions of social fairness and justice. It goes through periodic cycles of rigidity, reform, flexibility, as various saints, reformers, and leaders try to explicate it from time to time. It encounters petitions, protests, and upheavals, as well as a rising devotional faith ‘in the intervening power of the divine will’. (...) No wonder, talking about these (human rights) to Untouchables might as well be talking about either a ‘mythic garden of justice (*insaaf ka sabzabagh*) or a totally unfamiliar, practically impossible hope. It is unlikely to change soon unless human rights advocates translate their concerns into popular terms and for lived social conditions, and unless they are ready to first educate themselves about the people’s relevant experiences, expressions, and expectations. » See also Panikkar 1984a ; Vachon 1991 & 2000.

armoury of a formal, instrumentalist view of law, no attempt has ever been made for what we could call a “cultural disarmament” (see Panikkar 1995). Traditional societies continue to be treated as objects, like a machinery which can be made desirably functional by replacing some old parts with new ones or as a patient who can be cured by surgical interventions. The traditional communities with their low literacy levels, slow adaptability to the modernized ways of the world heading towards globalization and their strong reliance on religious and customary beliefs are considered as an ideal object for conducting a reformatory operation by legal measures.

Thus, every time a problem concerning women catches limelight, it is treated as a single issue, a kind of tumour, which can be surgically removed. Never ever, an attempt is made to seek the support of the community itself to dig the roots of the problem. Taken out of its context, the issue is dealt with the aim of performing immediate corrective measures. Working under national as well as international pressure to produce immediate concrete results none of the institutions, governmental or non-governmental, finds time to understand the whole issue in its proper context. The system of the community is never considered worthy enough to be used for the purpose that the State is trying to achieve with its system, and the idea to negotiate the goals themselves between the communities and representatives of the State does not even strike the mind of anybody⁸. Response of the communities towards this kind of approach is necessarily that of rejection and internal closure. The issues being taken out of context bring further problems, both for the individual concerned and for the community as a whole.

This specific state of affairs for dealing with the traditional societies especially in the context of Women’s rights in India is representative of a general state of affairs in dealing with traditional communities in different parts of the world. In spite of the strong emphasis on legal pluralism and on cultural diversity, the traditional formalist conception of law and its prejudiced attitude towards the communities informs the efforts made to deal with them both at the theoretical level as well as on the empirical levels. A rethinking is strongly needed. An intercultural and pluralist approach to law seems

⁸ R.S Khare (1998a : 148) notes in this respect from his point of view as an anthropologist working with untouchable women « Despite the label of the ‘lowest of the low’, these women had a lot to say, I found, once directly approached and carefully listened to. But initially my own subtle preconceptions (including perhaps my ‘caste mind’ and gender bias), I now think, also stood in my way. I recall how I had bypassed their ‘everyday concerns’ for such ‘weighty matters’ as reform ideology, caste conflicts, and political power struggles. »

necessary as we have to break out of the trap of the encompassing of the contrary explicated by Louis Dumont (1991 : 140-141) and which lies at the root of the universalism / relativism dilemma⁹.

2. The Rights of Women in-between “Tradition” and “Modernity”

It is a rather common trend, as an application of the principle of the encompassing of the contrary, to treat tradition as antithetical to modernity. Those who emphasize the necessity of not interfering in the affairs of the traditional communities to protect culture and cultural diversity tend to essentialize cultures into homogenous wholes forgetting about their diverse and dynamic character (See Eberhard 2000 : 63 ss ; 305 ss). Strangely enough, even those who adopt a universalistic position and advocate the necessity of taking action against the oppressions exercised in the name of protecting culture, are also informed by this approach towards culture or tradition. They also treat tradition as a homogenous entity, which needs to be fought against and ultimately eradicated. They perceive anything related to tradition as irrational and primitive.

