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Chapter 5. Tradition as a Peacebuilding Tool

Tradition as a Peacebuilding Tool



Jessica Giles

Abstract The concept of tradition, rather like that of secularism, has come to mean different things to different people in a variety of contexts. This Chapter explores an understanding of tradition as that group of rules or practices which sits alongside core governing texts of groups within civil society. It identifies tradition as that which facilitates the contextualisation of civil society groups over time. It then examines how tradition could be used as a tool for engendering peaceful civil society relations. To do this it first explains the rationale for identifying plural religious traditions as important for strong civil society building, including for the protection of fundamental rights and the socio-economic well-being of a nation. Tradition is then proposed as a means of countering the exclusion of plural religious voices from the public square arising both as a result of the secular narrative manifesting itself in extreme forms of *Laïcité* and as a result of forms of theocracy and confessionalism. The chapter does this by identifying the development of the concept of tradition, setting out dictionary definitions, definitions within the discipline of law and their interaction and links with definitions within the three Abrahamic faiths. The overarching thesis drawing these threads together is that the various methods of forming and using tradition by intermediate institutions of civil society could inform the creation of a platform as a dialogical basis to build consensus amongst individuals, institutions of civil society and governments. This envisages a plurality of religious voices not as a threat but rather as a richly diverse canvas upon which to paint the interactions of civic life and formulate the law that governs those interactions.

1 Introduction

Fragmentation of communities and societies has been occurring throughout history as various factors have led to the breakdown in peaceful relations between individuals, civil society groups and nation states. What has changed from time to time is the

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root causes of this breakdown. A recurring theme occurring in various guises is the polarization of views around the role of religion in civil society. Extreme modern forms of secularism manifesting in a laic model of government which ultimately exclude the expression of any form of religion from public life on the one hand contrast with forms of governance seeking to impose one particular and sometimes fundamentalist view of religion upon civil society. At both ends of the spectrum plural religious voices are excluded from public life.

This chapter explores why the inclusion of plural religious voices is important for the building and maintaining of peaceful civil society relations. It identifies tradition as a tool for creating a dialogical platform to facilitate this process.

The polyvalent character of tradition, whereby it consists of a number of different forms and purposes depending on context and usage, means that providing a single explanation is challenging. Attempting to synthesise the various definitions and methods of forming tradition to come up with a core definition by boiling the various interpretations down to their very essence or by comparing and contrasting definitions to identify unifying elements would fail to do justice to the sophisticated, nuanced and deeply thought-through approaches to the concept both within and external to the different faiths.

It is proposed that the very nature of various traditions, including religious traditions, provides a means of taking a multivalent approach to dialogue, enabling various routes to be identified in order to build consensus around the common good, law creation and adjudication. This directly contrasts with forms of bivalent reasoning which create stark contrasts between right and wrong leading to a need for correct and incorrect answers. It is argued instead that within these various understandings of tradition lies the key to a multivalent dialogical platform for engagement built on a nuanced consensus across institutions of civil society. Consequently, this study does not seek to identify one 'correct' definition of or method of forming tradition, but to use the various understandings to create a platform for dialogue and building consensus.

2 The Need for Plural Religious Traditions in the Public Square

The constitutional mechanism used for supporting religious pluralism in democratic constitutional structures is to build the right to freedom of religion into a bill of rights or to rely on forms of national or international law, including legislation protecting a spectrum of civil and political rights.¹ In essence this protects freedom of religion

¹For example, Article 9 of the European Convention on Human Rights, incorporated into the law of England and Wales in the Human Rights Act 1998 and Article 18 of the International Covenant on Civil and Political Rights.

and belief as an individual right to manifest religious belief.² This is an important tool in the fostering of plural living together. Conversely a form of plural society is necessary in order for religious freedom to be enjoyed as a fundamental right. Rights frameworks are not and should be the only means of fostering and protecting plural living together, and while they provide the essential framework for it, the proposal in this chapter is that more needs to be done to create plural dialogue within civil society and to strengthen civil society groups, including religious ones. Plural religious voices expressed by faith traditions can be said to be important to peaceful civil society building on various grounds.

First, from a philosophical and theological perspective. Religious traditions themselves have much to contribute within their own philosophical theological literature on civil society building, human dignity, human flourishing and the common good.³ This includes support for a plural society incorporating freedom of religion. Freedom of religion, both the *forum internum* (to believe) and *forum externum* (to practice), is regarded by many as essential to human dignity and human flourishing.⁴ Freedom of religion can only be practiced within a plural society where religions are able to peacefully co-exist.⁵ Building a platform for dialogue to include religions and in order for wider society and government to understand religious groups, is arguably not only vital for peaceful civil society relations but also is bound up with and important for the protection of human dignity and flourishing.

²Freedom of association is also protected as a fundamental right, however when they refer specifically to religion, rights frameworks protect it as an individual right.

³For example, Williams (2008, 2010) both as Master of Magdalene College, Cambridge and as the Archbishop of Canterbury, Metropolitan of the Province of Canterbury and Primate of All England (2002–2012) argues for religious integrity coupled with plural living together. Within the Christian reformed tradition theologians such as Abraham Kuyper, Herman Dooyeweerd, Nicholas Wolterstorff and Jonathan Chaplin explore Christian theological approaches to civil society; within the Roman Catholic tradition theologians such as Robert George and John Finnis; within Judaism authors such as Sacks and Walzer (ed) 2006. Although concerns have been raised as to whether or not democracy can flourish where Islam is the dominant faith: see Esmer (2013). However, Indonesia with its political philosophy of Pancasila would be an example of a Muslim majority country which promotes pluralism. In Indonesia there are six official religions. The political system operates on the basis of deliberative consensus emphasising representative democracy.

⁴The right to freedom of religion or belief is seen by Witte and others as the first or core fundamental right upon which the effective operation of rights frameworks depend (Witte 2007, 2). According to Witte, freedom of religion as a universal right, was established within nation states constitutional frameworks in Europe, and later in America, at least since the reformation. Some authors trace freedom of religion, as a right of the church to be free from state interference, back to the Magna Carta (Witte 2007; Griffith-Jones and Hill 2015, 3 ff). Witte in fact traces its origins even further back to the Edict of Milan 313.

⁵Bielefeldt, Ghanea and Wiener identify the importance of religious pluralism to support the right to freedom of religion and belief. They argue that pluralism goes beyond the anti-egalitarian politics of toleration and avoids the pitfalls of post traditional unification projects which fail to account for diversity (Bielefeldt et al. 2016), 6–7, 14–16. Following on from a rich Christian theological, as well as secular philosophical tradition, they discuss human dignity as the universal unifying factor, Bielefeldt et al. (2016), 16–21. Although this is not historically the only basis put forward as justification for freedom of religion or belief: see McIlroy (2013).

At an international level, rights frameworks incorporating freedom of thought, conscience and religion are based on the idea that they are universal. To find universal acceptance these rights frameworks need to find theoretical justification within faith traditions as well as secular philosophy. This is because in many states religion rather than the absence of religion is the norm. Rights frameworks are at danger of being perceived as underpinned by Western liberal democratic ideals or even forms of colonialism, divorced from the reality of religious daily living, understandings of human dignity and the common good and models of governance in place.⁶ Consequently, further debate still needs to take place between religious and non-religious traditions. This is in order to find an acceptable basis for rights frameworks, potentially adopting multivalent forms of theological and philosophical reasoning accounting for differing underlying rationales. Ultimately either to find ways in which to contextualise rights implementation or to identify common ground for law creation and adjudication and to conceptualise a workable understanding of the common good.

It is proposed that a common understanding or conceptualization of the common good can be established within the various faiths in dialogue with institutions of civil society through the disparate traditions of those institutions—that by drawing upon the common practices and beliefs that create cohesion between members of civil society groups *intra se* it is possible to create the basis for dialogue between groups (*inter se*). This is because the tradition of a group is generally that which enables it to contextualize over time. Sacks argues that this avoids assimilation on the one hand and multiculturalism on the other but rather that this integrates diversity based on the concept of covenant built around the common good. It is based on cooperation rather than competition and individual self-interest (Sacks 2007, 23).

A second reason for the inclusion of a plurality of religious voices in the public square engaged in building consensus is based on a Weberian rationale. Religion can be deemed of importance to cohesive living together in society on a socio-economic basis.⁷ According to the Pew Centre, over 84% of the 2010 global population registered an adherence to a faith and 55% registered adherence to one of the Abrahamic faiths.⁸ Faith groups have an impact and influence in society in manifold ways. Grim and Grim (2016) at the Religious Freedom and Business Foundation argue that religion contributes nearly \$1.2 trillion of socio-economic value to the US economy. Earlier research by Grim (2014), and Grim and Finke (2011), demonstrated a link

⁶For example, Dr. Mahathir Mohamad, former Prime Minister of Malaysia and Lee Kuan Yew, former Prime Minister of Singapore, advocates of Asian values, argue that human rights are culturally relative to Western societies. Although Devan Nair, former president of Singapore has argued for the universality of human rights. For academic debate on the issue see Inoguchi and Newman (1997), Khong (1997) and Sen (1997). For a discussion of the clash between the universalisms of Islam and human rights frameworks, see Cox (2013).

⁷Weber (1905) argues that religion creates a framework which shapes an individual's understanding. It thus affects their understanding of their interests and how they decide to act. Within this framework soteriology provides both relief from suffering and reassurance of meaning. Religion can thus provide an incentive for individuals to act less selfishly, in the interests of the common good.

⁸Pew Research Centre (2012). Of these .2% were Jews, 31.5% were Christians and 23.3% were Muslims. Consequently 55% adhered to the Abrahamic faiths. 16% were unaffiliated, 15% were Hindu, 7% Buddhists, 6% folk religionists and 1% other religions.

between those nation states where Government restrictions on religion and social hostilities involving religion are low and high levels of GDP growth. Conversely that where religious freedom is limited, levels of violent religious persecution and conflict tends to be high. This indicates that in order to facilitate the stability that occurs with increased levels of GDP growth, in particular in those states where civil society has broken down or where there is poverty which can also lead to rights abuses, increasing dialogue between faith traditions and empowering plural engagement of religious groups with other institutions of civil society and government could create a positive impetus towards change.

The Pluralism Project, established by Professor Diana Eck in the Divinity School at Harvard⁹ and Eck (2009) in the Gifford Lectures, explore the positive impact of religious diversity in America. In particular how the communities and religious traditions of Asia and the Middle East have been woven into American life and culture. It explores the challenges and opportunities of a commitment to pluralism. In the UK the *Living with Difference Report* of The Commission on Religion and Belief in British Public Life (2015) acknowledges the importance of hearing and engaging with different faith groups in public life, calling for an increased public dialogue and religious literacy in the public square.¹⁰ Pluralism is supported as of practical benefit to society by faith groups themselves as well as NGOs and IGOs in the field.¹¹

Plural social interaction can be said to be dependent on tradition. This is because within the three Abrahamic faiths, for example, tradition, that is those rules and practices that sit alongside core scriptures, plays a key role in providing the locus where rules for daily living are formulated. Tradition therefore directly affects the lives of believers and for many operates as a compass to orientate lived experiences and social interactions. Any consideration of cohesive living together within society, law creation and adjudication by implication consequently needs to take into account theological understandings of the concept of tradition. In this way meaningful social interaction and dialogue can take place.

