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Towards a Pluralist and Intercultural Approach to Law: Tackling the Challenge of Women's Rights in India

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Christoph Eberhard[•] and Nidhi Gupta[•]

The article demonstrates the importance to adopt a pluralistic and intercultural approach to Law in human right's thought, in order to break out of the pitfalls of the universalism and relativism alternative[1]. The challenge is illustrated through the specific context of Women's rights in India. Certain epistemological breaks with the approaches adopted so far are required in order to tackle the complexities of cultural pluralism. Our understanding of modernity, tradition and custom needs to be reshaped to move ahead on the path of realizing the human rights' ideal of a dignified life for all.

The paper is divided into three parts. The first part presents a traditional practice prevalent in a particular community in India. The narrative, woven into the whole paper, provides an opportunity to deliberate upon theoretical considerations and to evaluate their relevance for real life situations. The second part focuses attention on the cultural relativist argument and provides a description of traditional communities and of their legal regimes. It demonstrates that traditional communities are endowed with many positive characteristics, but that there are certain aspects, which substantially

[•] Scientific Research Worker of FNRS (Fonds national de la Recherche Scientifique, Belgium), Facultés Universitaires Saint Louis (Bruxelles), Laboratoire d'Anthropologie Juridique de Paris. E-mail : c.eberhard@free.fr
[•] Research Fellow, Katholieke Universiteit Brussels, E-mail: nidhig04@yahoo.co.in
[1] To complement the developments in this article see Eberhard 1999 and 2001a for the requirements and the challenges of a pluralist approach and 2001b for an introduction to a dynamic approach to the human rights' *problématique* in all its complexity. For a more comprehensive and general overview see Eberhard 2000.

affect the lives of women in a negative manner, and must also be acknowledged. Finally, the intercultural and pluralistic approach that needs to be adopted for dealing with the complex situation intermingling the issues of women's rights and of the protection of cultural diversity is presented.

1. Virginity Tests: Between Traditions, Cultures and Modernity

1.1. *Saansi* Girls in India: A Profile to Culture, Traditional Practices and Women

Saansi is a tribal community inhabiting some districts of Rajasthan, the desert state of India[2]. In this community, girls are obliged to undergo a virginity test, known as *kukri ki rasam*, to give proof of their purity or virginity on the first night of the marriage. It consists in placing a white thread on the marriage bed on the first conjugal night of the newly married couple. The following morning, members of the groom's family inspect the thread in order to locate traces of blood on it. The blood stained thread is supposed to be proof of the rupture of the hymen of the girl on the conjugal night thus proving her virginity. If the thread is not found stained, the girl is declared impure as the unstained thread is considered as a proof of the hymen being ruptured as a result of sexual relations before marriage. The outcome of the test determines the validity of the marriage.

In the cases where a girl is not able to pass the test, she is obliged to declare the name of the person with whom she allegedly had relations before her marriage. Then, either the person whose name she declares or the family members of the girl are required to pay compensation to the in laws' family, so that, they can accept an 'impure bride'. If the girl or her family members contend the results of the test or the girl does not name any person or her family denies paying compensation, the issue becomes a public matter. The case is brought in front of the *panchayat, or* community council, where the accused girl and her family are given an opportunity to prove the girl's innocence in front of the whole community.

The burden of proof lies with the girl and her family. The community council prescribes three kinds of tests: the fire test, the water test, and the oath giving. The first one involves walking with burning embers on their hands for 100 yards with some leaves wrapped on the palms. If the person undertaking

[2] Members of this community inhabit different villages and there are inter-village marriages.

the test comes out unscathed, the girl is proved to be pure. The second involves staying under water while somebody from the groom's side walks a predetermined distance. Inability of a person to stay under water for this particular duration results in failure and the girl is declared impure. The third procedure, a rather simpler one, demands taking an oath about the girl's innocence by somebody from the bride's side in a temple in front of God and of some community members.

The outcome of the above tests determines the validity of the declaration of the girl's in-laws. If the girl's family members pass the test, the case stops, and no further action is taken. The in-laws do not get any money and they have to keep the bride in their house. There have been cases where the in laws have also been fined for making false allegations. On the other hand, in the case of failure, the girl's family or the person with whom she allegedly had relations before marriage is required to pay a fine to the groom's family, before they accept her again in the house. The fine seems to make the bride "pure enough" to live with her husband and the girl becomes once again 'worthy'.