Thus, every time a case concerning oppression of women, which happens to belong to non-western traditional society, comes to limelight, it is the whole tradition that is brought under attack. It is a rather common practice to cast aspersions on religions and communities and say that Hinduism derogates women or Islam authorizes oppression of women. “Traditions” certainly cannot be all encompassed in one big category, which is then opposed to another all-encompassing category “modernity”. Neither of these can, as is often done, be constructed as the poles either of “model to follow” or of the “evil to eradicate”. Let us give here only two major reasons showing the inadequacy and the failure of this kind of approach if we are genuinely interested in the realization of the ideal that incarnates the discourse women’s rights.

⁹ The principle of the encompassing of the contrary is linked to the modern ideology and its valorization of equality. Different cultures are for instance constructed as equal on an explicit level : they are all encompassed in the general encompassing category of humankind. But on an implicit level, it is the modern culture and its constructs which remain the non-confessed point of reference. Thus everything related to modernity is constructed as rational, universal etc. And everything which is not seen as « modern » is constructed in opposition and as an inferior thing such as « traditions » (with the idea of backwardness), particularisms, local practices (with the idea that they do not have a universal scope) etc. (see in that direction Alam 1999 : 3 ss ; Bauman 1987 : 3-4 ; Eberhard 2000a : 121 ss)

First, the attack on the whole tradition or culture as an entity, especially by the people not belonging to that tradition shifts the focus of the issue. In such cases, focus no longer remains the particular case or the incident but it becomes the issue of protecting the tradition or culture. As it happens often in India, whenever a women's group or any other groups tries to raise its voice against any of the practices being followed in a community or a religious group that are source of injustice for women, the issue is seen as an attack on the cultural or religious identity. This leads to a distortion resulting in the fact that the basic issue is missed out. It is necessary to understand that no tradition is a homogenous baggage wherein everything can be treated as bad or obsolete.

Besides, even though those who exercise oppression seek reliance on religion or tradition, in a lot of cases one could contend that such interpretations of tradition for legitimizing the oppression of women are "aberrations" that seem to have developed in the otherwise coherent system of old traditions. They in fact are the result of certain interpretations, which are not only historically specific but also have been perpetuated to serve the interests of the influential ones in the community. Those who want to maintain status quo in their own interest tend to profess such interpretations and thus put forward a rather static view of the tradition. But nothing forbids to recognize or to move towards interpretations of traditions, which are more "women friendly".

Tradition is a dynamic and evolving process in constant tension between interpretations and reinterpretations by those who want to perpetuate a *status quo* and those who favour change to suit the changed social, economic and political circumstances. The fact that tradition provides support to both kinds of arguments demonstrates its potential to welcome change provided it is approached in a right manner. Justifications for change are derived from the external sources only when the most core values of the tradition are challenged. This kind of argument tries to show that tradition may have nurtured a particular point of view but that due to completely reversed social and particular circumstances that belief needs to be reversed. The general belief in Hindu tradition that a woman's life can be considered worthy only when she has been married and blessed with a son constitutes one such example. The reformists argue that this thinking may have held ground in a certain historical context but in the present circumstances, it is obsolete and needs to be changed. This kind of understanding of tradition can help in adopting new and more effective approaches. To exemplify this with cases such as those related to virginity tests (see Eberhard & Gupta 2001) in traditional communities and associated

violence against women, two types of challenges are projected here. One has to seek justification from the explanations internal to the tradition while at the same time the other has to rely on the external source. Both type of challenges need to be made at a different pace and with much prudence.

To begin with, there is a need to challenge the use of violence against women. To raise voice against cases of abuse of women it is more beneficial to find justification within the tradition, since immediate corrective measures are required in such situations. Indeed the level of understanding amongst the people of the particular community is higher through explanations to which they can relate too, which refer the models of conduct and behaviour they share, as we have noted above (see especially footnote 7). Also, tradition, culture or religion play a very important role in the definition of a person's identity. Usually people perceive severance from their traditional community or sharp criticisms of their traditions as a major cause of embarrassment, especially as the justifications from the sources external to the tradition usually make the tradition under scrutiny as a whole appear as inferior. It thus seems more appropriate to look for internal resources (ideal, human, institutional) in order to change or to challenge objectionable practices from within the tradition, although in a process of dialogue with the outside. Such an approach is much more welcome and relatively more easily acceptable than by relying on external sources alone.