Moves to work towards plural living together have to counter the strong push towards forms of secularism.¹² Vanoni and Ragone (2018) make a comparison between the strong laic form of secularism which seeks to drive the religious voice

⁹See in particular Pluralism Project @ 25 (2016).

¹⁰See also Casey (2016).

¹¹This includes, for example, interreligious work of organisations such as KAICIID (founded by the Kingdom of Saudi Arabia, The Republic of Austria and the Kingdom of Spain, with a Board of Directors made up of representatives from major world religions): <https://www.kaiciid.org>; the Community of Sant'Egidio (officially recognised by the Catholic Church as a church public lay association): <https://www.santegidio.org/pageID/30008/langID/en/THE-COMMUNITY.html>; The Institute for Global Engagement (founded by the first US Ambassador at Large for Religious Freedom): <https://globalengage.org>; The Religious Freedom in Business Foundation: <https://religiousfreedomandbusiness.org>; The Faith and Belief Forum: <http://www.3ff.org.uk>; Global One 2015: <https://globalone.org.uk/about-us/our-vision-mission/> (All accessed on 20 April 2018).

¹²Evidenced recently in the case of *Achbita and another v G4S Secure Solutions NV* (Case C-157/15) OJLR 2017 6(3): 622–623.

out of public life and, for example, the more moderate form of Italian *laicità*. The later seeks, in some instances, to accommodate religion, albeit using weaker forms of justification, on the grounds of historical importance or cultural relevance.¹³ Vanoni and Ragone point to the practical illogicality of the principle of neutrality and attempts to exclude religion altogether from public life.¹⁴

The third basis for inclusion of plural religious voices in civil society building is because a dialogical approach between religions, institutions of civil society and law makers, creating a plural public square, will have the effect of supporting the democratic legitimacy of the law-making and adjudication processes. This is because the lived reality of those within faith communities will consequently stand some chance of being reflected in law and law will find a broader basis of support. Vanoni and Ragone (2018) see attention to faith groups and their traditions as essential to the just resolution of religious freedom disputes. They include this approach in their proposals for a third way as a tool for judges when addressing legal issues which implicate religions.¹⁵ In addition, religions are likely to feel less threatened and more likely to surrender those elements of their tradition established as mechanisms to protect core identity when under threat.¹⁶ This will tend to increase the likelihood of accommodation of religion within civil society and by religion of civil society.

The fourth ground supporting engagement with religious traditions in civil society building is that this can facilitate the integration of minorities and immigrant communities. The argument of this chapter is that by using tradition as a platform for dialogue it is possible for civil society groups and states to retain their core identity and integrity while managing to find their own varied paths to work towards an agreed common good. The inclusion of the religious traditions of immigrant and refugee populations is particularly important in view of the fact that there are more than 65 million displaced persons across the globe.¹⁷ Religion is likely to be the one constant that individuals are able to take with them as they flee their home. It is also likely to be that which could facilitate integration in host states. This is not only because of the emotional and spiritual support provided by a person's faith, but because faith groups tend to create supportive communities over and above that which can be offered by the state and can create welcoming environments for incoming immigrants and refugees.¹⁸

¹³For example see the Grand Chamber judgment of the European Court of Human Rights in *Lautsi v Italy* Application no 30814/04 [2011] ECHR 2412.

¹⁴This is echoed by Bielefeldt et al. (2016), 35–38.

¹⁵Further support can be found in the writing, for example of Newbigin (1989), Williams (2008) and Sacks (2007).

¹⁶The wearing of the veil within the Islamic tradition would be an example of this. Although contested, for some it represents a religious requirement and for others a cultural choice.

¹⁷UNHCR Refugee Agency (2017).

¹⁸Although in some cases religion can act as form of oppression, creating microcosms of communities from which refugees have fled: see Open Doors (2014). Such experience supports the pressing need to hear the religious voice of migrant communities in a dialogical manner so as to enable contextualisation within host communities.

Finding a means to envisage immigrant and refugee communities within the concept of the common good through dialogical approaches located in the traditions of immigrant communities addresses some of the concerns raised by Pin (2014, 419). Pin is troubled by the use by member states of rights frameworks to reinforce national identity in attempts to integrate migrants from plural backgrounds. Where there is a sense that civil society institutions and civil society itself can retain its core principles, but that a degree of mutual accommodation and contextualisation is required for communal peaceful coexistence to occur, states and existing civil society institutions can recognise and welcome the rich diversity that immigrant communities have historically brought and continue to bring. Seeing integration as a one-way process ignores the strength that incoming faith traditions bring as communities and individuals linked to a broader and potentially global network of faith. Seeking a dialogical approach arguably stands a greater chance of facilitating integration and contextualisation rather than seeking to impose legal and social frameworks alien to immigrant culture and tradition which is likely to have a ghettoizing effect.¹⁹ As Pin writes:

people, including newcomers, do not simply receive human rights: they also actively contribute to their conception and reconsideration, as religious and cultural traditions interact openly in shaping a common narrative of rights and duties. (Pin 2014, 437)

Dialogue with immigrant communities, which are in and of themselves an important part of the jigsaw puzzle that is involved in rebuilding broken host communities, could in fact enable Western democratic liberal models to understand how to communicate a more nuanced and contextualised idea of universalism of rights frameworks. These frameworks could consequently stand a chance of finding greater acceptance in non-Western nation states.

The fifth ground for considering religious traditions within a dialogical approach to consensus and peacebuilding is that globally religion can be said to be on the agenda in terms of foreign policy and international development, as states grapple with the breakdown of civil society and extreme poverty in the Middle East, Africa, parts of Asia and elsewhere.²⁰ The inclusion of religious freedom in external state policy requires a coherence with internal policies. Offering aid coupled with a requirement that a fragile state promote religious freedom is, as Annicchino and Ventura point out, only feasible where religious freedom is fostered in the home state (Annicchino 2014, 257–263).²¹ A coherent approach to freedom of religion or belief requires a certain level of religious literacy and a willingness to incorporate various religious

¹⁹For example, see the Casey (2016).

²⁰For example, in 2016 the European Union appointed a Special Envoy for Religious Freedom outside the EU, Dr. Ján Figel: https://ec.europa.eu/europeaid/special-envoy-jan-figel_en (date accessed 20 April 2018) and speaking at the opening of the European Academy of Religion, Italy 15 December 2016 https://www.youtube.com/watch?v=QE_-0tpmEfE and at the Institute for Cultural Diplomacy: Annual Conference on Cultural Diplomacy: 5 January 2017 <https://www.youtube.com/watch?v=iimjLKGk6g>.

²¹See for further analysis Giles (2017).

traditions openly in civic life at home in order to use this fundamental right as a policy tool abroad.

Sixth, faith groups play an essential role in society as intermediate institutions. Using religious traditions to feed into a platform for plural dialogue increases the likelihood of their effectiveness in this role. The role of intermediate institutions is explored by Chaplin (2011) and Benson (2012). Chaplin, in his examination of the political philosophical theology of Dooyeweerd, identifies Dooyeweerd's concerns that there is a deep-rooted problem in ignoring plural living together. He analyses Dooyeweerd's theory that intermediate institutions, including faith bodies, act as a buffer within civil society between the universalizing tendency of the state and the individualism of members of civil society. He then goes on to explore how subsidiarity might be applied to refine this theory in order to fit contemporary society (Chaplin 2011, 14–16²²). Scriven (2013) identifies that a political system needs to avoid undue concentrations of power while at the same time requiring a common vision of the common good to which society should aspire. Sacks (2007) describes this as “the home we build together”. This then is the challenge for pluralism and the potential for normative institutional pluralism. Intermediate institutions of civil society can act to create a form of cohesion where no one group becomes too powerful so as to dominate others but where a sufficient vision of the common good enables peaceful coexistence. It is suggested that religious groups are able to use their traditions to work with other civil society institutions to facilitate strong plural living together between civil society institutions.

A seventh ground supporting the inclusion of the plural religious voice in civil society building is to counter the pervasive fear which is a reaction to forms of violent extremism and terrorism. This is to ensure that the vulnerability of some to radicalisation is not exacerbated by a lack of understanding of the various forms of religion and their practical outworkings. Also, to ensure that those members of the various faith groups who have nothing to do with violence and terror are not tarred with the same brush as those who do. Fostering plural living together based on a dialogue between religions and between those of no faith encourages religious literacy and understanding. It also could act as a tool to tackle the environment in which radicalisation can occur.

3 The Problematic Nature of Tradition

The use of tradition as a platform for institutions of civil society is not without potential for manipulation and misuse. Such misuse has been explored by Stopler in her work on equality rights. Stopler (2003) addresses the issue of entrenched or orthodox faith traditions underpinning the denial of basic rights and lacking widespread democratic consent in society, even within western liberal democratic traditions. She argues that despite being based on egalitarian principles western liberal democracies

²²See also Benson (2010).

nevertheless support and even protect sex-discrimination on the basis of religious and cultural principles (Stopler 2003, 154ff.).

The problematic nature of tradition is also considered by McFaul (2018), Bakhshizadeh (2018) and Qureshi (2018). McFaul identifies how a state can invent or manipulate tradition so as to define which groups constitute a religion and to accord legal personality to those religions it deems worthy of recognition. Exploring Hobbsbawm's concept of invented tradition and using Russia as an example, he identifies how a state is able to manipulate religious tradition in order to put forward one form of faith as the state religion and exclude specific groups from legal recognition.

In the context of Iran Bakhshizadeh explores the problems that arise when religious and legal traditions become fixed so that the implementation of international norms becomes problematic. Qureshi explores a similar phenomena in relation to the blasphemy laws in Pakistan. He demonstrates how fundamentalist religious tradition combines with legal tradition to produce fixed blasphemy laws.

Ghanea (2017), Bakhshizadeh (2018) and Ravitch (2016, 2018), sound a note of optimism as they explore how faith traditions and national and international legal traditions can work together to improve rights protection. Ghanea proposes that the synergies between freedom of religion and women's rights be revitalised. Bakhshizadeh explores justification within Islamic tradition for the acceptance of international human rights norms to inform law reform in Iran. Ravitch considers four faith traditions, including Japanese Zen Buddhism, Roman Catholicism, American Episcopalian Christianity and American Conservative Judaism, and their approach to same-sex relations in order to explore how faith can inform social coexistence.

Calo (2018), considers a far more pervasive problem, namely de-traditionalization, that is the stripping away of cultural and social surrounds in order that individuals are liberated to seek personal authenticity. He identifies that the temptation here for religion is to seek to withdraw from, rather than engage with, a process of re-traditioning or at least with a living in diversity. This is a grassroots, as well as a legal and political, challenge and threatens the stability that is linked to the development of tradition over time, in the present and in the future. While it may not be possible to force dialogue upon civil society, facilitating dialogue by providing opportunities for it at whatever level members of society find acceptable would do something to counter this trend of de-traditionalization. Sacks makes a strong argument countering this focus on the self, in favour of a shared ethic which he terms a 'counter-fundamentalism of love' (Sacks 2005, in particular Chap. 4).

