

OPINIO JURIS inComparatione

Studies in Comparative and National Law

Question of geo-legal perspective:
geopolitical links as a potential driver of legal developments
Anna Marotta

QUESTION OF GEO-LEGAL PERSPECTIVE: GEOPOLITICAL LINKS AS A POTENTIAL DRIVER OF LEGAL DEVELOPMENTS

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Abstract

The Geopolitical decisions and actions, alliances included, may influence legal developments. In current societies, the coexistence of different cultural groups in the same territory sometimes generates an identity defensive attitude by minority groups, who refuse to adapt to the majority culture. These antagonisms may give rise to geopolitical conflicts, namely rivalries for the power over a territory, which may cause legal changes. The events connected with the institutionalization process of Islamic Alternative Dispute Resolution in England, which has resulted in bodies generally called '*sharia courts*', show that geopolitical dynamics impact on law, and vice versa. The use of geo-law as an exploratory methodological approach that combines Comparative Law and Geopolitics to address geopolitical conflicts arising from the circulation of legal rules, reveals that the functioning of *sharia courts* directs both the internal and external legal evolution, under the pressure of links between people with a common goal. At the domestic level, there are calls for legal changes. The required change concerns not only *sharia courts*, but also other phenomena linked to the application of *sharia*-based rules. At an external level, it seems that *sharia courts* are becoming a model of Islamic justice for Muslims in other countries, who resort to these structures to be trained as 'judges' and replicate that model in their own countries.

Through the geo-legal perspective, therefore, this paper aims to show the evolution of the relationship between the involved law systems and their founding values, turning the spotlight on human links as a potential driver of legal developments.

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Table of Contents

QUESTION OF GEO-LEGAL PERSPECTIVE: GEOPOLITICAL LINKS AS A POTENTIAL DRIVER OF LEGAL DEVELOPMENTS	1
Abstract.....	1
Keywords:.....	2
1. Introduction	2
2. Combining Comparative Law and Geopolitics for a new methodological approach	4
3. A conflict of jurisdiction with a geopolitical meaning: the controversial role of Islamic ADR bodies in England.....	8
4. Speaking with a single voice: legal debate between shared representations and alliances	15
5. Circulation of legal rules and impact of power struggles on legal evolution: some concluding remarks	25

Keywords:

Geo-law, ADR, English law, Islamic law, sharia courts

1. Introduction

Law, as the set of rules through which a community organises itself and its internal and external relations, is a dynamic reality. It inexorably changes, without interruption.

Very often, the cause of legal change can be found in a phenomenon that comes from within the word of law itself. An example of this is the disapplication or the repeal of rules that have become obsolete. Other times, legal development follows from extra-legal phenomena. Geopolitical conflicts, as rivalries for the power/influence over a territory, are one of them.

In times of globalisation, the circulation of legal rules and models as a consequence of population migration seems to frequently result in a reassertion of local identities. In such cases, legal transplants are accompanied by power struggles that may impact on the legal development of a country.

Currently, law and territory no longer coincide, and the coexistence of a variety of cultural groups in the State territory sometimes generates tense social relations. The widespread sense of superiority of a culture over another makes it difficult to establish a cultural dialogue, often with the complicity of inappropriate state policies. These antagonisms may result in geopolitical conflicts when the involved people act to have their claims over the territory recognised.

In a geopolitical situation, the legal sphere may become the space where actors try to consolidate their claims, forging links to achieve their objectives. The influence exerted by geopolitical links on the legal debate is the subject of this paper, which takes as an example the conflict connected with the functioning of English *sharia courts*: Islamic Alternative Dispute Resolution institutions widely represented as parallel legal courts.

This conflict of jurisdiction with a geopolitical meaning involves actors from the social, political and academic spectrum, each moved by different visions of the values at play. However, their common understanding of the sacred law of Islam – the *sharia* – and of *sharia courts* has favoured the emergence of links which have ended up directing the internal and external legal debate with respect to the application of *sharia*-based rules.

The present analysis is conducted through the lenses of ‘geo-law’ as a methodological approach that combines Comparative Law and Geopolitics to address geopolitical conflicts arising from the circulation of legal rules. The geo-law analysis studies the content of involved legal systems and investigates how their interaction impacts on a geopolitical level.

The geo-legal perspective shows a change in the relationship between the English common law system and the Islamic model, revealing, at the same time, the role played by human links as geopolitical strategies.

2. Combining Comparative Law and Geopolitics for a new methodological approach

Where there is a society, there is law. Law is one of the aspects that make up man's culture¹.

As a socio-cultural phenomenon, there is no global understanding on what is meant by law. The law-making process involves a plurality of actors that are to be thought within cultural coordinates². Law lives in multiple dimensions and results in multiple layers, as it is not only the product of a variety of actors playing different roles as rule-makers and rule-takers, but also of different identities, stories and interpretation practices that give rise to the different ways in which people organise social experience and give it meaning³.

Comparative law is aware of this and therefore presupposes the existence of a multiplicity of legal rules and institutions. It studies them in order to determine to what extent they are similar or different. The necessary aim of comparative law, as a science, is to acquire better knowledge of law⁴.

¹ R. Sacco, *Antropologia giuridica: Contributo ad una macrostoria del diritto* (Bologna, Società editrice il Mulino 2007).

² M. Bussani, *Il diritto dell'Occidente: Geopolitica delle regole globali* (Torino, Einaudi 2010).

³ F. Fiorentini, M. Infatino (eds.), *Mentoring Comparative Lawyers: Methods, Times and Places, Liber Discipulorum Mauro Bussani* (Ius Gentium: Comparative Perspectives on Law and Justice 77, Cham, Springer 2020) 274.

⁴ R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative' (1991) 39 *The American Journal of Comparative Law* 1 (Installment I of II).

Comparative law also recognizes that living law consists of many different elements called ‘legal formants’⁵. Every legal system contains a large number of formants (such as statutory rules, judicial decisions, scholarly workings), within each of which further formants can be identified. Furthermore, these elements may or may not be in harmony with each other.

The study of legal formants allows the comparative law scholar to make a dynamic comparison, which highlights both the circulation mechanisms of legal systems and the competition between different legal formants within a law system and between legal systems⁶.