For doing so, it is necessary to involve the people who are part of that tradition. Only they have the internal knowledge of their culture which outsiders do not have. The emergence of dialogical endeavour with the outsiders becomes thus paramount. A precondition is to break away from the prejudices and the mental barriers against those who do not conform to the standards of "modernity". This in turn entails to emancipate ourselves from a purely dialectical approach to reality as Raimon Panikkar (1984b) calls it, whose underlying assumption is that the whole of Reality can be exhausted by the lights of Reason alone and where thus the questions of our living together, of its *organization* are basically seen as problems that can be rationally solved and organized (Bauman 1993 : 6 ss), - which also implies because of Reason's universality, that there is only one right system towards which we should all move (and which we identify for the moment with the modern inventions such as human rights, democracy, development etc.). Genuine dialogue between different cosmovisions, that does not fall back into the trap of the encompassing of the contrary, through the use of diatopical hermeneutics which recognize the importance of the diverse *topoi* from where we see/construct the world thus becomes paramount (see Panikkar 1984b ; Vachon 1990). But from this perspective it appears

unsufficient to only open up the Western scientific and legal frame, to other cultures' perceptions. It seems, that little by little we also have to accept the idea that, if we really take the different worldviews seriously, we have to place ourself in "in-betweens" between cultures (see Eberhard 2000a : 112 ff.), where it is rather doubtful that our concepts can constitute the all encompassing frame.

3. Customs and Legal Phenomena within Traditional Communities

The preconditions in order to enter such a dialogical approach is an eking out of a balance between human rights in general or women's rights in particular, and a recognition of cultural diversity, which in turn demands a revitalization and support to traditional legal regimes. Support must not be equated to the singling out of general customary practices, in the form of weak legal pluralism, to incorporate them into formal law or to the developing of certain mechanisms, which try to dispense law in formalistic patterns of the application of general norms for each apparently similar situation¹⁰. It rather demands the granting of maximum possible autonomy to the communities, helping to develop a kind of strong legal pluralism but marching ahead of that, with a stern and sincere attitude on part of the State's formal as well as informal machinery to make interventions in right earnest as and when required. It also implies to shift attention from the pluralism of substantial law to the pluralism of modes of adjudication and to the creation of forums where traditional and modern approaches can, when necessary, meet. Such an approach does bear the risk of corrupting the traditional societies, through unwanted politicization but the fact that there are voices and the mechanisms within the community that support the forward looking view point oblige us anyway to look for one way of articulation or another.

In order to adopt such a pluralistic approach towards law it is necessary to accept certain epistemological challenges in respect of the general understanding of "custom", as well as the "legal phenomenon" (*phénomène juridique*) in general. So far, the attempt of the State for accommodating cultural pluralism in law is through acknowledgement of the customary practice by the legislature. But

¹⁰ See the problem of the codification of customs and their transformation into customary law (*droit coutumier*). The process ultimately destroys « custom » as by writing it down and by reducing it to general and impersonal norms its original logic, its functioning in terms of models of conduct and behaviour and of a negotiated order is destroyed (see Le Roy 1984b : 137-138 ; 1999 : 189).

from a “multilegal” perspective (Le Roy 1998 ; 1999 : 189 ss), custom, which informs the *panchayats*¹¹ way of solving disputes, should not be equated to customary law, which is the “codified version” of custom - and thus at the same time its death sentence through the destruction of its original logic. It is important to become aware of its original formalization or putting into forms of social relationships in order to reach an accepted resolution of conflicts in the communities. The attitude to reduce custom to a not yet perfect law, that would reach perfection only through its codification and thus through its transformation into general and impersonal norms and its integration in the “state legal order”, is an application of the “principle of the encompassing of the contrary and bears testimony to an evolutionist approach whose ultimate horizon is supposed to be given by the Western type Law and its formalisations. Such an attitude does not permit to understand observed legal phenomena in different cultural settings in their originality as Alliot has demonstrated in his seminal article on African custom (1985 - see also Alliot 1983 and to put his approach in perspective Sinha 1995).