This practice of virginity tests prevails in the *saansi* community since 'times immemorial'. It came into the limelight and caught international attention only recently, when one of the girls, named *Mewar,* challenged her in laws' allegation and subsequently her family denied to pay compensation, which caused strong enmity between two groups of the community[3]. This led to a serious threat to the law and order situation in general and for the people of the 'defiant' girl's village in particular.

In *Mewar's* case, as her family members passed the test prescribed by the community *panchayat*, she was forced to continue to live at her husband's house in spite of their evidently hostile behaviour towards her. Apparently, her husband wanted to extract money from *Mewar's* family on the basis of her alleged impurity. She was continually mistreated and beaten by her in laws and was forced to declare the name of the man with whom she allegedly had relations before getting married so that a fine may be charged by her in-laws. *Mewar* succumbed to the severe beatings and insults inflicted on her. To escape the torture she named her brother-in-law for having had sexual relations with her. Presumably, she decided to name him as he was working with the state police department. She must have hoped that the involvement of the state police officials might help her to get justice. Later she also somehow managed to escape to her parent's house.

[3] It resulted in attempts on life and in violence against women. Cases have been reported where the women from Mewar's village were raped or where attempts were made on their lives whenever they tried to enter Mewar's in-law's village.

Ultimately, *Mewar* and her mother were blamed for being responsible for bringing this disruption in the society. There was immense pressure placed on her family to send her back to her in-laws' house, irrespective of the in laws' treatment of her. Since her widowed mother decided not to yield to the community pressure, they were forced to leave the village.

Mewar's story, certainly an extreme case, is also a typical example of misuse of traditional practices to pursue personal economic interests resulting in the exploitation of women. Unfortunately, such misuse is not rare. In many recent cases, the groom's family has declared the bride to be impure, even without *kukri ki rasam*. Where the bride has been courageous enough to raise her voice, or where the girl's family members are not able to pass either of the prescribed tests, she is severely beaten or otherwise pressurized by her in-laws to name a person with whom she had relations before marriage. Declaration of the name of "any person" strengthens the case of the in-laws in front of the *panchayat*.

To most of us the very practice of *kukri ki rasam* may appear primitive and oppressive, something which needs to be eradicated through adopting strong measures. On the contrary, it makes sense to the members of the community, even though they may condemn its misuse. Most of them do condemn the acts of undue violence and greed on the part of the groom's family, but they do not perceive the underlying practice as wrong. It is an integral part of their culture and a means of pursuing their values. The three tests constitute the normal state of affairs and the normal frame of action. As per their belief, these institutions help them in reaching a fair judgment. The practice is also justified as being well intentioned as it is aimed at preventing pre-marital sexual relations. The payment of fine is justified as a form of punishment for the girl's parents for not being able to protect her chastity, and for the boy, with whom the girl allegedly had relations before marriage, for being irresponsible enough to establish sexual relations with an unmarried girl. For the groom or his family the amount of the fine is a compensation for the violation of their right of getting a chaste wife/ daughter in law.

The community members argue that it is only recently that, their practices are under critical scrutiny from the outside world. But with the exception of some sporadic cases such as *Mewar's*, they argue that they have managed their affairs peacefully and efficiently. Some of the community members also lay the blame for this situation on the girls. They believe that they have become less tolerant due to the increased exposure to the western ways of life. Discussion with women of the community reveals that

they subscribe to the practice due to its perceived antiquity, connection with their tradition and also because they do not have any other alternative besides silently accepting it. Defiance normally results in expulsion or boycott from the community or in strong opposition from rather influential members of the group, which threatens the basic survival in absence of any other reliable external support. Most of the women accept this practice and the resulting injustices as their fate due to being born a woman.

Notwithstanding the justifications extended by the *Saansis* in defense of their practice and associated mechanisms, it cannot be denied that it results in the violation of women's rights that can lead in the contemporary context to extreme violence and abuse. The fact that the hymen test cannot be considered foolproof for determining the virginity of women makes the result uncertain, which ultimately makes the girls vulnerable to exploitation. In the whole process, from the in-law's declaration to the conduction of the various tests, the woman is treated like an undesirable object, who is made to shuffle between her parent's and in laws' family unless either is satisfied that their "honor" is saved. It is rather disturbing to note that her own dignity and bodily integrity is not even an issue. The much acclaimed stress on dignity of a human being as promoted through human rights' discourse seems to have no applicability for women in the *Saansi* community, in want of sanction from their culture and tradition.