A dialogical approach set in a framework of normative institutional pluralism would work particularly well for groups which have established methods and forms of reasoning facilitating adaptation to cultural context.²³ This model needs further refinement to deal with the cultural phenomena identified both by Calo above and by Putnam and Campbell. Putnam and Campbell (2010) describe pluralism as a lived reality in society in the USA, pointing, however, to growing polarization and culture

²³ Strong support for a dialogical approach between faith traditions from within the Christian faith was put forward by Newbigin based on his theological training and lived experience as a missionary in India Newbigin (1989).

wars. They evidence a falling away from the effectiveness of intermediate institutions in facilitating plural living together. This is juxtaposed against an increase in personal interfaith ties, in particular through marriage and an acceptance of the interreligious in public life, echoing Calo's concerns over de-traditionalization. This is, according to Putnam and Campbell, despite a continuing strong link between religion and patriotism. They identify fluidity of religious belief as a mark of American society which mutes interreligious tensions because of strong interpersonal ties. Arguing that as long as these ties can sustain a common understanding of the public good, plural living together is likely to be sustained in the USA (Putnam and Campbell 2010).²⁴ The danger, however, of relying too heavily on individual, interpersonal ties is that the faith basis for these can more easily be eroded, in particular, without the presence of faith communities and without strong ties between intermediate institutions of civil society. It is these groups that provide the essential cohesion for society and a voice for religious concerns in public life. The individual voice is easily lost. The voice of a faith group is more easily heard.

In contrast to the USA, the United Kingdom sits somewhat uneasily between a constitutional settlement incorporating an established church supportive of a plural society bolstered by freedom of religion and belief on the one hand and increasing pressure from European rights jurisprudence seeking to enforce strong forms of *Laïcité*²⁵ and a public policy of 'neutrality' on the other. Ahdar and Leigh (2013) describe this as the British Kulturkampf. Recent evidence demonstrates that despite enjoying an established religion there are factors, including a general lack of religious literacy, which mitigate against a plural public square: see the Commission on Religion and Belief in British Public Life (2015).

An additional factor undermining positive understandings of tradition is the manner in which violent extremist groups have used religious tradition as justification for their own political or other ends. This has led both consciously and subconsciously to a public fear in particular of Islam but also of religion in general. If this fear is allowed to undermine the potential value of religions and their contribution to civil society it will exacerbate the pervasive effect of this fear, fragmenting society.²⁶

For the reasons identified above it is argued that tradition can potentially provide a platform for dialogue between institutions of civil society in a manner which could lead to consensus building and cohesion both nationally and internationally. This will require thought as to how to engage with increasingly individualistic outlook and understandings of identity and religion which mitigate against cooperation and collaboration at an intermediate level. It will also require the use of mechanisms to protect against negative use of tradition by states and other actors.

Having explored the reasons for enquiring into the concept of religious tradition, this chapter will now examine various definitions of tradition to identify how tradition as a concept could provide a platform for dialogue between institutions of civil society.

²⁴See in particular Chap. 1.

²⁵See D'Costa et al. (2013) and Giles (2017).

²⁶For further discussion on this see: Giles (2018).

4 Defining Tradition

The following section explores the definition of tradition in various loci including dictionary definitions, tradition within the law and within the Abrahamic Faiths. It does so to identify how elements from these traditions could be harnessed to create a multivalent dialogical platform to foster strong intermediate institutions and build consensus around the common good, law creation and adjudication. The ultimate aim being to create capacity for strong civil society building.

Dictionary definitions tend to recite and reinforce modern understandings of the concept of tradition, rooting this, in some cases, first in Judaism, then Christianity, followed by Islam. Taking Judaism as a starting point the Oxford English Dictionary (OED) (2002. 2017 update, 'Tradition')²⁷ defines tradition as:

An ordinance of the Oral Law not in the Torah but held to have been delivered by God to Moses and transmitted orally from generation to generation; these ordinances considered collectively, constituting the Mishnah

De Lange (1986, 24) identifies eight different types of tradition within Judaism.²⁸ Tradition as a core concept within Judaism has its roots in the very early practices of Judaism whereby the *Torah* (the first five books of the law handed down by Moses) was supplemented by oral explanations of the rules for daily life which interpreted and built upon the Written *Torah*, these subsequently became known as the Oral *Torah*, the *Torah* then came to be interpreted to form a body of Jewish religious law named *halakhah*. It is *halakhah* that has the strongest resonance with the modern-day understandings of the concept of tradition. In Judaism the essence of the word tradition, *masoret*, is passing something on.

The linguistic roots of the word "tradition" are also found in the Latin verb *tradere*, 'to hand down' or 'to bequeath'; in Greek *Paradosis*. The OED, further explores its use within the Abrahamic faiths:

The action or an act of imparting or transmitting something; something that is imparted or transmitted.

A belief, statement, custom etc., handed down by non-written means (esp. word of mouth, or practice) from generation to generation; such beliefs, etc., considered collectively.

In early use often used critically, e.g. with reference to Jewish practices and Catholic teachings.

In so far as it relates to theological use of that term the OED reads:

Doctrine, or a particular doctrine, which is not stated in scripture but which is believed to have comparable authority, having been transmitted orally or by other non-written means.

²⁷ OXFORD ENGLISH DICTIONARY definition of "Tradition". By permission of Oxford University Press.

²⁸ De Lange identifies Tradition as all those materials encompassed with the interpretation of the *Torah*, the tradition of Worship, biblical tradition, legal tradition, ethical tradition, mystical tradition and theological tradition, eschatological tradition. One might also add to this the philosophical tradition and Kabbalah.

And for the Christian Church the OED describes it as:

Doctrine, or a particular doctrine, which, though not explicit in the Bible, is believed to derive from the oral teaching of Christ of the Apostles and to be divinely revealed. Also: the transmission of such doctrine. In later use (in Roman Catholic and Orthodox usage) often with capital initial, or modified by *holy*, *sacred*, etc.

And for Islam:

An account of a saying or act of Muhammad not recorded in the Qur'an but believed to have been initially transmitted orally and subsequently written down; these accounts considered collectively, especially those constituting the collection accepted as authoritative in Sunni Islam but not in Shia Islam.

This aspect of tradition is further defined to include the idea that it is a practice or custom that is generally accepted and has been established for a period of time. It is located within a society, faith or social group and is considered collectively.

It is a term that is also used within art, literature and music to establish persons or groups of persons followed by others.

Downie's definition in *The Oxford Companion to Philosophy*²⁹ is telling in that it portrays a divergence from the sophisticated manner in which religious groups identify and refine tradition over time, it does appear, nevertheless, to portray current popular and political understandings of tradition:

Customary sets of belief, or ways of behaving of uncertain origin, which are accepted by those belonging to the tradition as persuasive or even authoritative and which are transmitted by unreflective example and imitation.

[...] The nature of traditions is such that they cannot (logically) be willed; rather they have grown up. Traditions exist in all areas of life – literature, religion, legal institutions, and so on – the term is of particular interest in political philosophy. For those political philosophers hostile to the idea of tradition it is perceived as representing entrenched privileges holding back political and social progress, and it is to be contrasted with a vision of human beings controlling their own destinies with rational decisions and asserting rationally based rights. This latter was the position of revolutionary political thinkers such as Rousseau, Tom Paine, and Richard Price. Their position was opposed by thinkers such as Edmund Burke, who had less faith in reason. For traditionalists like Burke social life is kept going not mainly by rational decision-making but by feeling, habit, emotional attachments and conventions.

It is the assumption by Downie that the origin of a tradition is uncertain and the transmission or transformation of tradition over time is unreflective that is perhaps least accurate when examined in the light of the manner in which some faiths have carefully ascertained and developed their tradition over time. Faith traditions tended to identify early faith leaders capable of creating and passing on authoritative teachings and establish systems that would ensure the authenticity of the tradition as it developed.

Similarly, if one considers tradition within the scope of the law, in particular for countries with common law systems, precedent, which forms a constituent part of legal tradition, will have been developed carefully and thoughtfully over centuries.

²⁹Downie (2005), 1760–1761 (by permission of Oxford University Press).

Also within politics and law creation through parliamentary processes, tradition will have been thought through and applied for a reason, even if that reason is not evident to those applying it in the modern day.³⁰

Scott and Marshall in *The Oxford Dictionary of Sociology* have another interesting definition of the concept, they perceive tradition as:

A set of social practices which seek to celebrate and inculcate certain behavioural norms and values, implying continuity with a real or imagined past, and usually associated with widely accepted rituals or other forms of symbolic behaviour. Research has established that many traditions which are popularly perceived to be of long standing are in fact relatively recent inventions. Examples include the distinct Highland culture (of kilts, tartan, and bagpipes) of Scotland, a late 18th- and early 19th-century creation; the lifetime employment system in Japan, which was created in the 1920s to bolster a strategy of economic modernization; and the supposedly indigenous political and economic traditions of many African societies (which were in fact invented by colonial authorities in order to make the necessary connections between local and imperial political, social, and legal systems). Some fascinating case-studies along these lines are reported in Eric Hobsbawm and Terence Ranger (eds.), *The Invention of Tradition* (1983).³¹

The concept of tradition has synergies with but is distinction from various other terms, such as doctrine and culture. This is particularly so when considered in the light of a faith tradition. Some of these terms are encompassed within the concept of tradition, others overlap with it. Doctrine,³² for example, will have grown up within and be encompassed by the tradition of a given faith. Culture³³ may either be considered part of or synonymous with a particular tradition or may legally be set apart from it. This occurs, for example, where in the legal sense religious practices might be protected—for example by equality legislation or the right to freedom of religion or belief—whereas cultural practices might not. However, this distinction can also be blurred where, for example, the wearing of the veil is regarded legally as an exercise of religious freedom³⁴ even though within Islam it might be regarded as a cultural rather than a religious requirement (Wagner et al. 2012). Alternatively, a well-known religious symbol such as the crucifix can benefit from protection as a cultural and historic symbol in a classroom pursuant to the right to freedom of

³⁰The use of constitutional conventions within Parliament in the UK is an example of political tradition developed over time based on conduct rather than rules or legal norms. For example the Salisbury Convention—this states that the House of Lords will not oppose legislation from the House of Commons that was part of its election manifesto.

³¹Scott and Marshall (2009), 238 (by permission of Oxford University Press).

³²Teaching on a particular subject matter which is regarded as true concerning that subject matter.

³³Ideas, customs or social behavior.