Le Roy (1984a : 221-223) notes in the same line of reasoning concerning the resolution of conflicts through custom in an African context : “(...) the notion of ‘rule’ itself is inadequate. (...) The telling of the “moral” of a narrative is extremely malleable and in any way does not resemble a normative precept, and thus a civilist rule. It is a way to think conflict, its resolution, and the perenity of social relations. The ‘narrative’ is a way to say how to approach the ways to do, while letting the group free to handle the conflict with regard to the specific factors of time, space, groups etc. The suppleness in the resolution of the conflict does not forbid to refer to the fundamental principles of the constitution of the society and of its socio-cosmic order, but its role is first of all to filter them. Because according to the types of conflicts and the spatio-temporal circumstances, the interest of the society and the research for its global reproduction can lead to appeal to the authority of one or another narrative, which means behind the selected moral to one or another socio-political norm or cosmic force. The divergence with the French civilist concept of a rule of law (*règle de droit*) is thus fundamental. (...) Law does not appear here as a set of legal rules through a formal process of juridicisation of social facts in the resolution of conflicts. Moreover, there does not exist a unique corpus of solutions transmitted from generation to generation. What one learns in the sacred wood, is a way to approach problems, not a general and abstract way to settle them.”

¹¹ *Panchayat* is the Hindi language word, which literally implies coming together of five persons. These *panchayats* can be considered as “legal institutions” belonging to the traditional communities in India. More or less similar traditional ‘legal institutions’ known with different local names exist among the traditional communities in different parts of the world.

To sum up, before moving towards a first glance into a pluralist approach to Law, what is important to note here is that rather than remaining in a logic of an imposition of generalized norms, the emphasis should be on negotiation of a solution in reference to shared and accepted models of conduct and behaviour. This explanation of the logic of the custom proves the point that it is necessary to go beyond mere legal pluralism, seen as a pluralism of normative orders that apply in a same social space. Beyond this kind of legal pluralism, legal anthropological research has indeed unveiled the existence of “multilegalism” (multijuridisme in the original French theory exposed by Étienne Le Roy - 1998) : the question of pluralism in the field of Law cannot be reduced to the coexistence and the overlapping of different “laws” understood as legal orders or general and impersonal rules. Indeed a trap in which a lot of approaches of “legal pluralism” fall, is that they explicitly claim to recognise legal pluralism, while they in fact always reduce conflict resolution to the application of norms. From an epistemological point of view, these approaches implicitly always fall back into a legalist point of view as concepts such as “legal order” or general and impersonal rules, which have to be applied to the diverse situations - and which are typical of the modern approach - remain the key concept around which this approach to Law gravitates.

4. Openings Towards an Intercultural and Pluralist Approach to Law

Anthropological research on Law (Le Roy 1998 ; 1999 : 202) has shown that general and impersonal rules linked to an “imposed ordering of society” are but one “foot” of Law. Law, with a capital “L”, the legal phenomenon as such, understood as “that which puts into forms and puts forms to the reproduction of humanity in the domains a society considers as being vital” (Eberhard 2001a : 176 ss) does not only rest on the one foot of general and impersonal rules. It is a complex phenomenon made up of different constitutive elements, which make up the legal in their dynamic interplay. Besides the foot of general and impersonal rules, which corresponds to an “imposed ordering” of society, there exists also the foot of custom which rests on models of conduct and behaviour and corresponds to a more “negotiated ordering” of society, and the foot of habitus in Bourdieu’s sense (1986 : 40), e.g. systems of lasting dispositions for action, which corresponds to a more “accepted ordering of society”. All cultures know this three foundations of Law, although they value them differently (see Le Roy

1997 : 131 & 1999 : 202 ; Eberhard 2001a : 190).