1.2. Rights of Women Confronted to the Virginity Test

The practice prevailing in the *saansi* tribe brings forth a very specific situation of women belonging to a rather "backward" community of Rajasthan. The prevalence of such practices are usually attributed to their socially and educationally "backward" status. While accepting the specificity of the situation in this particular context, it is interesting to note that the practice of virginity tests has been widely prevalent all over the world. Most societies of the world seem to know or have known it as a means to prevent pre-marital sexual relations pointing to the importance of chastity and virginity for the concept of womanhood. Often similar methods of inspection of the conjugal bed for bloodstains as a proof of rupture of hymen on the conjugal night are used. Though the definition and extent of emphasis has varied in different parts of the world, they carry enormous importance in traditional, non-western societies. They are considered as essential values associated with culture and tradition and any questioning is treated as a direct attack on the culture and tradition. The very objection against virginity tests, which actually lie at the root of such extreme cases of violence against women, by national as

well as international women's governmental and non-governmental organizations, are viewed as negative effects of modernization and globalization. These campaigns are decried as being influenced by the western perspective with no or little relevance for the non-western world.

Although, there is partial truth in this argument, we cannot shut our eyes towards the violation of women's dignity and physical integrity, which is a more or less direct result of such practices. Neither a universalistic position, imposing the Western view and simply condemning the virginity tests and thus the whole underlying worldviews, nor a relativistic position arguing that "everything goes" as we cannot judge the practices and points of view of one culture from the *topos* of another culture, holds. The universalistic approach leads to the paradigm of the "Western steam-roller" (Latouche 1998 : 8), by the imposition of its values over other cultural values. It contradicts the human rights' basic ethics of respect of the other but is also counterproductive, as it feeds feelings of resentment and of aggression and boosts particularistic withdrawals and communitarian crystallizations often referred to as communalism. The relativistic position on the other hand may lead us from the recognition of a right to difference, to the recognition of a right to indifference, which in the hand of totalitarian regimes (state regimes or community regimes) can lead to the acceptance of a "right to emprisonment", a "right to oppression", " a right to death" (Abou 1992: 34-37).

It is thus important to raise here a few points in respect to virginity tests which force us to open up to the whole underlying *problématique*. One of the underlying reasons for the suppression of women worldwide is a result of the over-emphasis on these values for women only. It imparts them an inherently vulnerable character: they are seen as 'persons' who need to be protected and guarded all the time. This whole process inadvertently transfers undue power and authority to her protectors. The rather onerous responsibility of maintaining the chastity of the daughters automatically makes girl children less desirable than the male progeny. It is a widely accepted fact that most of the women who at any point of time exercised, supported or participated in female foeticide or infanticide, strongly justify it for having saved their daughters from unforeseen misery or indignation had she been born or had she remained alive.

The issue to what extent these values of chastity or purity of women are important remains debatable and does not lend itself to simple, single solutions. But it does lead to fundamental questions: why should women be the sole barriers of these values? If they are important is it unreasonable to demand

that they are pursued with the same vigour for both men and women? Why is it that only a husband has a right to claim a chaste wife, while the wife cannot expect the same from her husband? Truly, in the case of the *Saansi* community, like in many other such cases, it is the man who is held guilty of having had sexual relations with an unmarried woman and he is often the one who is forced to pay the fine. But for him the punishment ends there. Insidiously it is the woman who has to bear the real punishment with a lifelong stigma on her integrity. It is the woman's honour, which is ultimately under attack and it is her parents who are put to shame for not taking good care of their daughter(s).

1.3. The Underlying Issues and Some Strategies

On the basis of this particular incidence manifesting the delicate conflict between protecting cultural diversity and ensuring a dignified life for women, some general issues can be summarised. This will provide a framework for an approach, which on the one hand takes into account the real problems and the exploitation that women are facing, but on the other hand also recognizes the different perspectives on the issue and the necessity of dialogue between them in order to find or to invent solutions:

- The community has its own well-developed legal order for resolving its disputes. It is an integral part of their culture. It enjoys authority and autonomy no matter whether it is in conformity with the state's formal legal order or not. The community members are not inclined to accept any external interference in their matters and want to solve their matters amongst themselves.