In order to acquire better knowledge of the legal rules and institutions that are compared, comparative law may benefit from the contribution of other disciplines. This is especially true when it comes to critical comparison, which aims to identify the reasons behind legal rules.

A significant contribution to comparative law analysis may come from geopolitics, as a method of analysis of power struggles over a territory, whether large or small, including territory within urban areas⁷. The question is: how can geopolitics contribute to comparative law analysis? Addressing a conflict between legal systems by focusing on the personalities in actions, their concrete opposing claims and the resulting impact on the wider society, appears to be more coherent with the need to conduct an operational analysis, i.e. an analysis focused on the application of law, which is what comparative law aims to do.

As a ‘*géographie des conflits*’, geopolitics places territory at the centre of the analysis⁸. The term ‘territory’ has a wide meaning, however: it encompasses not only territory as such, with its size, land forms, resources, spatial sets with their order of magnitude and their intersections, but also men and women who live in the territory and the

⁵ *ibid*; R. Sacco, ‘*Legal Formants: A Dynamic Approach to Comparative*’ (1991) 39 *The American Journal of Comparative Law* 343 (Installment II of II).

⁶ G. Ajani, D. Francavilla, B. Pasa, *Diritto comparato: Lezioni e materiali* (Torino, G. Giappichelli Editore 2018) 33.

⁷ Y. Lacoste, ‘La géographie, la géopolitique et le raisonnement géographique’ (2012), 3-4 *Hérodote* (n 146-147) 14, 27.

⁸ B. Giblin, *Les conflits dans le monde: approche géopolitique*, (Collection U, Paris, Armand Colin 2012).

authorities they accept and those they fight against, by reason of their interpretation of history and their representations of both the past and the future⁹.

The ‘representations’ are at the root of the conflict, determining its intensity and duration¹⁰. A geopolitical conflict opposes people or groups who have contradictory representations, that is different points of view about a territory or a phenomenon taking place over it¹¹. These personal and collective ideas define actors’ objectives and explain their strategies.

A geopolitical representation is the result of a reasoning which combines elements of reality and more approximate facts, even untrue facts, in order to build a truthful interpretation of life, which must be defended¹². It aims to justify an opinion and conveys the message that a situation is fair or unfair, good or bad, without explaining its complexity¹³.

The contribution that geopolitics can give to comparative law analysis is particularly important in the era of globalisation and multicultural societies, where the circulation of rules and legal models places differences between legal systems within the same space: the state territory.

When it comes to Western secular states, the coexistence of different cultural groups and different rule systems occurs in a legal framework ruled by the principle of territoriality of law, which creates unified legal orders that grant internal plurality and, at the same time, retain the right to decide if foreign laws can be applied or not. This may generate a dialect between phenomena of socio-cultural homologation and identity-based refusal by cultural minorities to adapt to majority culture since, on the one hand, domestic policies sometimes prove to be reluctant to actually make room for cultural diversity, and, on the other hand, some cultural groups may decide to follow legal rules different from the law of the land in accordance with a principle of personality of law. The resulting state of tension may give rise to geopolitical conflicts when individuals demand recognition of their rights over the territory.

⁹ Y. Lacoste, ‘La géographie’ (n 7) 14.

¹⁰ B. Giblin, *Les conflits dans le monde* (n 8) 9.

¹¹ B. Loyer, *Géopolitique: Méthodes et concepts* (Paris, Armand Colin 2019) 45-65.

¹² *ibid* 46-48.

¹³ *ibid* 46.

A geopolitical conflict should not be necessarily understood as an open conflict, however. In democratic societies, geopolitical situations deriving from problems of power-territory generally result in verbal controversies that are expressed by means of demonstrations, debate, controversy in the press or opposition vote¹⁴.

The mutual influence between some legal phenomena and geopolitical dynamics in the current globalised and multicultural world, requires analytical paths that go beyond the traditional limits between disciplines. The combination between comparative law method and geopolitical method in a geo-law analysis is an attempt in this direction.

The term 'geo-law' was adopted for the first time in Italy by Natalino Irti to indicate the renewed relationship between legal rules and space on account of changes produced by the globalisation of markets¹⁵. In the present paper, however, the expression 'geo-law' has to be understood in its methodological function, namely as a methodological experiment aimed to address geopolitical conflicts arising from the circulation of legal rules through the analysis of the content of the confronting law systems and the elements of the conflict, in order to verify changes (if any) occurring in the relationship between the involved legal systems and to examine what their direction is¹⁶.

This transdisciplinary approach does not identify and describe the legal issue and the geopolitical conflict as two separate entities. It examines how legal phenomena and power struggles affect each other, while also making use of the contributions from other disciplines. Legal systems, legal families, legal formants, legal tradition, circulation of rules and models, territory, actors, strategy, stake and representations: all of these elements are taken into account in a geo-law analysis.

The geo-legal perspective has been used to examine the phenomenon of English *sharia courts*: Islamic bodies resulting from the institutionalisation process of Alternative Dispute Resolution (hereafter referred to as ADR) in accordance with

¹⁴ B. Giblin, 'La géopolitique: un raisonnement géographique d'avant-garde' (2012), 4 *Hérodote* (n 146-147) 3, 9.

¹⁵ N. Irti, *Norma e Luoghi. Problemi di geo-diritto* (Bari, Editori Laterza 2006).

¹⁶ A. Marotta, *A Geo-Legal Approach to the English Sharia Courts: Cases and Conflicts* (Volume 1, Comparative Law in Global Perspective, Bussani and Della Cananea Editors, Brill 2021).

Islamic law. These institutions are the heart of a wide geopolitical conflict which covers a length of time ranging from 2008 to the present day and revolves around the prevailing representation of Islamic ADR institutions as a parallel legal system.

3. A conflict of jurisdiction with a geopolitical meaning: the controversial role of Islamic ADR bodies in England

It was 1982 when the representatives of ten mosques set up The Islamic Sharia Council in London¹⁷. It was the first *sharia council* to be established in the Britain and the whole of Europe.

Three years later, in the same city, the Egyptian scholar Zaki Badawi contributed to establish the Muslim Law (Shariah) Council UK¹⁸.