In the traditional communities, solutions are always adapted to the demands of changed social and political circumstances in the customary logic through negotiation between the concerned actors. General and impersonal rules with the scope to be applied (imposed) in the future may also be changed and new precedents created - besides new models of conduct of behaviour orienting action and constituting new horizons for the negotiation of solutions, through time new *habitus* may also take shape.

The first challenge we are facing is to see how the general and impersonal rules, which characterize traditional statist women's rights approaches can be complemented by a taking into account *habitus* and models of conduct and behaviour of actual women belonging to the diverse communities. It is useless to try to impose general rules which do not refer to models of conduct and behaviour that make sense for the concerned actors and which do not fit with their *habitus*, their lasting dispositions for action. It seems that most important work must be made in the domain of a negotiation of shared models of conduct and behaviour that could be reached through genuine dialogue between representatives of the state advocating human rights' view and the representatives of the diverse traditional viewpoints. Indeed normative production does already exist and seems even to be over productive and not very effective and it is a very long-term job that *habitus* get changed. It thus seems that it is in the field of models of conduct and behaviour that the most fruitful work could be achieved¹².

The second challenge is to understand how we can articulate traditional legal mechanisms that carry out functions of protection of women's dignity with modern ones. The State cannot be in charge of everything and even if it could this should not be seen as an ideal. Indeed each time the State takes over responsibility for a community's issue, it at the same time deresponsibilizes the community, or through the introduction of new legal mechanisms even disorganizes it¹³. And in the process, the community is also turned it into an object, and is not seen as a subject with its own visions and as an equal partner in the dialogue. Nevertheless, the state's actions have also brought about positive effects, such as the

¹² Read in that context the interesting book *Empowering Women. An Alternative Strategy from Rural India* where an NGO's work focused on a rising of awareness is depicted (Narasimhan, 1999).

¹³ See the chapter « Human Rights : The Trojan Horse of Recolonization ? » in Esteva & Prakash 1998 : 110 ss.

awareness of certain problems in the public sphere and their discussion there, and it also has positive roles to play. Thus, while the State cannot be endowed with the sole responsibility for women's well being it cannot also be treated as solely an opponent of the communities. We may have to enter paths such as proposed by Jacques Vanderlinden (1998) in his "pluralist utopia"¹⁴ leading to give back the Law to the people (1996) and to rethink the State through a pluralist production of Law (Vanderlinden 2001 ; see also Eberhard 2002 ; Panikkar 1982).

Fundamentally, we need to engage in a more dialogical approach where the existence of mythos, of our underlying non-conscious assumptions, as another domain of intelligibility next to the logos is recognized. We have to face the challenge to enter into a pluralist outlook on reality (Panikkar 1995b) and to focus our attention on ways of shaping "our living together" in that new predicament. The stake is to open up our mental spaces to a new "pluralist horizon" (Vachon 1997) and to look for ways to translate the so gained insights in the "legal field" so that true respect for the other can emerge and so that we can move from a logic of exclusion of contraries towards a logic of complementarity of differences and of sharing and where beyond universalist or culturalist debates, women's voices are given attention and are fully heard.

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¹⁴ In the conclusions to his article he writes (1998 : 10-11 page numbering according to the version found on <http://www.dhdi.org>) : Pluralism, supposing that the States accept to implement it, is different from the quasi-totality of existing institutional set ups relative to minorities in three essential characters:

- it is not a "recognition" of the existence of particular regimes allowed for by a dominant structure, but an agreement reached by a meeting of free wills between parties considered as being equal.
- the production of law in the domains recognized as being the object of pluralism are completely beyond the reach of the majority group and is placed exclusively under the control of the minority ;
- the conflicts of laws and of reattachment (*for*) between minority legal orders and between the latter and the majority legal order are settled through instances that represent in an equal way the concerned parties.

Let us note that in the Indian context to speak of "minorities" as such is not really appropriate. But we can replace "minorities" by "communities" and "majority group" by the "modern state". For even more radical implications, necessitating even the invention of a new language in the meeting of two homeomorphic legal cultures see Vachon 1995a, 1995b and 1995c.

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