- While in general a majority of the community members condemns acts of extreme violence against women, there is a general support for the practice of virginity tests, notwithstanding the fact that there is a potential threat that many more cases like that of *Mewar* may occur in the future.

- Hymen tests are an integral part of the *Saansi* community's culture and are meant to prevent pre-marital sex as a means of protecting the values. From a human rights perspective, this practice is a clear case of violation of the rights of women. It is a source of undue violence and oppression and needs to be eradicated. Not only this, by virtue of being a party to Convention for Elimination of Discrimination against Women, steps for eradication of such kind of practices is a legal duty for India.

- The Indian State has been making attempts to deal with such issues but considering the deep-rooted social acceptance of such practices, it has not been very successful. The community members perceive the steps taken by the government as interference into their internal affairs and are viewed as instrumental in destroying the fabric of the community life.

At first sight, the following strategies may be suggested in order to reach a balance between the rights of women in traditional communities and the protection of cultural diversity:

(a) A Relativist Approach: Non-interference in the affairs of the community, except in the cases of extreme violence, where the situation becomes a threat to public peace. This demands imparting communities with the autonomy and freedom to manage their own affairs and is characterized by an attitude of indifference towards its practices, which may be oppressive or derogatory for women.

(b) A Universalistic Approach: Development of various specialized state-sponsored mechanisms to deal with such issues and problems with an aim to bring the activities of the community in conformity with the ideals and policies of the State. This involves strong condemnation of its activities. Although it tries to tackle the demands of the existing pluralism and does to a certain extent, recognize the necessity not to confuse the universalization process of some values with a complete uniformization of values and the strategies of action it can be termed universalistic. Despite of the diversity of mechanisms that are deployed in order to respond to the existing socio-cultural Indian pluralism, they all operate from within the dominant framework of the state and its aim to universalize its hold and control over society.

(c) A Pluralist and Dialogical Approach: A general policy of "partnership" between the different communities and the state where a strong supporting mechanism for women is linked to general support to the communities' activities and mechanisms.

2. The strength of traditional communities - An argument for cultural relativism?

The option of not interfering at all in the affairs of different communities seems to maintain cultural diversity and is in conformity with the cultural relativistic position. But it leads to accepting cultural

relativism in its negative sense. It implies that the basic human right of protection against violence or the right to be ensured with a life of dignity is only a privilege of those, whose communities allow it to be so - or where the powerful in the communities allow it to be so.

It remains rather disturbing to note that the Indian State is often forced to follow this option even though it has been progressive enough in adopting various specialized mechanisms to deal with the specific pluralistic situations. 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 force the State to tolerate them.

2.1. Societal and Legal Structures of Traditional Communities in India

There are two types of non-state legal regimes in India: caste based and community based. They are concerned not only with dispute resolution but also effectively regulate all kinds of human interactions within the group, which are necessary for the sustenance and the reproduction of the group.

The dominant organizations in these legal systems are the *panchayats,* which consist of five or more members of a village or a caste. They hear and decide disputes, mostly when they are summoned to do so, but frequently they also take initiative on their own. They consist of men only. They arbitrate on all matters of community disputes. Although their verdict may not be termed “legal” in a strict positivist sense, it carries a lot of weight even in officialdom and is essentially binding, socially, on all members of the community.

As in the state legal system, the caste or the community based legal systems involve the application of pre-existing norms. But this is not the only way of solving conflicts. There are also specific processes of negotiating solutions which can better be understood in reference to custom, rather than to the application of norms as is usually done by speaking in terms of “instant norm creation” or “norm innovation” (see Le Roy 1999 : 189 ss).