Those were years when Islam was becoming the major identity marker for Muslim populations in European countries¹⁹. At first, Muslim's relationship with Europe was based on categories such as ethnicity, national identity and political identity²⁰. Starting from the mid-1970s, however, Muslim migrants' original project of a temporary stay to make a fortune gave way to a permanent settlement in Europe. This resulted in a gradual process of visibility of Islam in Europe, which later became 'European Islam'²¹.

A series of events in Muslim countries have influenced the phases of this process: the Six-Day War, the death of the Egyptian leader Nasser, the Iranian Revolution, and the strengthening of the Wahabi-Salafi vision connected with the international rise in oil price contributed to shape a new geopolitical vision of Islam.

¹⁷ The Islamic Shari'a Council, *Welcome to The Islamic Shari'a Council*, < <https://www.islamic-sharia.org/>> accessed 11 October 2022.

¹⁸ The Muslim Law (Shariah) Council UK, *Welcome to The Muslim Law (Shariah) Council UK*, <<https://www.shariahouncil.org/>> accessed 11 October 2022.

¹⁹ F. Dassetto, 'L' "islam europeo" e i suoi volti' in A. Ferrari (ed.), *Islam in Europa/Islam in Italia tra Diritto e Società* (Bologna, Società Editrice il Mulino 2008) 13-41. See also F. Dassetto, *L'islam in Europa* (Torino, Edizioni della Fondazione Giovanni Agnelli 1994).

²⁰ *ibid* 15-18.

²¹ *ibid* 22-28.

“Concerns about energy resources and oil prices, along with multiple conflicts in the Middle East, have all conspired to construct ‘Muslim’ as a demonised social and cultural identity”²² over the years. 1989, the year of the Rushdie Affair and the *affaire du foulard* in France, marked the emergence of “a more specific concern about the ‘failure’ of Muslims (whether migrants, refugees or settled populations and their descendants) to integrate [...]. 9/11 and what followed are part of this, with demands for integration often couched in terms of ‘security’”²³.

The beginning of the new millennium was therefore dominated by ideas such as the global Islamic revival, the attraction of conservative ideologies among Muslims in Europe, the alleged incompatibility of Islamic values with the values underlying European countries, Muslims’ loyalty to *umma* and their ‘parallel lives’, all of this generating the fear of an Islamisation of Europe²⁴.

In those years, which made Islam the major site of antagonisms between principles and rules, the Birmingham Shariah Council, also now known as Family Support Services (Shariah Council), was established at the Birmingham Central Mosque²⁵.

Although a number of *sharia councils* have been set up in the UK over the years, there is neither an authoritative definition nor a single type of *sharia council*. *Sharia councils* may vary depending on doctrinal affiliation, size and even status. Only a few *sharia councils* are registered charities.

These “unofficial legal bodies”²⁶ offer their services to a doctrinally diversified Muslim population²⁷. Their services consist of three main functions. One is to provide mediation and reconciliation on family issues in accordance with the Children and Families Act 2014.

²² R. Grillo, *Interculturalism and the Politics of Dialogue* (B and RG Books of Lewes 2018) 52.

²³ *ibid* 52.

²⁴ *ibid* 52.

²⁵ Family Support Services (Shariah Council), <<https://centralmosque.org.uk/services/>> accessed 19 October 2022.

²⁶ S. Bano, *Muslim Women and Shari‘ah Councils: Transcending the Boundaries of Community and Law* (London, Palgrave Macmillan 2012) 84.

²⁷ I. Bowen, *Medina in Birmingham Najaf in Brent: Inside British Islam* (London, Hurst & Company 2014).

Under Islam, dispute resolution based on the search of a compromise is grounded in the primary sources of Islamic law (Qur'an and *sunna*), which enshrine the principle of *tabkim* (arbitration) as an integral part of the *sulh* (negotiated settlement)²⁸. Furthermore, not only it is a religious obligation upon the parties involved in a dispute to resort to some sort of arbitration should the need arise, but it is also a duty for Muslims, both as individuals and as part of a community, to help resolve disputes²⁹.

Islamic reconciliation-based dispute resolution has found a place in English law, which has been encouraging the use of ADR since Lord Woolf's reform of civil justice in the 1990s, in order to set up a more simplified, accessible and less costly civil justice system for private litigants and reduce the costs linked to civil legal aid³⁰.

Sharia councils also produce expert opinion reports on matters of Islamic family law and custom to the Muslim community, solicitors and the courts. However, the vast majority of applications comes from women who wishes to obtain an Islamic divorce certificate. The will to assist Muslim women with Islamic dissolution of marriage – whose classical Islamic law rules may put the wife in a vulnerable position³¹ – is the reason of creation of the first and best-known *sharia councils* indeed³².

There is more than one reason that explains why *sharia councils* mainly operate in matters of family law, however: the Islamic tradition to solve family disputes out of courts; the role of concepts such as honour and shame, which prevent Muslims from publicly solving family disputes; the lack of recognition towards Western law of the same authority and legitimation recognised to Islamic law rules; the State failure to recognize plural orders³³.

²⁸ M. M. Keshavjee, *Islam, Sharia & Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (London, I.B. Tauris & Co. Ltd 2013) 67.

²⁹ S. Bano (n 26) 102-103.

³⁰ H. Genn, 'What is Civil Justice For? Reform, ADR, and Access to Justice' (2012), 24 *Yale Journal of Law & Humanities* 397, 399-401.

³¹ F. Castro, *Il modello islamico*, edited by G.M. Piccinelli (2nd edn, Torino, G. Giappichelli Editore 2007), 51-55.

³² A. Marotta (n 16) 92-106; 109-112.

³³ I. Yilmaz, 'Challenge of post-modern legality and Muslim legal pluralism in England' (2002), 28 *Journal of Ethnic and Migration Studies* 343.

The intention to provide Muslims in Britain with a wider range of services, which included a dispute resolution system different from *sharia councils*, drove Shaykh Faiz ul-Aqtab Siddiqi, barrister at law and leader of the Hijaz community, to establish the Muslim Arbitration Tribunal in 2007 (hereafter referred to as MAT)³⁴. MAT deals with commercial and civil arbitration, family dispute mediation, Islamic marriage dissolution, forced marriage cases, mosque disputes, inheritance disputes and the draft of *sharia*-compliant wills.