³⁴This is so within the UK: for example, see *R v D (R)* [2013] EW Misc 13 (CC); in the jurisprudence of the European Court of Human Rights: for example, see *Ebrahimian v France* [2015] ECHR 1041; and in the jurisprudence of the Court of Justice of the European Union: for example, see the *Achbita* case and *Bougnouli and another v Micropole SA* (Case C-188/15) 2017 OJLR 6(3): 620–622. Although in many of these legal cases the wearing of a veil was limited in the interest of the enjoyment by others of other rights, the court acknowledged that the wearing of the veil was an exercise of religious freedom in the first place but that this right to religious freedom was legitimately limited. This avoided any lengthy legal disputes as to whether the veil was an expression of religious freedom or a cultural requirement.

thought, conscience and religion under Article 9 of the European Convention on Human Rights. In the *Lautsi* case, for example, the Grand Chamber of the European Court of Human Rights ruled that a crucifix in the classroom did not amount to a process of indoctrination and did not infringe the Article 2 of Protocol 1 ECHR rights of a parent, rather that the crucifix was of cultural and historical importance within Italian society.³⁵ Similarly, Christmas crib scenes may be displayed in public buildings in France where their importance is primarily of cultural rather than religious significance. The requirement is that they are within the festive nature of Christmas.³⁶

It is at this point that the distinction between religious practices and culture becomes important both in order that an individual seeking to manifest their religious belief might be protected and in order that the correct justification for the exercise of religious freedom might be found. It is here that we see a modern example of the phenomena identified by Bobrowicz (2018) of law shaping and informing religion. Bobrowicz explores this in the context of the Roman Theodosian code, identifying its influence on the shaping of orthodoxy. An overt modern-day example of this would be the application of the political philosophy of Pancasila in Indonesia³⁷ where the state recognizes freedom of religion in respect of six faiths (Islam, Christianity (Protestantism and Catholicism—counted as two religions), Hinduism, Buddhism and Confucianism) and sets out the scope of the doctrine and permissible practice of those religions: see Decision No 140/Puu-VII/2009.³⁸

While there are some discrepancies between dictionary definitions, most notably as to the care or otherwise that is taken to ascertain the content of tradition, it is at this stage possible to outline the main threads that have been woven. Tradition thus includes the notion of passing on and adding to; it is that which supplements a core body of rules, and can become authoritative texts. It is that which facilitates and cements relationship (with a deity) and creates cohesion within a community. It enables a community to survive as a minority group within civil society and can be regarded as divine law. It is normative and binding compared to that which has historical significance but which is not normative and binding. It can also be described as rules governing daily life. Already it is possible to discern how tradition might be used to facilitate dialogue between groups. This is because of its use as a tool for facilitating cohesion and relationship. It both protects identity and importantly

³⁵*Lautsi and others v Italy* (2012) 54 EHRR 3.

³⁶Thebault (2017).

³⁷Pancasila is based on five principles: belief in the One and Only God; a just and civilized humanity; a unified Indonesia; democracy, led by representatives of the people and; social justice for all Indonesians.

³⁸Decisions No 140/PUU-VII/2009: Constitutional Court, Republic of Indonesia, 19 April 2010. 2012 OJLR 1(1): 527–528. In that case the court ruled that the Indonesian Blasphemy Law, Law 5/1969, by allowing the state to ban a group that was considered to have deviated from the teachings of a religion, did not infringe the right to freedom of religion enshrined in the Indonesian constitution. This was because the blasphemy law was seen as a legitimate interference with that right in the interests of public order and religious values. The Blasphemy Law was upheld as necessary to maintain social harmony and prevent religious deviancy.

is open to development over time. It contains within itself a method for formulating rules governing conduct often based around a moral code. Having outlined the various dictionary definitions of “tradition” this chapter will now move on to consider tradition as a concept within the discipline of law.

5 Tradition and Law

‘Law’ is applied within the context of this chapter as a body of rules made by a government or group of governments, governing the interaction of individuals with each other and with the state, and the interaction between nation states. It will contain mechanisms for enforcement. In a national context and sometimes in an international context it will carry sanctions for infringement. National and international law can be created by national parliaments or representatives of nation states. ‘Religious law’, is that body of rules applicable to members of a religious group governing individual behaviour mandated by their religion as well as the interaction between members of that group and between individuals and the state. It can be created by religious groups for members of that group or by a state. A system of adjudication will be in place to resolve disputes concerning the law and a framework of moral and/or theoretical reasoning will underlie law creation and adjudication in terms of the formulation of norms and the process by which law comes into being, as well as the manner in which disputes are resolved. Enforcement will depend on the authority and power of the law-maker and the extent of the control it seeks to assert over those subject to the law.

The concept of tradition engages with the discipline of law at various points. First, when a society, and in particular a government, establishes norms in order to formulate law. A tradition will have been developed whereby ethical reasoning is applied to establish the moral basis for law. Tradition will also dictate which groups within society or individuals are heard in the debate around law creation. Second, in the process whereby moral principles are applied to the formulation of law. A tradition will have developed around how the law is created, this would include sources used and manner in which they are used and interpreted together with the process by which the rule is formulated, written down and ultimately accorded the status of law. In a common law system this will involve both Parliament and the courts.³⁹ Third, tradition is also evident in the adjudication of disputes. This

³⁹The legal aspects of tradition also take into account judicial reasoning and interpretative tools. Where courts apply a literal interpretation to statutory interpretation this involves adhering to that which Parliament made evident by the words it used, where the courts apply the mischief rule or a purposive approach this facilitates a more responsive and adaptive approach to statutory interpretation. The literal rule is akin to orthodoxy—sticking with the rules as they were created, the mischief and purposive approaches provide scope to adapt the rules either within what might be considered tradition or taking it outside established ways of thinking or reasoning. Where the gap between established rules and newly created rules is too great it is at this point that tradition—in the sense of an ongoing and continuous body of law—might be said to be broken. For an exploration

involves rules on interpretation of legal instruments and rules on judicial reasoning and precedent (*stare decisis*). The common law, in particular, entails the concept of previous generations of jurists passing on their wisdom to future generations on the basis of some form of precedent or established reasons. Fourth, tradition will have influenced a particular constitutional settlement in place within a nation state or an intergovernmental or supranational legal system operating between states. That tradition will govern not only the constitutional structure, but the mechanisms put in place to ensure that structure operates effectively. This is because written law cannot govern the minutiae of the operation of government and its relations with its citizens. There will be a need for the exercise of discretion and the operation of certain practices. The United Kingdom, with its ‘unwritten’ constitution, is an example of a constitutional settlement which is particularly dependent on tradition and where the constitutional tradition and in particular the role of judges within that tradition is currently the subject of lively debate.⁴⁰

In the view of some jurists, rabbis, theologians and academics the concept and use of tradition in relation to law creation and adjudication has, since the enlightenment and for some since the European reformation, been changing.⁴¹ There has been a move away from faith and their traditions as a basis for national and international law creation and adjudication. Over time there have been moves within the faiths to counter this with orthodoxy and to revert to a time when tradition was first fixed, before cultural adaptations occurred. This has particularly been seen within Islam with the expansion of neo-fundamentalism in the form of the Muslim Brotherhood. For reasons outlined at the beginning of this chapter there is a need to reassess where we are and reconsider what we mean by tradition, how we operate in the light of tradition and how this might impact upon governance, moral reasoning, law creation and legal adjudication. Authors such as David are already starting to blaze this trail, drawing attention to the rich Jewish and Islamic traditions that have potential to feed into current legal debates (David 2014). Similarly, the Christian tradition has seen authors such as Cochran and Calo (2017), McIlroy (2009), Chaplin (2011), Reed (2013), Sagovsky (2008) and Strickland (1999) engage theology to re-invigorate the voice of the various faiths in governance, law creation and adjudication. Feeding into this debate is the need to understand the manner in which the faiths adopt and develop tradition and how this might inform national and international legal thinking. Before delving into the three Abrahamic faiths to discover how tradition is developed within these faiths, it is first necessary to explore the concept of tradition within the law in a little more detail. This will provide a backdrop for the proposal that tradition as a concept, in particular within the different faiths, can interact with governance, law creation and adjudication to provide a means of building consensus within society and protect individual identity and fundamental rights whilst also fostering strong intermediate institutions.

of Jewish legal reasoning in the context of halakhic tradition see David (2014), 11 ff. David looks, *inter alia*, at legal discretion and legal reasoning in a comparative Jewish/Islamic context.

⁴⁰Etkins (2018).

⁴¹See McConnell (2016) and Witte (2007).

Ravitch (2018), Bobrowicz (2018), McFaul (2018), Qureshi (2018), Bakhshizadeh (2018) and Vanoni and Ragone (2018) all argue that links between law and faith traditions do not or should not necessarily form one-way traffic either by law imposing norms on faith traditions or faith traditions imposing norms on law creation and adjudication. The dialogical approach between faith traditions, between these traditions and other institutions of civil society and between these intermediate institutions and the state anticipates both contextualization of faith traditions as well as accommodation of religion within civic life.

5.1 *Glenn and Chthonic Legal Tradition*

Glenn in his study on legal traditions identifies a point where law and tradition were synonymous. He commences from a point even earlier than that identified within the dictionary definitions already outlined, exploring first the concept of chthonic legal traditions. Glenn defines chthonic legal tradition as follows:

To describe a legal tradition as chthonic is thus to attempt to describe a tradition by criteria internal to itself, as opposed to imposed criteria. It is an attempt to see the tradition from within, in spite of all problems of language and perception, and to see it from a time prior to the emergence of colonial language. 'Indigenous' or 'aboriginal' traditions are what they are because they have been chthonic, for hundreds of thousands of years, though they also, inevitably bear new designations since the colonial encounter of the last few hundred. (Glenn 2014, 62)

Glenn further explains that:

There was no point of origin of chthonic legal tradition. There was no recorded revelation; no dramatic rupture from other traditions; no single, literally unforgettable achievement. A chthonic legal tradition simply emerged, as experience grew and orality and memory did their work. Since all people of the earth are descended from people who were chthonic, all other traditions have emerged in contrast to chthonic tradition. It is the oldest of traditions; its chain of tradition is as long as the history of humanity. (Glenn 2014, 62)

Chthonic legal tradition can be summarised as rules emerging from the practice of a community over time, being passed down over time. Glenn's concept of chthonic legal tradition could perhaps be best described as pre-legal or pre-formal legal rules, it is closest to the definition of tradition that emerges from the study of the concept in this chapter as a body of rules which sits alongside core texts governing a group, except that with chthonic tradition the rules governing the group are all contained in tradition and there is no formal core text. It identifies a form of coexistence based on that which exists outside formal written law or rules. It is the essence of the dialogical platform proposed in this chapter. In his book *Legal Traditions of the World* Glenn goes on to use the word tradition in a broader manner than is adopted in this chapter (Glenn 2014). Thus, he examines Talmudic, Civil law, Islamic, Common law, Hindu and Confucian legal traditions in order to consider in his final chapter whether there is potential for reconciling legal traditions to facilitate sustainable diversity in law.

When using the term ‘tradition’ in this context Glenn is using it to encompass the whole of a legal tradition: both its core and additional elements. His study of legal tradition is useful for the present project in that he proposes that it is possible for legal traditions to work together but still sustain diversity. The study undertaken in this chapter differs from Glenn’s work in that it identifies ‘tradition’ with that element of the ‘law’ or norms, customs and practice of a group which supplements the written law or core principles and is more akin to Chthonic legal tradition. This contrasts with what Glenn would describe as modern legal tradition which encompasses a whole type of legal system, whether religious or national and judicial and includes core legal rules (such as legislation) and supplemental rules. In this chapter tradition is defined to encompass that which supplements the core tenets or principles of the group to which it applies. This is an important distinction because it is proposed in this chapter that ‘tradition’ can enable a faith or institution within society to contextualise themselves, because of its flexible nature, while facilitating core integrity.

While Glenn’s concept of tradition is broader than that discussed here, his arguments supporting sustainable diversity in law provide the theoretical mechanism whereby the more limited concept of tradition outlined in this chapter might be used as a tool to build consensus. This could support increased religious freedom and diversity in civil society by using multivalent reasoning, as discussed by Glenn, as a tool for building consensus around the common good.