Generally speaking, it can be claimed that the processes of dispute handling in traditional communities, howsoever complex, share common features of informality, flexibility, and decision making by consensus. In contrast to the impartial judges of the state system, justice in these *panchayats* is dispensed by the people, and mostly by the elders of the village who personally know the disputants. Village law and village justice are aimed at seeking collective justice, achieving group and social harmony through consensus and compromise where no single party is a loser and both the parties engage in give and take. This presentation should not give the view of a "soft justice" - a negotiated form of justice is not "softer" than an imposed form of justice. It is only the formalizations that change. Once decisions are reached, *panchayats* have a whole repertoire of sanctions, which include fine, public censure, civil boycott, ostracism, and varied public opinion pressures by the village notables and sometime by predominant groups in the area. Castes also predominantly have the very strong sanction of "outcasting". Public expression of penitence, self-correction assurances also serve as sanctions. Broadly speaking we can say that social stigmatization forms the essence of all sanctions (Baxi 1992: 473-6).

The above description highlights the fact that traditional communities do have well-developed systems for managing their affairs. They find more favour within the community and enjoy relative superiority to the State's and to other associated legal systems. As they are much closer to the "lived norms", the models of conduct and behaviour, and the representations of the people, the gap between rhetoric and reality is much narrower than in the case of the state legal systems.

The relative superiority of these "non state legal regimes" as compared to the formal ones leads legal pluralists, to support the relativistic position. But stories like that of *Mewar* highlight that there are also certain aberrations within the traditional systems. They need to be strongly dealt with because these systems do not live completely separated from their surroundings and other concurrent, state- or non-state legal systems.

As cases of extreme violence and abuse against women do take place, it is necessary to address them: it does not serve to only uncritically glorify traditional systems. Constructing the other as *a priori* more harmonious, or morally better is as non-dialogical as constructing him/her as *a priori* inferior. If universalists tend to see their worldview as the only civilized one and as the ultimate horizon for any action, relativists sometimes have a tendency to draw a too nice a picture of different cultures or

"grassroots' perspectives", forgetting about the power relations that exist in them as well as about the emancipatory role the State can play in certain circumstances and if certain conditions are fulfilled. (Mahajan 1998 : 26)] A critical but nevertheless open-minded approach is thus paramount for any genuinely dialogical approach.

Apparently those eulogising the traditional communities are not unaware of these negative aspects but they tend to ignore them so far, in absence of any other viable option for dealing with them. The attempts made by the state to deal with the negative aspects of these communities are not successful in generating any optimism either. The reactivation of the traditional institutions like *panchayats* by the State has led to politicisation and introduction of power games within the communities. While this has lead to the corruption of the traditional communities, the social orthodoxies and hierarchies embedded in them have not been dismantled.

So far, the relative superiority of non state legal systems as compared to the formal one has led legal pluralists to over emphasize their positive aspects and to only make passing references, if any at all, to their negative ones. But should we stay in a logic of "either / or", of "choosing a lesser evil between State Law and non-state Law? Should we not try to look for ways to ameliorate women's situation by entering the paradigm of the "in-between" of state law and non-state law, of "tradition" and "modernity" in all its complexity?

It should be our task to look for ways to articulate the best in all systems. Instead of remaining in a logic of opposition of contraries, we should move towards a logic of complementarity of differences. But this demands a new epistemology and a pluralist, intercultural and dynamic approach to Law. Simple answers will not do. It remains paramount to highlight both the negative and the positive aspects of both kinds of legal systems and processes in order to have a complete picture permitting to take meaningful action in the domain of Women's rights.

4. Openings Towards an Intercultural and Pluralist Approach to Law

Tradition is a dynamic and evolving reality, as is Law (see Moore 1983). It is not the inverted image of "modernity" (see Bauman 1987: 3-4; Alam 1999 : 3 ss). Each tradition is a process of change and of re-interpretation. In this process there are always tensions between those who rather perpetuate a *status*

quo and those who rather favour change to suit the changed social, economic and political circumstances – and both base their arguments on tradition. This fact demonstrates that tradition is not antinomical to change and to innovation.

Challenges to seemingly objectionable practices can be successful if one adopts this more dynamic view of the tradition. In cases such as those related to virginity tests in traditional communities and associated with violence against women, two types of challenges can be projected. One has to seek justification from the internal explanations of the tradition while at the same time putting them in tension with the external inputs. Both challenges need to go hand in hand and must be approached prudently although they must follow different paces.

Radical challenges of the core values of a tradition, though not successful in achieving their purpose in short run, do serve the purpose of attracting attention towards certain underlying issues. Such challenges question the very way of looking and understanding reality. For the case dealt with in this article the questioning of the very practice of demanding a specific conduct or behaviour from women only and then putting it to scrutiny through virginity tests is like challenging the basic values of the community.