MAT and *sharia councils* distance themselves from one other³⁵. However, some commonalities can be observed: in spite of their own doctrinal orientation, their services are destined for all Muslims in Britain; records of the cases are not made public for privacy reasons; they have a transnational visibility: their decisions hardly reach domestic courts for enforcement and tend to be recognised in Muslim countries³⁶.

The alternative and institutionalised offer of Islamic justice by *sharia councils* and MAT has progressively resulted in a representation of Islamic ADR bodies as parallel legal courts referred to as '*sharia courts*'. Although the debate on Islamic ADR mainly revolves around these institutions, it sheds light on different understandings of the type (and the number) of Muslim fora that fall into the category '*sharia courts*'³⁷. This seems to be due to several reasons. One of them is the existence of a large number of Islamic figures providing intra-communitarian dispute-resolution services in accordance with Islamic law: imams in the mosques, community elders, associations and community structures that provide the same services as *sharia councils*/MAT but have different names, as is the case with the Ismaili network of dispute resolution known as Aga Khan Conciliation and Arbitration Board for the United Kingdom (NCAB UK).

³⁴ A. Marotta (n 16) 109.

³⁵ J. S. Nielsen, 'United Kingdom: An Early Discussion on Islamic Family Law in the English Jurisdiction', in M. S. Berger (ed.), *Applying Shari'a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in the West* (Leiden, Leiden University Press 2013) 93.

³⁶ A. Marotta (n 16) 92; 109-112.

³⁷ *ibid* 84-91.

In addressing the controversial phenomenon of ‘*sharia courts*’, the prevailing representation of Islamic ADR institutions as (*sharia*) *courts* is deconstructed and reconstructed on the basis of the following criteria:

1. identification of the institution over the territory;
2. expert staff, whose members can be identified;
3. hierarchically organised internal structure;
4. jurisdiction granted by the involved parties on the subject matter of the claim;
5. pre-established and formal procedures that are made public (through a website);
6. pre-established costs for the applicant;
7. record-keeping;
8. information services for the public; and
9. external communication channels³⁸.

These criteria limit the use of the term ‘*sharia courts*’ to four institutions:

1. The Islamic Sharia Council
2. The Muslim Law (Shariah) Council UK
3. Birmingham Shariah Council
4. Muslim Arbitration Tribunal

Such terminological choice implies recognition that, from a technical-legal point of view, *sharia courts* are not legal courts. They are not permitted to operate either within the court system or in parallel with it. And yet, just like courts of law, *sharia courts* are structured institutions run by law experts who solve disputes in accordance with their understanding of the relevant law and in conformity with their pre-established procedures. Islamic law scholars analyse each case through multi-stage procedures that involve costs to be paid and forms to be filled by the parties, whose meetings

³⁸ *ibid.*

with one other and with scholars are encouraged. Finally, a panel issues a decision, which is listed in a dedicated register.

From this perspective, *sharia courts de facto* appear as legal courts and act like parallel legal courts. However, unlike courts of law which apply domestic law, *sharia courts* apply a law model which can be defined as virtual and ahistorical. It is virtual because it is only derived from the speculative tradition of Islamic legal schools and there is no geographic space where it applies as a whole. It is ahistorical because it is abstract compared to the rules and legal practices applied in Muslim countries.

Sharia courts generally operate within the limits of domestic law. However, media investigations have turned the spotlight on a practical-informal operating level, where activities prohibited to ADR bodies take place and human rights violations may occur³⁹.

When *sharia courts* go beyond the limits laid down by English law and public policy for the administration of private justice, what follows is a conflict of jurisdiction with a geopolitical meaning: justice provided by domestic courts is represented as antagonistic to justice given by *sharia courts*, which are in turn represented as jurisdictional bodies competing with courts of law for the exercise of jurisdiction over Muslims.

A variety of actors and views emerges in this conflict. However, it is marked by two main ideological identity-based visions concerning the relevant law, its founding values and its objectives. The two opposing legal perspectives, which reflect respectively the Western Legal Tradition and the Islamic legal tradition, result in two formal public claims: the right to have English law, as one secular law for all, applied in England through courts of law, on the one hand; and the right of the Muslim minority to have Islamic law applied in given law fields through Islamic ADR institutions, which are entitled to exist and operate within the existing legal framework.

³⁹ Panorama, 'Secrets of Britain's Sharia Councils', Part 1 (online video 2013), <<https://www.youtube.com/watch?v=4gZCFdHkd4A>>, Part 2 (online video 2013). <<https://www.youtube.com/watch?v=tQ3PIhFHDdE>> accessed 21 October 2022.

Prominent public figures have spoken in favour of Islamic ADR structures. They come from the religious circles, such as the former Archbishop of Canterbury Rowan Williams; the judiciary, such as the Lord Chief Justice (from 2005 to 2008) Nicholas Phillips of Warth Matravers, and the Muslim ‘representative’, as in the case of The Muslim Council of Britain.

As regards opposition to Islamic ADR bodies, three main types of opposition can be identified as a part of a broad coalition:

1. opposition grounded in Christian religious values, as in the case of Baroness Caroline Cox, cross-bench member of the the House of Lords;
2. opposition in the name of secularism, which brings together organisations such as National Secular Society, One Law for All, the Council of ex-Muslims of Britain, Southall Black Sisters, and British Muslims for Secular Democracy;
3. right ideology-based opposition, which includes political parties such as the United Kingdom Independence Party and the British National Party, groups such as Sharia Watch UK and street movements such as English Defence League.

The strong public opposition to *sharia courts* has not prevented interactions between such institutions and domestic courts, which occur in various ways: from requests by domestic courts to *sharia courts* for expert advice to the referral of cases in order for *sharia courts* to determine Islamic law-related aspects. Furthermore, case law shows English judges’ willingness to understand the needs linked to the use of intra-communitarian dispute resolution tools and their commitment to make room for them, provided that English law is respected and English values are not compromised⁴⁰.