5.2 *The Tradition Project*

The concept of tradition and its links to the law has been taken up recently by the Tradition Project at St John’s University New York. Launched in Autumn 2016, it took an interdisciplinary and innovative approach to defining tradition for the 21st Century. Movsesian,⁴² the project leader, identifies the starting point by defining tradition as ‘a broad understanding of what the received wisdom of the past continues to offer contemporary law and culture’.⁴³

McConnell, in his keynote lecture, considers the concept of tradition as it is applied by him to common law reasoning within the United States. He highlights a distinct move away from the operation of the common law as tradition. He sees tradition as the legal rules whose authority derives from longstanding practice. He contrasts this with rules and mores imposed by command from some kind of sovereign and expert. He highlights the idea that traditions also have the characteristic that they are not frozen in time but are evolving. He notes that they are there and of value precisely because they survive the test of time as a living force that animates and informs the

⁴²Frederick A Whitney Professor, St John’s Law School and Director of the Centre for Law and Religion.

⁴³References to the Tradition Project have links provided on the Tradition Project web page at: <http://www.stjohns.edu/about/news/2016-10-27/center-law-and-religion-s-tradition-project-convenes-new-york> date accessed May 2017.

present. He regards the bearing of fruit on the basis of a tradition as a condition of the passing of it on to future generations. Interestingly he comments on the fact that tradition has a social coordination role, which ‘participates in democratic consent’. His view is that because of this democratising element it is the most effectual source of law.

He also goes on to distinguish tradition from the notion that ‘old is good’, linking tradition to Darwinian logic on the basis that traditions survive because they accomplish something. He suggests that there will be mutations of a given tradition and if they produce fruit they will become the rule.⁴⁴

According to McConnell, the conceptualization of tradition within the field of legal reasoning and its practical effect has transformed since the 19th Century. Previously judges adjudicated on the basis that they did not create law but ‘discovered’ the law, they considered society and asked themselves what were the rules, norms and practices that a reasonable person in society would expect. They were operating a concept of tradition and working within it. *Stare decisis* required a considerable body of judicial opinion to support a decided point of law. This meant that judges had to decide a case before them on a string of existing case law. The common law and the operation of the doctrine of *stare decisis* has since the 19th Century, in his view, taken a more positivist approach to adjudication so that the judges of the time establish law. One 5:4 decision in the Supreme Court is now capable of creating precedent. Thus, McConnell argues, *stare decisis* becomes a type of positive law and does not sit so easily within the concept of tradition.

This development towards a form of positivism in judicial interpretation has resonances with the current debate between Finnis, senior judges and legal academics across common law jurisdictions on the Judicial Power Project.⁴⁵ This project debates the legitimate role of the common law judge. Finnis directs his attention to ‘group-think’, the idea that members of a group decide in accordance with group norms and seek uniformity and group unity.⁴⁶ This in turn picks up on a debate raised by Griffiths in *The Politics of the Judiciary* where Griffiths pointed to the similar educational and cultural backgrounds of the judiciary which he claimed led to the specific way in which cases were decided (Griffiths 1997). Lee in *Judging Judges* critically analyzes Dworkin’s theory of adjudication,⁴⁷ and, recognizing the complexity of judging, discusses the need to take account not only of the past but to contextualize judicial decision making in the present and look towards the future (Lee 1988/89). As Lee explains inevitability some cases, because of the issues raised and their context, leave a justifiable feeling of discomfort (Lee 2003). Lee’s work is perhaps closest to the notion of common law as tradition as defined in this chapter since, rather than envisioning the judicial role as existing solely in the present and taking a restrictive

⁴⁴ Presumably when a government decides to legislate this then creates a formal rule, which, although based on tradition, steps outside the definition of tradition as identified thus far.

⁴⁵ <http://judicialpowerproject.org.uk> (date accessed August 2018)

⁴⁶ Irving (1973).

⁴⁷ Namely that judges weigh and apply competing rights in all cases, law consequently embraces moral and political as well as strictly legal rights.

approach to judicial rules of statutory interpretation, it accounts for development over time with a view to past, present and future.

Law creation and adjudication is thus familiar with and dependent upon tradition. The move away from reliance on tradition towards a more positivist approach evident in some legal systems could be counteracted by the creation of a dialogical plural platform which through multivalent reasoning is able to build consensus to inform law creation and adjudication. This would support Vanoni and Ragone's (2018) thesis for a third way to inform adjudication, providing a strong mechanism for doing so.

An interesting approach is taken by Elaine Mak in her comparative analysis of the changing practices of western highest courts where she explores instances of common law judges taking note of decisions from outside their own jurisdiction (Mak 2013). This informs the current study since it demonstrates the existence of a practice of synthesizing of different traditions, albeit within the overarching umbrella of common law jurisdictions. In this process one legal tradition voluntarily accepts reasoning from another legal tradition where there is no or limited resources within its own case law. If one understands common law to be the development of tradition as that which supplements statutory formal rules, this provides an existing example of one (common law) tradition working as a platform for dialogue with another (common law) tradition to resolve a dispute which potentially has wide ramifications on the constitutional settlement within a state. An example of this is the case of *R v D (R)* 2014 OJLR 3(1), 176 in the Crown Court at Blackfriars, London, where the court reasoning relied heavily on the Canadian Supreme Court case of *R v NS* 2014 OJLR 3(1), 175 when deciding whether a defendant should be required to take off a niqab in court when giving evidence. This also occurs on a regular basis where national courts follow the judicial decisions of the Court of Justice of the European Union or the European Court of Human Rights. Pin identifies one European Court of Human Rights case where the Grand Chamber compared the law of England and Wales with law in Australia, New Zealand, South Africa, Canada, Hong Kong and the USA (Pin 2014, 431).⁴⁸ This plural approach to legal tradition works either because both jurisdictions have sufficiently similar frameworks for the development of tradition or because an overarching formal legal framework is in place requiring the taking account of another legal tradition. This plural approach to legal adjudication has been addressed by Fry (2014) who suggests that joining the religious voice to implementation of international law in particular would inject a measure of regionalism and pluralism in the debate such that tensions between universalism and localism might be alleviated and global social stability improved. This involves courts not only taking account of other legal traditions but of faith traditions as well.

The danger of using a plural approach to legal tradition which ignores the voice of religion is evidenced most recently in the *Achbita* and *Bougnaoui* cases⁴⁹ in the Court of Justice of the European Union. In the *Achbita* case the CJEU gave precedence to the right to conduct a business pursuant to Article 16 of the Charter of Funda-

⁴⁸*Al Khawaja and Tahery v The United Kingdom* App nos 26766/05 and 22228/06, [2011] ECHR 2127.

⁴⁹Giles (2017) and CJEU judgments in the cases: 2017 OJLR 6(3): 620–622.

mental Rights of the European Union over the right to freedom of religion pursuant to Article 10 and as a protected characteristic pursuant to the Anti-discrimination Directive, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p 16). The opinion of Advocate General Kokott in *Achbita*, in contrast to that of Advocate General Sharpston in *Bougnaoui*, demonstrated a willingness to ignore the importance of the religious voice in the public square. Ultimately the judgments reflected the neo-functional drive towards economic integration over and above priorities set for human flourishing and well-being within pre-existing international and national fundamental rights instruments. The dangers of this approach which allows religious interests to be too easily outweighed have been identified, *inter alia*, by myself (2017, 2018) and Weiler (2017).

The CJEU is a prime example of judicial law-making creating a unique and recently developed legal tradition built from existing traditions of its members states and the European Court of Human Rights. This process has been perceived as a hotly contested topic since the publication of his thesis by Rasmussen *On Law and Policy in the European Court of Justice* and the replies by Cappelletti “Is the European Court of Justice Running Wild?” and by Weiler “The Court of Justice on Trial” (Rasmussen 1986; Cappelletti 1987; Weiler 1987). More recently this debate has calmed down such that Beck has been able to identify what could be described as the legal tradition of the Court of Justice of the European Union (Beck 2012). This is arguably a prime example of syncretism, the coming together of the legal traditions of the various member states to create a supranational court with a body of judges trained within the legal systems of their own member states ruling by consensus. In contrast, the practice and jurisprudence of the European Court of Human Rights with its application of the margin of appreciation demonstrates a greater ability to accommodate diversity and consequently takes a stronger plural approach. In and of itself this makes for an interesting exercise in multivalent reasoning leading to a majority judgment where the dissenting voices can be heard. The CJEU, on the other hand, gives a single judgment representing the views of the entire court. Finnis might well legitimately raise the accusation of groupthink here, in particular in relation to the operation of the CJEU. The plural voices are subdued or lost in the ultimate judgment, the overarching aim being the unification project that is the European Union and the need for uniformity throughout the Union to create conditions for economic integration.

Religious tradition, as defined within this chapter, can, in this context, arguably provide a stabilising framework for judicial decision making and play a legitimizing role for the development of legal tradition or precedent by providing a basis for the acceptable bounds of judicial decision making on the basis of multivalent reasoning accounting for the past, present and future. Consequently, it could provide a means to resolve the concerns as to the politicization or otherwise of the judiciary. It could also provide a means for retaining a plurality of voices while still ensuring sufficient consensus necessary for decision making and the resolution of disputes. More importantly it could facilitate the voicing of dissenting opinion essential to

counter groupthink mentality. Ultimately it could also act to prevent the erosion of fundamental rights protection.

Echoing the Finnis/Lee debate in the United Kingdom, Dreher, in the United States, in his commentary on the inaugural speech and Tradition Project conference, equates tradition to an icon, referring to Pelikan who saw tradition as “a mark of an authentic and living tradition which points us beyond itself” noting that on this view, tradition finds its roots in transcendence.⁵⁰ Arguing that the Enlightenment’s claims of universal rights grounded in reason did not see itself as depending on tradition, for Pelikan this makes it very difficult to hold on to supposedly universal truths without having grounded them in the tradition that produced them. It is argued in this chapter that in order to find acceptance as universal norms, rights frameworks and enforcement mechanisms need to find a basis in multi-faith theological philosophy as well as in secular philosophy. As a result, the legal reasoning underpinning their development and adjudication will require the acceptance of multivalent rather than bivalent forms of reasoning in order to account for difference.

Moreland supports the need to enable religious tradition to inform law creation and adjudication, identifying the link between tradition and (legal) reasoning:

The better view, I think, is to appreciate that rationality (including legal reasoning) is inescapably embedded in a tradition, even when the “tradition” is an emancipation from tradition itself. American Christianity has a long tradition of rejecting certain forms of tradition (not least Catholicism) and placing an emphasis on “thinking for oneself” (Nathan Hatch and John McGreevy). This, in turn, has shaped in historically complex ways how the American religious, political, and legal traditions interact.

He suggests that Newman’s treatment of tradition and argument might help tackle differences and points out that achieving clarity about the traditions (even if one of emancipation from tradition) would be of great value to legal argument.⁵¹

In summary, tradition in its modern and legal contexts appears to have retained some sense of the value of rules and practices existing outside formal legal rules, and belongs to society being moulded over time to produce that which is most valued or valuable to civil society. However, since the 19th Century, the influence of this conceptualization has been eroded by an increasingly positivist view of law such that tradition and the operation of law have become somewhat separated, potentially to the detriment of the adjudication of disputes and the creation of law. For some this results in the loss of what is seen as a democratic form of law making and adjudication, while for others it can provide a break from fundamental, orthodox and oppressive forms of religion which might otherwise deny basic fundamental rights. It is the argument of this chapter that given the high percentage of those who adhere to faith within any given society it is necessary to find a way of building consensus with various faiths in order to contextualise, and to move forward to gain increased rights and equality

⁵⁰<https://www.theamericanconservative.com/dreher/tradition-law/> (Date accessed May 2017) and <http://www.theamericanconservative.com/dreher/the-tradition-conference/> (Date accessed May 2017).