While radical activism does serve its own purpose in its crusade for ensuring women's rights, it is important to note that such changes cannot be seen to be coming overnight. Such changes need to be accompanied by evolutions in social, economic and political circumstances. In most societies, radical activism is resisted and sometimes rightly so, because social and economic conditions are not ripe to accommodate such changes. For example in most of the south Asian countries large section of population including women are usually found resistant to the idea of sexual freedom for women since they perceive the prevailing conditions adverse to support the same. Thus, if any community appears to be rejecting the challenge to its core values, even for a considerably long period of time, it should not be labelled as retrogressive or oppressive. It is not only the mental attitude but also the material circumstances that need to change. The non-relevance of a certain category of rights for women in non-western countries must be understood on the basis of the large disparities on the level of social and economic as well as cultural circumstances.

Radical activism is necessary for certain purposes but it cannot be denied that it is not sufficient to bring about changes. As Yogendra Singh (2000: 15) notes, *"each cultural system tends to integrate cultural traits into a configuration, which is guided by its core values ; these values impose a logic of selectivity which define the limits of acceptance or rejection of alien cultural traits."* Given this logic of selectivity it is necessary that the radical changes demanded in the society to a certain extent try to conform to this logic. In traditional societies chastity of women forms an important part of its core values. Challenge to this certainly will be an arduous task and is bound to meet rejection with rather strong arguments for supporting these values. Challenge may become relatively easier, though not too much, if the radical activism tries to seek conformity with this core value. Thus the challenge can be moulded as claiming extension of the same values indiscriminately both for men as well as women. This leads us to the importance of argumentation from within the tradition.

To raise voice against cases of abuse of women it is more beneficial to seek justification within the tradition. Since immediate corrective measures are required in such situations, one should refer to those explanations to which the community's members can most directly relate too. Second, tradition, culture and religion play a very important role in defining a person's identity. In numerous circumstances people perceive severance from their traditional community or sharp criticisms of their traditions as a major cause of embarrassment. Justifications for change derived from sources external to the tradition usually make the tradition under scrutiny appear as inferior. Thus, finding justification for change or challenge to current objectionable practices within the tradition is much more welcome and relatively more easily acceptable than relying on external sources.

In order to find justifications within the tradition it is necessary to involve the people who are part of it. Only they can reveal approaches, which remain unthinkable for anybody, who is not part of that culture. A dialogical approach thus seems inevitable. It demands as a precondition to break away from the prejudices and the mental barriers against those who do not conform to our standards of "modernity". It further entails to emancipate ourselves from a purely dialectical approach to reality whose underlying assumption is that the whole of Reality can be exhausted by the lights of Reason alone, and where the questions of our lives and of our living together are basically seen as problems that can be rationally solved - which also implies, as Reason is one, that there is only one right system towards which all should move (and which is identified with the modern inventions such as human rights, democracy, development etc.). Dialogical dialogue (Panikkar 1984b) between different Cosmo-

visions backed by diatopical hermeneutics thus becomes paramount (Vachon 1990). It is not enough to 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 will have to place ourselves "in-between" cultures (see Eberhard 2000a: 112 ff.), where it is not at all sure and rather doubtful that our concepts can constitute the all encompassing frame.

In the present case only genuine and open dialogue with both men and women from the *Saansi* community can help to understand their way of reasoning and their way of dealing with things. Most of the women in so-called "backward communities" have devised innovative methods suitable to their social structure. They have their own ways and ideas of dealing with their exploitation (see Khare 1998). What they want from the State machinery is the sensitive support commensurable to their prevailing social and economic circumstances. There are others who for some reasons have not been able to find a way out of their predicament but who do carry the potential to do so with little support from some source. These are situations where the State and its associated mechanisms have to come forward and render required support.

But in order to do so an intercultural approach, which opens the way for getting an insight into various cultures and their core values before attempting to foster change together, seems paramount. As Raimon Panikkar (1984a : 30) notices, in the present predicament we get more and more aware that every culture constitutes a particular window through which we see reality and that the sight out of one window only, cannot provide us with satisfying solutions for the invention of new forms of "living together". It is only through mutual cultural disarmament (Panikkar 1995) and dialogue that new paths of Peace can be opened up and then walked.

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