The beginning of the *sharia courts*-related conflict can be traced back to 2008, when the Archbishop Williams agreed to launch the series *Islam in English law* with a public lecture. This conflict has developed through significant moments over the years ever

⁴⁰ *Al Midani and another v Al Midani and others* (Lloyds Rep 923 (1999) C.L. R 904); *Khan v Khan* [2007] EWCA Civ. 399; *Bhatti v Bhatti* [2009] EWHC 3506; *Uddin v Choudbury* [2009] (EWCA Civ 1205); *Jivraj v Hashwani* [2010] EWCA Civ 712; [2011] UKSC 40.

since, generating strategic links between people divided by different worldviews and united by a common goal.

4. Speaking with a single voice: legal debate between shared representations and alliances

Dr Rowan Williams triggered a media storm when he gave his lecture on ‘Civil and Religious Law in England’ on 7 February 2008, in the Great Hall of the Royal Court of Justice⁴¹. His suggestion to the ‘transformative accommodation’ scheme, which would give the individuals the liberty to choose the jurisdiction under which they can resolve specific matters, included “aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution”⁴².

In July of that year, the then Lord Chief Justice Nicholas Phillips further fuelled the debate by giving a speech on ‘Equality Before the Law’ at the East London Muslim Centre. He pointed out that, since the law of the land allows certain disputes to be solved by mediation or arbitration, there was no reason ‘why principles of *shari’*a law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution’⁴³.

While the Archbishop Williams and Lord Phillips were accused of advocating the application of *sharia* in the UK as a separate system of legal rules with its own officially sanctioned courts, the term ‘*sharia courts*’ made its official entry into the public debate⁴⁴.

⁴¹ R. Williams, ‘Civil and Religious Law in England: a religious perspective’, in R. Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari’a* (Cambridge, University Press 2013) 20-33.

⁴² *ibid* 32.

⁴³ N. Phillips, ‘Equal Before the Law’, in R. Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari’a* (Cambridge, Cambridge University Press 2013) 287.

⁴⁴ R. Edwards, ‘Sharia courts operating in Britain’ (*The Telegraph*, 14 September 2008), <<https://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html>> accessed 24 October 2022.

The Archbishop's lecture generated a domino effect which has influenced legal debate under the pressure of links between actors sharing the same understanding of both *sharia* as an intrinsically discriminatory law and *sharia courts* as parallel legal bodies abusing jurisdiction.

One of the first significant moments in the *sharia courts*-related conflict was the introduction of the Arbitration and Mediation Services (Equality) Bill by Baroness Cox in 2011. In order to “tackle the problem of Shari'a courts in England and Wales”⁴⁵, the Bill proposed amendments to a series of statutes, providing further provisions regarding arbitration and mediation services in light of the equality legislation.

The Brill brought together individuals and groups who called for a legislation to restrict the activities of 'Shari'a courts': Christians (such as Alan Craig, leader of the Christian political party Christian Peoples Alliance from 2004 to 2012; the then Anglican – now Roman catholic priest – Bishop Michael Nazir-Ali; leading Christian organisations such as the Christian Institute and the Christian Concern; the retired Anglican bishop Lord George Carey), Muslims (British Muslims for Secular Democracy, whose then leader, Tehnmina Kazi, advised on the Bill), advocates of secularism (One La for All, the Council of ex-Muslims of Britain, National Secular Society) and right-wing supporters (The United Kingdom Independence Party, British National Party, English Defence League and Sharia Watch UK) found themselves on the same side.

On the other hand, The Islamic Sharia Council's Secretary, Dr Suhaib Hasan, faced with Baroness Cox's statements about the need to protect Muslim women, stated that Baroness Cox had “regurgitated common myths about the role of women in Islam”⁴⁶. For his part, Khurshid Drabu, adviser on The Muslim Council of Britain constitutional affairs at that time, declared: “Bills of this kind don't help anybody.

⁴⁵ R. Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain*, (Farnham, Ashgate 2015) 145.

⁴⁶ R. E. Maret, 'Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom' (2013), 36 *Boston College International and Comparative Law Review* 255, 276.

They don't appear to understand that we live in a free country where people can make free choices"⁴⁷.

In order to promote Baroness Cox's Bill in view of the second reading, a booklet titled *Equal and Free? Evidence in Support of Baroness Cox's Arbitration and Mediation Services (Equality) Bill* was drafted by barrister and academic Charlotte Rachel Proudman and published as a part of the Equal & Free Campaign, which deals with women who suffer religiously-sanctioned gender discrimination⁴⁸. The booklet put emphasis on the way *sharia* law is applied in the UK and the aims of *sharia* bodies. It was prefaced by Baroness Cox, who provided Parliamentarians and others with evidence of the need for the Bill.

The Bill was widely celebrated during the second reading. However, the Lords emphasised that the existing legislation already provided measures to deal with the problems connected with the functioning of *sharia courts*⁴⁹.

The second reading did not leave *sharia courts* indifferent. In reply, The Islamic Sharia Council produced a pamphlet entitled 'Response to Baroness Cox's Arbitration&Mediation Bill', which addressed the matters discussed at the House of Lords⁵⁰.

Meanwhile, concerns about an undefined category of 'Shari'a courts' voiced by Baroness Cox echoed in the words and actions of several supporters. On April 2013, it was journalist Jane Corbin who denounced *sharia councils* through an undercover

⁴⁷ K. McVeigh, A. Hill, 'Bill limiting sharia law is motivated by "concern" for Muslim women' (The Guardian, 8 June 2011), <<https://www.theguardian.com/law/2011/jun/08/sharia-bill-lords-muslim-women>> accessed 25 October 2022.

⁴⁸ C. R. Proudman, *Equal and Free? Evidence in support of Baroness Cox's Arbitration and Mediation Services (Equality) Bill* (2012), <<http://www.secularism.org.uk/uploads/equal-and-free-16.pdf>> accessed 25 November 2022.

⁴⁹ UK Parliament, *Arbitration and Mediation Services (Equality) Bill: Second Reading* (House of Lords 19 October 2012), <<https://publications.parliament.uk/pa/ld201213/ldhansrd/text/121019-0001.htm#12101923000438>> accessed 25 October 2022.