⁵¹<http://mirrorofjustice.blogs.com/mirrorofjustice/2016/10/tradition-and-reason.html> (Date accessed May 2017).

protection, whilst ensuring faith groups have a voice in law creation and adjudication. It is argued that tradition as developed within the various faiths provides such a basis for moving forward because this provides a *loci* for contextualising any given faith while enabling any particular faith to retain the integrity of its scriptural principles. Tradition can become a bridge between modern civic life and religious communal living ensuring a two-way dialogical process whereby law is equally able within acceptable limits to accommodate religion. In order to establish how this might be undertaken, tradition as a concept with the three Abrahamic faiths will be explored in order to identify what they might bring to the dialogical platform.⁵²

6 Tradition Within the Abrahamic Faiths

The theological concepts of tradition have been crafted from and constituted within not only texts and oral forms but within artforms and communal practice. David Burrell identifies this as the ‘pluriform richness of religious traditions’, an understanding of which he regards as a pre-requisite of any comparative theological exercise (Burrell 2011, 2).

The analysis of religious tradition in this chapter is a descriptive definitional one: it does not seek to move into the substantive comparative realm at this stage. Consequently, it will consider how the concept of tradition has developed and been applied within the three Abrahamic faiths focusing on texts and practices within those faiths. It will not compare the theological content of each tradition in any depth. The body of tradition within a faith will often contain the tools for ethical reasoning and for contextualizing scripture in the light of historical developments and the civil society within which a given faith community might find itself. Burrell warns, in this regard, against the temptation to seek to preference one tradition above another for the purposes of comparative theology. He explains:

The three traditions grouped under ‘Abrahamic faiths’ have a special difficulty relating to each other, given the unalterable order of their chronological appearance. Indeed, given their close association, it would be surprising if the successor tradition did not consider itself to be superior to, or even claim to replace its predecessor [...] Yet Foucault’s strategy of intellectual ‘archaeology’ will offer the antidote needed to restore this imbalance, reminding us how easily we will fail to construe a succeeding generation if we neglect to identify the lineaments of predecessors in its very structure. (Burrell 2011, 2)

Burrell’s warnings identifying Foucault’s academic tools for ‘archaeological’ engagement⁵³ are apposite for the current study of the concept of tradition and its relevance within constitution framing, law creation and adjudication today. They also

⁵²The three Abrahamic faiths have been chosen for this study because it was necessary to place a limit on the length of this chapter.

⁵³In the sense that this encourages a non-reductive and non-totalising examination of history, but rather examines differences, forms of mutation and transitions and looks for relations between them: Kendall and Wickham (1999), 24.

sit well within the framework of legal reasoning of the common law tradition. With this in mind let us start to dig.

6.1 *Some Initial Definitional Thoughts*

As a broad generalization, the three Abrahamic faiths distinguish between scripture on the one hand and teachings or rulings about Scripture that are considered authoritative on the other. There can in addition be further material or practices that may or may not be regarded as tradition. The authoritative teachings about Scripture have often been established long ago—this body of teaching is considered within the Christian tradition, post-reformation and using counter-reformation terminology, to be Tradition with a capital ‘T’. This distinguishes it from those religious practices (tradition with a lower case ‘t’) which gave rise to the complaints which acted as the tinder box for the European reformation epitomised by Luther’s *Ninety-Five Theses* of 1517.

Within each faith there are practices pertaining to religious and personal observance of the faith. These can be considered as tradition with a lower case ‘t’ within the Christian faith, whereas they are more likely to be considered Tradition (with a capital ‘T’) within Judaism and Islam. This is because Judaism and Islam tend to be more prescriptive concerning rules for daily living. Consequently, this distinction between Tradition and tradition is not as clear cut as may at first appear; but it does provide a means of distinguishing that which is regarded as authoritative for believers of a particular faith (as part of scripture or Tradition) and that which is practiced by the faith community outside of authoritative teachings (tradition or in some cases cultural practices). An example of tradition within the Christian faith would be the wearing of a crucifix on a chain around the neck or as a pin on clothing. This is not required by scripture or Tradition, but many Christians will wear such symbols. This chapter will henceforward refer to Tradition with a capital ‘T’ in respect of authoritative teachings which supplement scripture.

It should be born in mind that these faiths have interacted with both theological and secular philosophical frameworks. Thus, over time variable understandings of what constitutes Tradition and tradition have developed. An example of this would be the differences evident between Orthodox Judaism on the one hand and Reform and Reconstructionist Judaism on the other. For Orthodox Jews *halakhah* (authoritative rules) incorporates the divine law as laid out in the *Torah*, rabbinical laws, rabbinical decrees and customs combined. For Reformed or Reconstructionist Jews, modern views of how the *Torah* and rabbinic law developed imply that Jewish law is no longer normative today but that interpretation of the *Torah*, *Talmud* and other Jewish works is a matter of personal interpretation (traditionalist wing). Liberal and classical wings of Reformed Judaism regard most Jewish religious rituals as no longer necessary. Tradition within this context holds a different meaning and has a very different effect on the religious and personal lives of members of the faith. It also has consequential

effects on believers' worldviews when it comes to living within and contributing to any given civil society.

It is this ability of religious groups to hold together despite often contradictory differences that Glenn (2014, Chap. 10) identifies as multivalent thought. This is a contribution that faiths can make to a public discourse around the common good and law creation and adjudication. There is every reason to anticipate that this type of reasoning could be applied to multi-faith existence within societies encompassing a complexity of norms governing diverse social institutions. The following section explores whether within faith Traditions there lies a key to providing additional mechanisms to create a platform for dialogue and cohesive living.

6.2 *Judaism and Tradition*

De Lange explains that Judaism cannot be described as a religion in the manner in which Christianity or Islam might be so described. It is rather a way of life. According to de Lange it cannot be reduced to a system of beliefs and although it can be defined sociologically by its institutions, worship and ritual observance, these expressions of Judaism can change from place to place (de Lange 1986, 5). For de Lange Judaism is best defined in the history of the Jews, that is through a historical approach (de Lange 1986, 7).

Judaism is consequently the attachment to the historical development of the Jewish people, commencing with the establishment of the covenantal relationship between God and the Children of Israel. Its core text is the *Torah*. Jews believe that God promised Abram that his offspring would become a great nation. The covenantal relationship sets out that as God loves his Children, so His Children should love and worship God and care for one another and His world as He does. It is through the observance of *halakhah*, Jewish religious law, that Jewish people live out this covenantal relationship and engage in everyday personal experiences of God.

De Lange writes:

Judaism is a profoundly traditional religion, in the sense that each generation instinctively looks for guidance to the past, and is reluctant to overthrow received values and patterns of behavior. It is also a religion in which the idea of Tradition has always played a vitally important part. (de Lange 1986, 23)

One reason for this is the lack of creedal basis, another is the lack of a central religious authority. When challenged with new ideas Jews are therefore required to look back into their Tradition since there is no canon of faith or human authority to which to address questions. Jewish Tradition tends to be far more undefined and less formulaic than other faith Traditions and this facilitates flexibility. Judaism uses the word *kabbalah* to describe the process of receiving Tradition.

For the Jews the *Torah* provides rules for living.⁵⁴ The concept of Tradition within the meaning of *Torah* refers to that which has been passed on—firstly in the oral *Torah*, then in the Gaonic period in the *Talmud*. Between 882–942 A.D. Gaon Saadya authored the first systematic expositions of Jewish beliefs in Iraq. De Lange explains that from this point on the theory of Tradition was rationally justified and for Saadya became one of the three pillars of Judaism along with revelation and reason. Further, that having reached this point Judaism then adopted the reverence prevalent in the Middle Ages towards antiquity such that it was not until Abraham Geiger (1810–74) and others took up ideas of progress within Judaism that Reform Judaism developed and Tradition was adopted as a tool for contextualizing or at least reforming Judaism (de Lange 1986, 28). Subsequently the concept of Tradition was adopted by modernisers and traditionalist alike with considerable disagreement over its content.

The *Talmud* consisted of records of rabbinic discussions on matters of law and practice. Alongside this the ancient rabbis also developed the *Midrash*. This is a body of reflections and expositions on biblical topics. Each of the named authorities created a link in the chain of Tradition. Materials were authored between the second century CE and completed during the 12th century. Together the *Talmud* and the *Midrash* provide discussions and commentary forming the basis of a Tradition which supplements the *Torah*.

In addition to the *Talmud* and *Midrash*, the term *Halakhah* encompasses Jewish traditional religious law. This outlines the way in which Jews should conduct themselves. It is an interpretation of the Written and Oral *Torah*, comprising the 613 *mitzvot* (commandments based on the *Torah*), *Talmudic*⁵⁵ and rabbinic law and the customs and Traditions in the *Shulchan Aruch* (Code of Jewish Law). *Halakhah* includes a body of rabbinical opinions, legislation, customs, recommendations and behaviors passed down and subject to a specific type of legal reasoning.⁵⁶

David makes a sophisticated link between the concept of Tradition and the problem of knowing and remembering. Outlining the heteronomous perception of memory, he explores the idea that memory is not only an epistemological question, but a theological challenge. This becomes highly relevant to consideration of the development of Tradition where the ancient original content tends to have been passed down orally, from memory, before being formally written down (2014, 106).⁵⁷ Traditionally, memory was about the relationship between Israel and their God, whereas Hellenic thought based on Platonic and Aristotelian thought perceived memory as

⁵⁴*Torah* can be used to mean the written and oral law which includes Jewish scripture as a whole and includes all authoritative Jewish religious teachings throughout history.

⁵⁵The initial consolidation of rabbinic literature. *Aggadah*, which means ‘the telling’, is a body of rabbinic exegetical, narrative, philosophical, mystical and other ‘non-legal’ texts. Authors of *halakhah* drew upon and incorporated the *Aggadah* into the *Talmud* and *Midrash*. *Midrash* is the genre of rabbinic literature which included early interpretations and commentaries on the Written and Oral *Torah*.

⁵⁶For a detailed account of legal reasoning applicable to *halakhah* see David (2014), 11 ff.

⁵⁷This question is not about the authority of the sources, that is the authority of those who passed the tradition down but how their remembering might have affected the tradition they did in fact pass down.

that which connects subject and reality or subject and true knowledge about reality. David's view is that the point at which the two met produced a conceptualisation of memory as inner writing upon or within the heart. He points out that the construct of inner writing is also used within Christianity (David 2014, 97).⁵⁸ For the Rabbis memory was encompassed in the duty to remember the *Torah*, the oral covenant of memory, resulting, after the destruction of the Temple, in the study of the *Torah* as of highest importance in mediating relations between God and humankind. Tradition thus becomes an important tool of relationship not just of law. It is this understanding of Tradition as a relational tool that can potentially form the core basis within Judaism for contributing to a dialogical relationship with those outside the faith, as well as those within it. Coupled with the potential for multivalent reasoning already existing within Judaism (David 2014, 45ff and 83 ff) Judaism thus will prove to be a strong partner on the dialogical platform for discourse across various groups in civil society. Judaism, in addition, according to Last Stone (2006) is concerned with establishing bonds of social solidarity between diverse members of society. Jewish tradition thus contributes a conception of the individual as heteronomous, not autonomous, and located in community. This is particularly evident in the work of Sacks (2005, 2007).