⁵⁰ The Islamic Sharia Council, *Response to Baroness Cox's Arbitration&Mediation Bill* (2012), <<http://www.islamic-sharia.org/wp-content/uploads/2014/05/Booklet-on-Coxs-Bill-Sep-2013.-2-1.pdf>> accessed 25 October 2022.

investigation for the BBC programme Panorama, which included interviews to Baroness Cox and Charlotte Proudman⁵¹.

The documentary, titled ‘Secrets of Britain’s Sharia Councils’, showed a reporter who pretended to be a Muslim woman who had suffered violence from her husband and resorted to The Islamic Sharia Council for advice. *Sharia councils* were described as patriarchal structures failing to provide help to women and going beyond their legal remit. In particular, The Islamic Sharia Council was accused of ruling on cases that it had no legal authority over. This gave new impetus to the opponents of Islamic ADR bodies.

In the aftermath of the programme, Conservative MP for Keighley, Kris Hopkins, opened a debate on ‘shari’a law’ at the House of Commons the next day, thanking both journalist Corbin and Baroness Cox for their work⁵².

Questioned about *sharia* and the rulings by religious bodies, the Parliamentary Under-Secretary of State for Justice, Mrs Helen Grant, confirmed the positions previously expressed by the Government:⁵³ She maintained that *sharia* law has no jurisdiction under the law of England and Wales, that there is no parallel court system and that criminal law decisions issued by alternative courts are not recognised.

BBC did not have to wait long for a reply from *sharia courts* and their supporters. Both The Islamic Sharia Council and The Muslim Law (Shariah) Council UK issued a written statement which clarified how *sharia councils* operated⁵⁴. Furthermore, The Islamic Sharia Council lodged a complaint with Ofcom (Office of communications),

⁵¹ Panorama (n 39).

⁵² UK Parliament, *Sharia Law* (House of Commons 23 April 2013), <<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130423/halltext/130423h0002.htm>> accessed 25 October 2022.

⁵³ E. Butler-Sloss, and M. Hill, ‘Family law: Current Conflict and their Resolution’, in R. Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari’a*, (Cambridge, Cambridge University Press 2013) 110-111.

⁵⁴ The Islamic Sharia Council, *Response Regarding Panorama* (11 May 2013), <<http://www.islamic-sharia.org/panorama/>>; The Muslim Law (Shariah) Council UK, *Press Release* (22 April 2013), <<http://blog.islamic-sharia.org/wp-content/uploads/2013/05/Press-Release-re-Panorama-Programme-2013-04-22-Imam-Raza.pdf>> accessed 25 October 2022.

the UK's communication regulator, since Panorama was considered to be in breach of Ofcom's Fairness and Privacy's guidelines⁵⁵.

Academics, too, spoke on the issue, emphasising the changes made by *sharia councils*⁵⁶, and examining the reasons for The Islamic Sharia Council's actions⁵⁷.

A year later, protests linked to increasing concerns about *sharia* prompted The Law Society to withdraw a practice note on how to write *sharia* compliant wills and to publicly apologise for having produced the guidance⁵⁸.

After The Law Society Affair, the application of *sharia* in England and Wales did not cease to be a matter of concern, however. On March 2015, the then Home Secretary Theresa May reopened the debate on the application of *sharia* in the UK⁵⁹. She announced the intention to commission an independent figure to complete an investigation into the application of *sharia* law in England and Wales, as a part of a counter-extremism strategy.

The speech by the Home Secretary provoked mixed responses. The academic world was split between enthusiasm and doubts⁶⁰, but such a decision was welcomed by opponents to *sharia* and *sharia courts*, and did not encounter any public opposition from *sharia courts*⁶¹.

⁵⁵ The Islamic Sharia Council, *Complaint to Ofcom regarding Panorama* (20 May 2014), <<http://blog.islamic-sharia.org/complaint-to-ofcom-regarding-panorama/>> accessed 25 October 2022.

⁵⁶ Bowen, J. R., 'Panorama's exposé of sharia councils didn't tell the full story' (The Guardian, 26 April 2013) <<https://www.theguardian.com/commentisfree/belief/2013/apr/26/panorama-expose-sharia-councils-balance>> accessed 26 October 2022.

⁵⁷ R. Grillo (n 45) 124.

⁵⁸ A. Molloy, 'Islamic law to be enshrined in British law as solicitors get guidelines on "Sharia compliant" wills: The Law Society has issued guidelines to solicitors on drawing up "Sharia compliant" wills' (The Independent, 23 March 2014), <<http://www.independent.co.uk/news/uk/home-news/islamic-law-to-be-enshrined-in-british-law-as-solicitors-get-guidelines-on-sharia-compliant-wills-9210682.html>> accessed 26 October 2022.

⁵⁹ Home Office, *A Stronger Britain, Built on Our values: A New Partnership to Defeat Extremism*, (Speech) (23 March 2015), <<https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values>> accessed 26 October 2022. ⁶⁰ A. Marotta (n 16), 215-218.

⁶⁰ A. Marotta (n 16), 215-218.

⁶¹ *ibid* 200-205.

While Baroness Cox called for a judge-led inquiry⁶², her view about *sharia* and *sharia courts* found a voice in a 2015 Dutch study on Islamic ADR in Britain⁶³, whose contents were first published by The Independent⁶⁴, and then had a large press coverage, causing The Islamic Sharia Council to respond publicly and to lodge a complaint with The Independent's complaints department⁶⁵.

The launch of the Home Office review in 2016 was followed by the launch of a review in parallel by the Home Affairs Committee, which aimed to address the increasing uncertainty concerning the role of 'Sharia courts' in Britain⁶⁶. Both marked a change in the Government's reassuring line, which had remained unchanged since 2008.

The early positive reaction to the Home Office review gave way to criticism when the members of the panel were revealed. The review was chaired by an academic specialised in Islamic law, who was supported by a family law barrister, a retired judge and a specialist family law solicitor, and was advised by two religious and theological experts.

In an open letter to the Home Secretary, approximately one hundred organisations for women's rights and activists expressed opposition to the review, identifying five main areas of concern – the panel, the terms of reference of the review, the competence of imams as advisers, the issues covered by the inquiry and the implications deriving from the lack of representation of the victims of *sharia councils*

⁶² C. Cox, 'A Parallel World: Confronting the abuse of many Muslim women in Britain today' (The Bow Group, 2015), <<https://bowgroup.org/bow-group-report-a-parallel-world-confronting-the-abuse-of-muslim-women-in-britain/>> accessed 26 October 2022.

⁶³ M. Zee, *Choosing Sharia? Multiculturalism, Islamic Fundamentalism and Sharia Councils* (Eleven International Publishing 2015).

⁶⁴ The article is no longer available on the website of The Independent.

⁶⁵ The Islamic Sharia Council, *The Independent*, 'Sharia courts: The Inside Story' (10 December 2015), <<http://blog.islamic-sharia.org/the-independent-sharia-courts-the-inside-story/>>; The Islamic Sharia Council, *The Unholy Trinity* (January 2016), <<http://www.islamic-sharia.org/the-unholy-trinity/>> accessed 26 October 2022.

⁶⁶ Home Office, *Independent review into sharia law launched* (26 May 2016), <<https://www.gov.uk/government/news/independent-review-into-sharia-law-launched>>; Home Affairs Committee, *Sharia Councils inquiry launched* (24 June 2016), <<https://old.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news-parliament-2015/160623-new-inquiry-sharia-councils/>> accessed 26 October 2022.

and of organisations upholding women's rights – and called on the Government to act accordingly⁶⁷.

Campaigners such as One Law for All, Council of Ex-Muslims of Britain and Southall Black Sisters, together with other campaigners, invited the public to boycott the inquiry until such time as the Government had responded to their concerns and established a proper inquiry⁶⁸. However, the same organisations, alongside other groups and personalities, members of *sharia courts* and Muslim scholars, presented evidence to the Home Affairs Committee inquiry, in order to provide data supporting their positions⁶⁹.

While the Home Affairs Committee inquiry was closed for the 8 June 2017 general elections, and the collected evidence was conserved for an eventual future inquiry on the issue, the findings of the Home Office review were published on 1 February 2018⁷⁰.

In line with the requests from over a hundred Muslim women from a variety of professions and thirty-four different towns and villages⁷¹, it was stated that the closure of *sharia councils* was not a valid option. The panel made three main recommendations:

⁶⁷ P. Patel, G. Sahgal, 'Whitewashing Sharia councils in the UK?' (Open Democracy, 4 July 2016), <<https://www.opendemocracy.net/pragna-patel-gita-sahgal/whitewashing-sharia-councils-in-uk>> accessed 26 October 2022.

⁶⁸ One Law for All, *Boycott the Sharia law inquiry: Organisers call on women's rights campaigners and organisations to boycott the Sharia law inquiry* (15 July 2016), <<http://onelawforall.org.uk/boycott-the-sharia-law-inquiry/>> accessed 26 October 2022.

⁶⁹ Home Affairs Committee, *Sharia Councils inquiry* (2016), <<https://old.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/inquiry6/>> accessed 26 October 2022.

⁷⁰ M. Siddiqui et al, *The independent review into the application of sharia law in England and Wales*, Home Office (1 February 2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFGR_Report_into_Sharia_Law_in_the_UK_WEB.pdf> accessed 26 October 2022.

⁷¹ F. Perraudin, 'Muslim women used as "political footballs in sharia court debate"' (The Guardian, 1 November 2016), <<https://www.theguardian.com/law/2016/nov/01/muslim-women-used-as-political-football-in-sharia-court-debate>> accessed 26 October 2022.

1. a legislative change consisting of amendments to the Marriage Act 1949 and the Matrimonial Causes Act 1973;
2. the promotion of awareness campaign to inform Muslim women of their rights and responsibilities under English law;
3. the creation of a body that “would set up the process for councils to regulate themselves”⁷².

The first and the second recommendation were intended to gradually reduce the use and the need for *sharia councils*. As such, they have been widely supported. By contrast, the third recommendation has not been unanimously supported by the review panel, even though the report stressed that “in speaking with the sharia councils, none were opposed to some form of regulation and some positively welcomed it”⁷³.

The first recommendation was intended to “ensure that civil marriages are conducted before or at the same time as the Islamic marriage ceremony, bringing Islamic marriage in line with Christian and Jewish marriage in the eyes of the law”⁷⁴. This choice was consistent with the Government’s previous attempts at curbing the widespread phenomenon of unregistered Muslim marriages, which has progressively led to the introduction of the category of ‘non-marriages’⁷⁵.

The practice of religious-only marriages with respect to Muslim couples has been one of the main reasons that has given rise to calls for a reform of marriage law over the years, indeed. In 2015, the Law Commission issued a report titled ‘Getting married: a scoping paper’, where this practice was defined a major reasons for the reform of law of marriage⁷⁶. Furthermore, the scoping work was followed, on 3 September 2020, by

⁷² M. Siddiqui et al (n 70) 5-6.

⁷³ *ibid* 6.

⁷⁴ *ibid* 5.

⁷⁵ V. Vora, ‘The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom’ (2020), 40 *Journal of Muslim Minority Affairs* 148.

⁷⁶ Law Commission, *Getting Married: a Scoping Paper* (17 December 2015), <http://www.lawcom.gov.uk/wp-content/uploads/2015/12/Getting_Married_scoping_paper.pdf> accessed 26 October 2022.

the launch of a Consultation Paper on its provisional proposals to modernise and improve wedding law, publishing the final report on 19 July 2022⁷⁷.

The issue of Muslim religious-only marriages has generated multiple responses: one of them is the ‘Register Our Marriage’ campaign, led by Muslim solicitor and family law specialist Aina Khan, which is “committed to raising awareness of the lack of legal protection for unregistered religious marriages, campaigning for law reform to create a fairer society”⁷⁸.

Another solution has been offered by the first instance judge in the case *Akhter v Khan*, which was about a Muslim couple who had undertaken an Islamic religious ceremony in Dubai in 1998 and had been together 18 years, raising four children⁷⁹.