An additional unifying factor potentially undergirding a dialogical platform based on Tradition is the similarities found across religious Traditions rather than within them. Classical Judaism, for example, gives rise to a similar approach to *halakhah* when compared with Ratzinger's Catholic theological approach to Tradition. Ratzinger regards Tradition and Scripture as authoritative and Tradition as capable of ongoing interpretation and development. This has parallels in Classical Judaism, which regards *halakhah* as authoritative but capable of interpretation in the light of current day circumstances. The startling difference between the two faiths lies in the absence of a hierarchy of authority within Judaism and its presence within Catholicism. The similarities may, nevertheless, provide sufficient ground for meaningful discourse to take place between faiths. Glenn points out that each Tradition is able to hold together disparate strands within itself. This may provide scope for the different faith Traditions to work together despite their differences.

6.3 The Christian Conceptualisation of Tradition

The Cambridge Dictionary of Christian Theology summarises Tradition within the Christian faith as:

a body of authoritative beliefs, teachings, or practices that, in the faith of believers, conveys the gospel message of Jesus Christ. (Thiel 2011, "Tradition")

It is first referred to in Paul's letter to the Corinthians:

⁵⁸2 Cor 3:2-3, 6 NRSV.

For I handed on [*paredoka*] to you as of first importance what I in return had received: that Christ died for our sins in accordance with the scriptures, and that he was buried, and that he was raised on the third day in accordance with the scriptures, and that he appeared to Cephas, then to the twelve.⁵⁹

Tradition, as first understood by the Christian Church, encompassed a set of beliefs contained in teachings, a doctrine, outlining the saving death and resurrection of Jesus Christ. This was expressed in the form of a Creed, namely a shared statement containing core tenets of the faith expressed in a fixed formula. It was also understood as a process of ‘traditioning’ (Thiel 2011, “Tradition”):

that unfolds in acts of believing, confessing, enacting, and receiving the faith from person to person and from generation to generation.

It flourished in the daily practice of Christians. Until the canon of scripture was fixed and the Conciliar creeds established, it stood in juxtaposition against Christological heresy. This role for Tradition could prove of vital importance in modern times where the need for religious literacy and correct understanding of core scriptural and other texts has a vital role to play in combatting violent extremism and countering terrorism. For example, scriptural reasoning is used by Dr. Fatima Akilu who runs the deradicalization program for the Nigerian Government, working with victims and members of Boko Haram.⁶⁰

After the Canon of scripture had been agreed in the third century AD, disagreements arose concerning the interpretation of scripture, which were resolved by adjudication by bishops meeting in councils. Creedal teaching emerged from this.⁶¹ These Conciliar creeds were treated as inspired by the Holy Spirit and authoritative. In addition to the creeds the Church developed Tradition around liturgical practices, the veneration of martyrs and ecclesial structures. The writings of certain ancient patristic authors such as Augustine, John of Damascus and Dionysius the Areopagite were also included within tradition.⁶² Later papal decretals were also included. When Martin Luther spoke out in Germany in the 16th century against Catholic traditions and customs, including indulgences, identifying them as abuses of faith, a clearer distinction between Scripture as distinct from Tradition started to emerge.

During the counter-reformation Roman theologians worked with the Scripture/Tradition dualism and countered Lutheran reformation theology with treatises devoted to explaining and justifying Tradition.⁶³ Chemnitz (1566–75) importantly

⁵⁹1 Cor. 15:3-5 NRSV.

⁶⁰The Telegraph. 16 April 2018. Meet the former NHS psychologist trying to get inside the mind of Boko Haram. <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/11644162/Meet-the-former-NHS-psychologist-trying-to-get-inside-the-mind-of-Boko-Haram.html>.

⁶¹Councils took place in Nicaea, Constantinople, Ephesus and Chalcedon.

⁶²In the early to high Middle Ages questions arose concerning the authority of the scriptural commentaries of the Early Church fathers and of the Conciliar creeds compared to scripture: Hugh of St Victor (1091–41), St Bonaventure (1221–74) and William of Ockham (1288–1348). Henry of Ghent (1217–93) foresaw the issue which was to redefine the concept of tradition and that sparked the European reformation, namely what happens when ideas that are matters of private judgment and custom are raised to the level of tradition (Rowland 2013, “Tradition”).

⁶³For example Driedo J. 1533. *De ecclesiasticis scripturis et dogmatibus*.

distinguished between ‘Tradition’ as the deposit of faith and ‘tradition’ as pious practices. Cano in 1563 in *De locis theologicis* developed the concept of Tradition as containing doctrine. Candler explains Tradition thus: ‘Becomes a thing to be interpreted rather than the act of interpretation itself.’ (Rowland 2013, Tradition).

According to Rowland (2013) parallel treatment of revelation by Francisco Suárez as information about God rather than a disclosure of God himself meant that revelation was no longer perceived as a revelation of the soul as it has been in the writings of Aquinas (1225–74). These two interpretations fed into a rationalist metaphysics, which in turn influenced the conceptualization of Tradition. The Catholic Church in the light of counter-reformation theology and in order to protect its Tradition, established the Magisterium. This was the shared teaching authority of the pope and bishops. The teachings were presented in papal encyclicals and both issued under the dogma of papal infallibility. The Magisterium insisted in 1965 on the mutual co-inherence of Scripture and Tradition.⁶⁴

The modern theology of Tradition was established in the 19th century as theologians sought to situate the gospel and Tradition not only within history but also within contemporary society. The reformed theologian Schleiermacher developed a theory of doctrinal development. This described how Christian doctrine was reshaped over time by Christian communities.⁶⁵ This was subsequently embraced by Catholic theologians, at the University of Tübingen.⁶⁶ At the same time High Church Anglicans in Oxford developed the work of Hooker (1554–1600).⁶⁷ Hooker retained a role for Tradition and reason and after him Newman (1801–90) (who later converted to Catholicism) affirmed the need for a sacred hierarchy to act as the final organ of authority to resolve doctrinal disputes. Newman wrote a highly influential theology of Tradition in the 19th Century identifying Tradition as guided by the Holy Spirit enabling the Christian community over time to identify the essence of its understanding of divine revelation so as to formulate doctrine. He regarded historical crises as pivotal in the development of Tradition. He established seven criteria by which it would be possible to distinguish true developments of Tradition from corruptions of it, these are summarized by Rowland (2013, 169–208) as:

1. Preservation of type. That is where there is growth but the end product is the same as the original.
2. Continuity of principles.
3. Power to assimilate alien matter to the original idea. If it is difficult to assimilate an idea this is likely to indicate corruption.

⁶⁴*Dogmatic Constitution on Divine Revelation* (1965) of Vatican Council II. DV 2.9.

⁶⁵Schleiermacher (1830).

⁶⁶Rowland (2013), Tradition. Rowland cites as examples: Drey (1777–1853), Möhler (1796–1838) and Johannes von Kuhn. The emphasis here was on living truth rather than transmission of old ideas, with the Holy Spirit active in human life. It was participation in the Trinity rather than adoption of a higher moral teaching that facilitated the engagement with and development of tradition.

⁶⁷McGrade (2013).

4. Logical Sequence. The level at which the development can be said to be a logical issue of its original reflects the extent to which it can be regarded as genuine or true.
5. Anticipation of its Future. Early and recurring indications of tendencies which come to be fully realized indicate that the subsequent development is in accordance with the early idea.
6. A conservative action upon its past. There is a corroboration and illustrations of a previous body of thought.
7. Chronic vigour. Corruption will be transitory in nature.

Arguably, as Moreland suggests, the provision of a framework for the development of Tradition along the lines of Newman's principles could have relevance today by providing a structure to limit unchecked transformations of the law in the hands of unelected judges. This approach might appear restrictive for those who have an expansive view of the constitutional role of judges and the operation of judicial precedent, particularly in the field of rights protection.⁶⁸ Such a framework could also enable institutions within society to safely retain integrity based on their founding principles, while developing a joint Tradition as a platform for dialogue in a clear and careful manner in order to facilitate contextualization of themselves within any given society by working with governments, and other civil society institutions.⁶⁹ Coupled with Judaism's relational approach and ability to use multivalent reasoning it is already possible to identify the contribution which faith groups could make to a strong dialogical platform. It would accommodate faith groups within society, which tend to take a more deliberative and gradual approach towards change and increase the chances of building consensus between extremes on either side. While it is important to undertake reform, it is similarly important that reforms take those subject to the law with them.

According to Rowland, following on from Newman, Alasdair Macintyre (1929–) put forward the notion that Traditions are found not only in books and lectures but can be transmitted through social practice. He recognized that thinking took place in a given context or structure within which there would be first, an understanding of truth which ordered particular truths; second, a conception of a range of senses within which statements were required to be judged true or false or to be construed; third, a conception of a number of different genres through which statements could be classified—for example historical, literal or dramatic and; fourth, a contrast between use of genres in situations where truth was at stake and those where standards of rhetorical effectiveness alone were relevant.

⁶⁸ Authors such as Möller (2012).

⁶⁹ An example of this within the Christian faith is demonstrated in the theological approach to Tradition of Cullmann and Ratzinger. Although from different theological positions, Ratzinger (Roman Catholic) and the Swiss Lutheran theologian Cullmann (1954), who made a study of the word *Paradosis* (Tradition) in the New Testament, both argue that Christ stands behind the transmission of Tradition, working in it, being its content and its author. Rowland's view is that while not accepting the concept of a Magisterium or Church hierarchy continuing the work of the Apostles throughout all time, Cullmann brought the two sides more closely together on the role and concepts of scripture and Tradition (Rowland 2013; Tradition).

Along with Gadamer, MacIntyre was therefore placing Tradition not merely within its historical context but within the context of particular languages and situations. Similarly, in the hands of these more recent scholars Tradition is seen as capable of acting as a means of contextualizing religious beliefs not only through established means but additionally through social practice. It is this understanding of Tradition's role that could enable a dialogical platform to provide a locus for the debates around same-sex and equality rights, facilitating a deeper understanding and ability for opposing sides to accommodate each other.

More recently Christian theologies of Tradition have taken issue with the established understanding that Tradition represents a universal truth and that there exists an unbroken continuity throughout history. According to Rowland these theologies stood against French Traditionalists who preserved the Christian heritage as an impersonal process resulting in fixity, demonstrating unwillingness to engage with intellectual questioning. In contrast to this the Flemish Dominican Schillebeeckx (1914–2009) sought to relate Catholic Tradition to trends in contemporary culture and intellectual life. Similarly, Liberation theologians have identified Tradition with the bolstering of empowered majorities and called for fresh understandings in the light of the experience of excluded groups. According to Theil (2011) post-modern theologies aim to expand the concept of Tradition and regard Christian communities as 'contested spaces' shaped by their rituals, texts and histories, rather than continuous agreement. This provides a thinner conceptualization of Tradition, loosening the thicker concept based on continuous agreement. The Catholic Tradition's response is to seek to redefine its understanding of continuity.

Differences now exist between those who see Tradition as constituting resources within itself for its own self-perpetuation and those who perceive it as open to elements external to the Tradition itself and as culturally situated.⁷⁰ Rowland (2013) explains that there remains within Christian theology a debate on the nature of Tradition itself. The divide between Scripture and Tradition has narrowed but that between Tradition and history and universality has arisen, whilst debates occur around the place of hermeneutics and the application of linguistic philosophy.