Justice David B. Williams of the Family Division of the High Court of Justice proposed a reversion of the judicial trend about ‘non-marriages’, ruling that an estranged couple’s Islamic marriage was ‘void’ (instead of a non-marriage) under section 11 of the Matrimonial Causes Act 1973, because it was entered into in disregard of certain requirements as to the formation of marriages. Therefore, the wife was entitled to a nullity decree. However, the Court of Appeal concluded that “the judge’s order must be set aside as there was, in this case, no ceremony in respect of which a decree of nullity could be granted pursuant to the provisions of s. 11 of the 1973 Act”⁸⁰.

Wider concerns expressed by the Home Office enquiry into the application of *sharia*-based rules have crossed national borders. In the *Molla Sali v Greece* case, the Grand Chamber of the European Court of Human Rights, by recalling the findings of the Home Office review, pointed out that the use of *sharia* by European citizens is admissible on the conditions that it is voluntary and that it is not in opposition to an important public interest⁸¹.

⁷⁷ Law Commission, *Weddings*, <<https://www.lawcom.gov.uk/project/weddings/>> accessed 26 October 2022.

⁷⁸ Register Our Marriage <<https://registerourmarriage.org/>> accessed 26 October 2022.

⁷⁹ *Akhter v Khan* [2018] EWFC 54 (Fam); [2020] EWCA Civ 122.

⁸⁰ *Akhter v Khan* [2020] EWCA Civ 122.

⁸¹ *Molla Sali v. Greece*, Application no. 20452/14, 2018, ECtHR (GC). See also

On January 2019, the Parliamentary Assembly of the 47-nation Council of Europe, for its part, voiced concerns about the “‘judicial’ activities of ‘Sharia councils’” in the UK. Its resolution 2253 (2019), ‘Sharia, the Cairo Declaration and the European Convention on Human Rights’, called on the UK authorities: to ensure that *sharia councils* operate within the law of the land; to review marriage law; to remove the barriers to Muslim women’s access to justice; to carry out awareness campaigns that inform Muslim women of their rights, and to conduct further research on the ‘judicial’ practice of *sharia councils*⁸².

It must be said that is not only concerns linked to the application of *sharia*-derived rules that have crossed national borders. *Sharia courts* have a sphere of influence that goes beyond the UK in more than one way. Sometimes religiously-founded foreign state laws refuse to recognise decisions by secular states, whether they come from administrative bodies or courts, while they recognise decisions by ADR figures on the basis of the religious nature of their law⁸³. This is especially true for *sharia courts*, whose decisions are generally recognised in Muslim countries⁸⁴.

Furthermore, it seems that *sharia courts* are becoming a model of Islamic justice for Muslims who live abroad. Muslims from Western countries resort to *sharia courts* not only to have their dispute resolved, but also to be trained as judges and replicate this model in their own country⁸⁵.

These dynamics confirm that the *sharia courts*-related conflict of jurisdiction with a geopolitical meaning has to be thought against the background of a wider geopolitical

D. McGoldrick, ‘Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights’ (2019), 8 Oxford Journal of Law and Religion 517.

⁸² Council of Europe, *Sharia, The Cairo Declaration and the European Convention on Human Rights* (2019), <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25353>> accessed 26 October 2022. See also S. Sandberg, F. Cranmer, ‘The Council of Europe and Sharia: An Unsatisfactory Resolution?’ (2019), 21 Ecclesiastical Law Journal 203.

⁸³ M. Rohe, ‘Reasons for the Application of Shari’a in the West’, in M. S. Berger, (ed.), *Applying Shari’a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in The West* (Leiden, Leiden University Press 2013) 30-31.

⁸⁴ A. Marotta (n 16) 92-112.

⁸⁵ *ibid.*

conflict opposing Islam and the West, *sharia* and democracy, Muslims and non-Muslims, all of them being representations of two incompatible worlds.

These representations take advantage of opportunistic links between people who mask their differences to achieve their goals, in this way directing legal debate and its developments.

5. Circulation of legal rules and impact of power struggles on legal evolution: some concluding remarks

The analysis of some current legal phenomena requires new disciplinary approaches. Geo-law aims to be a step in this direction.

The geo-legal methodology comparatively examines the data of legal systems and sheds light on how they are invoked and used by actors in a geopolitical conflict, helping the scholar evaluate the current and future relationship between the involved systems of law and their substratum of values.

In the case of *sharia courts*, the adoption of the geo-legal perspective has shown that the current scenario is the result of a gradual process. *Sharia courts* were set up to fill a gap in the law system: to provide services to British Muslims in response to ‘primary’ needs.

At the beginning of their operation, *sharia courts* played a major role in spreading that hybrid system of legal practices combining demands of Islamic law and English law that Judge Pearl and Professor Menski have called ‘*angrezi shariat*’⁸⁶. However, the beginning of the new millennium marked a change. The new geopolitical vision of Islam on a global scale has ended up influencing the British debate about Islamic ADR, causing *sharia courts* to reverse the trend and resort to a virtual and ahistorical legal model.

The geo-legal approach has also revealed that geopolitical links may give a specific direction to legal debate. When it comes to *sharia courts*, Christians, secularists and

⁸⁶ D. S. Pearl, W. Menski, *Muslim Family Law* (London, Sweet & Maxwell 1998).

exponents of right-wing views strategically come together against these bodies in the name of protecting human rights.

The response of both Muslim and non-Muslim communities to internal and international events linked to Islam results in an attitude of mutual closure and defence. The virtual and ahistorical law model driven-application of *sharia* within *sharia courts*, on the one hand, and the number of ideologically motivated campaigns against *sharia* and *sharia courts*, with the involvement of the far-right, have done nothing but increase the distance between the principles and values at play. This can be interpreted as one of the reasons why *sharia courts* are becoming a model of Islamic justice in the eyes of Muslims from other countries.

Positions taken by the actors involved in the conflict suggest that they are far from finding a compromise. Although UK public officials have managed the *sharia courts*-related conflict by showing a certain multicultural tolerance towards the activity of *sharia courts*, strong public opposition challenges the traditional model of English secularism. The future of multiculturalism in Britain appear to be uncertain.

In searching for valid solutions to improve the functioning of *sharia courts*, which may have great benefits for the relationship between the social constituents represented by the two legal systems at play, the answer may lie in the openness, permeability and flexibility of the English common law system, whose nature has proven to be able to ensure the respect of cultural diversity without compromising the founding values of a modern democracy.