The debate around cultural situation and self-perpetuation of Tradition is particularly relevant to the issue of whether Tradition can be used to facilitate contextualization of religion so as to create dialogue, build consensus and inform law creation and adjudication. This is because law (in the sense of national, supranational or international law) necessarily adapts over time to accommodate the changing nature of the society within which it locates itself both nationally and globally. If a faith Tradition becomes fixed the dialogue between faith and law becomes more difficult as does the dialogue between different faith traditions. If, on the other hand, Tradition is perceived as giving faith the ability to contextualize, it then becomes possible to envisage it as a tool for dialogue or bridge between faith and law. If one then looks to liberation and feminist theologies as they inform Tradition, it is possible, for example, to find within faith Traditions the ability to open up further dialogue

⁷⁰Resonances can be identified here both within Orthodox Judaism where there is a more fixed approach to tradition.

around some of the more pressing issues arising in fundamental rights dialogue most specifically equality issues and women's rights.

In terms of its relevance to law creation and adjudication, the manner in which Tradition has been developed over time and the various theological approaches to it are reflected in legal systems and approaches to adjudication. Common law systems, for example, will be most familiar with Ratzinger's approach to interpreting existing Tradition in the light of circumstance. Positivists will be more comfortable perhaps with post-modern theologies that adopt a thinner version of Tradition, moving away from a concept of continuous agreement. Liberation theology would call for legal tradition to encompass the needs of excluded groups. This could, for example, support legislation and adjudication in favour of minority rights.

This exploration of the concept of Tradition within the Christian faith has proposed that the Christian concept of Tradition could contribute to a dialogical platform. As developed by Newman and refined by MacIntyre, Tradition holds the potential for a framework upon which to test the authentic development of Tradition over time within given contexts and create a bridge between religious groups and the cultures in which they find themselves. Its use as a tool for contextualisation and as an instrument to mitigate against counter-terrorism and extremism have been identified as particularly important implications of Tradition with the Christian faith. The challenge would be to find sufficient commonality or consensus amongst the different approaches to Tradition within the Christian faith in order to inform a dialogical platform. It is arguable that the rich diversity and history of the development of Tradition provides a valuable resource. Further that the building of consensus incorporating this rich diversity would be well worth the effort required to do so.

6.4 *Islam and Tradition*

Islam professes that there is only one incomparable God (Allah) and that Muhammad is the last messenger of God. For Muslims God is merciful, all-powerful and unique. God is revealed in scriptures, natural signs and a line of prophets (including Adam, Noah, Abraham, Moses and Jesus (although Muslims reject the doctrine of the Trinity and the divinity of Jesus)). Muhammad is the last, final authoritative prophet.

For Islam the Qur'an is the primary scriptural text. It is taken, in Arabic, to be the word of God in its purest form given by Muhammad (570-8 June 623 CE). It is read together with the teachings, example, sayings and tales (the *Sunnah*, composed of accounts called *hadith*) of and about Muhammad. In addition, Islamic law is found in *qiyas* (analogical reasoning for Sunni Islam) or *aql* (dialectical reasoning for Shia Islam) and *ijma* (consensus among jurists).

There are various schools of jurisprudence today within Islam. Sunni Islam encompasses the Hanafi, Maliki, Shafi'i, Hanbali and Zāhirī schools of law. Sunni Shari'a today is based on the schools of law, the canonization of the *hadith*, the development of specific dogmatics and political developments (Radtke 2010, 46). Religious practices include the five pillars of Islam: the creed, this is the recitation

of faith (*shahada*); daily prayers said five times a day (*salat*); alms giving (*zakat*); fasting during Ramadan (*sawm*) and; pilgrimage to Mecca at least once in a lifetime (*hajj*). Islam teaches resurrection of the dead, a final tribulation and eternal division of the righteous and the wicked. Shi'a Islam is divided into three major sects: Fivers, Seveners and Twelvers.

Islamic law does not distinguish between church and state and scholars are both jurists and theologians. *Shari'ah* is Islamic law setting out a set of duties incumbent upon a Muslim. The study of Islamic law is called *Fiqh* (Islamic jurisprudence). *Usul al-fiqh* is the legal theory underlying Islamic law. This is used to preserve the original religion. Historically religion and state were one and the same—the Islamic community of Medina did not distinguish between the two (Busse 2010).⁷¹

Just as the Christian and Jewish faiths developed various strands of orthodoxy or fundamentalism, so Islam developed into two main groups with a spectrum of faith communities in-between. Sunni and Shi'a Islam. The ultra-conservative reform branch of Sunni Islam is known as the Salafi movement and developed in Arabia in the first half of the 18th Century (although some claim that they are part of the Wahhabi movement). Those who adhere to Sunni Islam make up the majority of Muslims at between 75 and 90%. Sufism developed early on within Sunni Islam as a form of mysticism, opening the way for all Muslims to rise to higher forms of religious knowledge.

The Arabic word *sunna* is translated as 'tradition' or 'custom'. A *sunni* refers to someone who follows tradition. Depending on how 'tradition' is defined within the context of the Muslim faith either a Sunni or a Shi'a Muslim can be considered a *sunni*—that is someone who follows tradition (Radtke 2010, 36).

Within Sunni Islam it was the *ulamas* (scholars or learned ones) who were regarded as the guardians of Islamic doctrine and it fell to them to interpret Scripture and existing Tradition and to transmit it. They continue to influence society and politics today. Their influence extends to dogma, religious practices and law.

There has been no equivalent within Islam to the Christian reformations. However there have been moves to reassert pure Islam against 'depraved' forms of development of the faith. According to Peters (2010, 70) this happened in the 18th and 19th centuries when reassertion of purity was linked to political movements. These movements were fundamentalist in as much as they adhered to strict scripturalism and rejected scriptural criticism. They went even further and sought the unity of Islam against plural trends within the faith and sought to resist external influence regarding all believers as equal before God. Wahhabism was one such movement founded in the mid-eighteenth century.

From the later part of the 18th Century onwards Islam developed in the context of Western expansion. Military, legislative, administrative and education reforms were

⁷¹ Jews, Christians, Hindus and Zoroastrians were to some degree tolerated (Busse 2010, 9–10). This strain of Islam developed into Islamic fundamentalism and Wahhabism—a pure Islam purged of any developments arising during the centuries after the establishment of Islam. This can be found in particular today in Saudi Arabia. A League of the Islamic World (*Rabitat al-'alam al-islami*) was founded in the later half of the 20th Century to propagate Islam in non-Islamic countries, building mosques and spreading the message of Islam throughout the world.

made in line with Western ideas. A key concern for Muslim communities became the requirement to protect their cultural identity and their faith Tradition, particularly in the face of Western prejudice. According to Peters (2010, 85, 103), Islam and Islamic Tradition became part of an individual's cultural identity as much as a religious belief, in an attempt to counter Westernisation. Towards the end of the 19th century religious change led to political and social reform. Many Western values were employed to develop a form of Islam acceptable to Europeans. Three pioneers of reform were Si Saiyid Ahmad Khan, Jamal al-Din al-Afghani and Muhammad 'Abduh. Key to their reforms were the lack of desire to create a purely Islamic state, declaring Islam and modern civilization congruent, adopting a number of universal values including democracy, tolerance, intellectual freedom and progress. There was an acceptance of separation of religion and politics. In contrast modern neo-fundamentalists attack Western ideals on the basis, *inter alia*, that they are responsible for individualism and social chaos.

Islamic Tradition, like Judaism and Christianity, has assumed different forms according to the place where it sits on the spectrum of belief. What might be described as the 'core' Tradition of Islam can be found in the *hadith*. Unlike Christian Tradition, it was fixed centuries ago within both Sunni and Shia Islam. Neo-conservative and fundamentalist groups within Islam rely on this original Islamic Tradition. Other forms of Islam accept the core Tradition but have contextualized the out-workings of their faith over time. Of all three religions the Islamic Tradition, with its reliance on a line of warrantors as a guarantee of authenticity of *hadith*, has the most fixed form of Tradition across the spectrum of belief and is heavily reliant on Tradition to enable it to adapt and survive in contexts where it is a minority religion. Where it can perhaps helpfully contribute to interfaith dialogue and links between law creation and religion lies in its methodological approaches. Because of the more direct links between the Islamic faith and legal and political systems, Tradition in Islam has developed similar methods of law creation and adjudication to those that would be recognized in the West.

The perceived fixed nature of Islam, which has sought to protect Muslim identity over time, together with the challenge Islam poses to laws on equality and women's rights has created something of a barrier to dialogue within Western liberal democracies. There is, however, evidence among the Imamate that attitudes are changing. On the other hand, outside of the Western liberal democratic tradition, Islam has found the individualism engendered by rights frameworks and the permissiveness of modern Western life a challenge. Using Tradition as a tool for contextualisation either within a nation state or within a global community of nation states could potentially prove a safe way forward in order to facilitate a dialogue around issues of fundamental concern within the Islamic faith in a manner which accords the faith Tradition respect and facilitates integrity whilst seeking to build consensus around basic norms for national or global communal living together. An example of this can be seen in the work of Bakhshizadeh (2018) as she considers different interpretations of Islamic Tradition and how this impacts on equality rights and the traditional role accorded to women under law in Iranian society.

7 Tradition as a Platform for Multivalent Dialogue

This chapter has sought to justify the inclusion of religious tradition as one of a plurality of voices within civil society that can contribute to strong intermediate institutions which foster the protection of fundamental rights frameworks, build consensus around the basis for the common good, and ultimately support peaceful relations in society. It has focused on the definition of Tradition as a concept, exploring its development in various guises and *loci* including dictionaries of the English language, philosophy and sociology. It has looked at the concept in law and within the three Abrahamic faiths. This exercise was undertaken to establish how tradition is developed and used within the institution or group to which it belongs and understand how this might lead to building a multivalent dialogical platform for institutions to engage with each other to create a strong plural civil society. What has been proposed is that despite, or rather because of, its various guises Tradition can be used as a platform to facilitate dialogue aimed at building sufficient consensus for peaceful living together but still capable of protecting individual identity.

Heeding Calo's (2018) warnings concerning current trends towards de-traditionalisation leading to increasing fragmentation of civil society, our archaeological excavations have revealed that the faith Traditions in particular have embedded within them the ability to hold together various strands or understandings of Tradition such that these might provide insights into a multivalent method of entering into dialogue (Glenn 2014, Chap. 10). In particular, Judaism provides an understanding of the concept which can facilitate relationship and community building as well as the contextualisation of itself over time. Christianity contains mechanisms for contextualisation and cultural adaptation and an approach to Tradition which in modern times protects authenticity and could assist in countering forms of extremism. In Newman's model, it provides a framework for safely developing Tradition while seeking to protect core identity. It too, along Judaism and Islam, brings a strong sense of the importance of community building. Islam contains tools of legal reasoning and law creation which facilitates a multivalent approach to decision making. This could facilitate communal living together in a national and international context, countering the more severe effects of the secular dialogue evidenced in extreme forms of *Laïcité*, as well as forms of theocracy and confessionalism. It would also address the democratic deficit and fracturing of social cohesion that arises when the body of faith Traditions are ignored by those governing and by law creators and adjudicators. It is proposed that the very process of building and engaging with this plural dialogical platform would reinvigorate not only strong religious intermediate civil society institutions, but the role of civil society institutions overall. Ultimately creating a strong peaceful civil society in which the plural religious voice is heard.

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