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Use human rights to fight terrorism

The head of the judiciary for England and Wales says respect for human rights is the most potent weapon against terrorism.

Speaking at the opening ceremony yesterday, Chief Justice Lord Phillips said that curtailing fundamental freedoms in the face of terrorism is counterproductive. Denying suspected terrorists the right to fair trails engenders resentment that results in support for terror, he said.

In closing his speech to a packed Grosvenor House ballroom, Lord Phillips called for lawyers in the US and the UK to ensure that the rule of law becomes the foundation of the fight against terrorism.

Earlier Lord Phillips had guided the audience through recent terror cases in courts on both sides of the Atlantic. He referred to the US Supreme Court's ruling on Guantanamo detainees' access to US courts; and the English House of Lords' declaration that the detention without trial of foreigners was unlawful.

In highlighting the cases where the courts had stood up to the executive, however, Lord Phillips said the perception that the judiciary is at war with government is false. Rather, judges and politicians are involved in a balancing act between the rights of the individual and the will of the majority as expressed through the state. He outlined the conflict between competing rights of security and liberty, before concluding that the checks inherent in that balancing act are the essence of the rule of law.

Justice Donald Lemons of the Supreme Court of Virginia, next to address the audience as they sipped their morning coffee, said he thought democracy was facing a terrorist threat opposed to a way of life epitomised by the rule of law. Certain rights are definitional to a way of life, he said.

"Certain fundamental rights are immutable and must not be curtailed by the changing will of the sovereign," said Justice Randy Holland of the Supreme Court of Delaware, next up and paraphrasing Jamestown, Virginia-founder Edwin Sandys. Courts in both the US and the UK are struggling to strike the right balance between competing rights, said Holland, who identified similarities in both systems, not least the vital role played by lawyers in bringing key cases to the attention of the courts.

Holland finished his speech with a reference to Dick the Butcher's "lets kill all the lawyers" pact with Jack Cade in Shakespeare's Henry VI, Part 2. What is not so often iterated, said Holland, is the purpose behind the injunction – it was only by killing all the lawyers and burning down the Inns of Court that tyranny could succeed. It is the responsibility of lawyers to protect the rule of law, and only through their efforts will the fight against terror be conducted through the rule of, rather than by, law.

"It was only by killing all the lawyers and burning down the Inns of Court that tyranny could succeed"

ISLAMIC FINANCE

Scholars block growth

Shariah scholars are the main obstacle for Islamic finance lawyers, due to their inconsistent judgements. This was the opinion of Luma Saqqaf, Linklaters global head of Islamic Finance, at Wednesday's session on the emerging market.

"Scholars sometimes change their mind, which makes it difficult to predict how a transaction will have to be structured," said Saqqaf.

She cited two transactions in the United Arab Emirates which took place within three weeks of one another – the DIFC and DP World *sukuks*. While DIFC was declared *shariah*-compliant with no assets, DP World had to invest in an asset for the transaction to be approved.

But standardization is not a purely academic problem, as other members of the panel made clear. Habib Motani of Clifford Chance argued that the popularity of Islamic finance has fostered confusion for consumers.

"There is too much choice – too many people offering too many products structured in too many ways," said Motani. "For the user this is very difficult to assimilate."

The International Islamic Finance Market (IIFM) is consulting with conventional capital markets and derivatives bodies to develop a standard for documents, such as master agreements for Islamic derivatives.

Cooperation between conventional and Islamic institutions was central to many of the panel's comments.

Mahmood Faruqui of the Institute of Islamic Banking and Insurance began proceedings with praise for the "courageous dialogue between conventional and Islamic bankers" which has helped *shariah*-compliant finance grow.

"Islamic finance must see and learn from conventional banks. It takes two to tango," he said.

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Bribery defeats privilege

In a popular and often lively session in the Court Suite yesterday morning, counsel highlighted the issues surrounding multinational internal investigations.

In the most heated part of the session, a question from the floor implied that auditing firms should be used from the outset for the "heavy work" as they have the experience and the manpower. Philip Urofsky of Shearman & Sterling's Washington, DC office was quick and forceful to disagree, referring to the fictional case study in question.

"If you start an investigation with external auditors and you discover a bribe, then you have no privilege left. None," he said. "You should at least have lawyers overseeing the operation."

Stuart Deming of Washington, DC firm Deming agreed: "Accountants sometimes think they can play the role of the lawyers and vice-versa," he said. "In complicated financial situations, it's best to have the auditors under the management of the lawyers. In a straight bribery situation, a lawyer would be preferable as he would understand the nuances better."

At the start of the session, Alexandra Wrage of Trace International outlined a fictional situation involving USco and its Danish subsidiary Danishco. An employee of the latter, Sicnarf, heard rumours of the company falsifying records to conceal improper placements while Nella called a whistleblower hotline to report the rumours under Sarbanes-Oxley.

Taking on various roles, the panel went through how to handle the situation and offered tips as to how to proceed.

Els de Wind, partner at Van Doorne in Amsterdam, began by highlighting the need to determine exactly what type of investigation is required. "Are you going to interview the employees involved, their managers or a wider group? Are you going to put some cameras in the workplace or tap phones?" she asked. "You need to check with local law. The Data Protection directive outlines legitimate goals. You can't just do what you want to."

When asked by Wrage what the penalties would be if this was ignored, de Wind was surprisingly honest: "There would be financial penalties, but they would not be so high that you would be scared. The biggest impact would be on your reputation," she said. "Indeed, you may not be able to use the information if it was obtained illegally."

Urofsky then highlighted the benefit of designing an effective compliance programme as a pre-emptive action, before pondering the thorny issue of what you should recommend to your management. "From a US perspective, you need to be aware that you may have to explain yourself to the government later down the road," he said.

With this in mind, Urofsky entered the in-house/external debate by saying: "You can keep it in-house sometimes. But when it involves bribery, it is best if you can show that you brought in someone who isn't in the chain of command and whose job doesn't depend on the outcome. It looks better."

"If you use external auditors and discover a bribe, then you have no privilege left. None" Philip Urofsky, Shearman & Sterling

TODAY'S SCHEDULE

7:45 am - 8:45 am	Committee Breakfasts	AUDLEY
	Breakfast Program: Public Speaking and Oral Presentations to Americans	COURT SUITE
9:00 am - 10:30 am	Appointing the Arbitral Dream Team	COURT SUITE
	Internationalization of Sports, Entertainment and Media Law	NORTH SUITE
	Laws without Borders: Potential Pitfalls for Financial Services Providers	FITZROY
	Showcase Program: Evidence Obtained by Torture/Extraordinary Renditions	GROSVENOR
	Pathways to Employment in International Law	BURLINGTON
10:45 am - 12:15 pm	White Collar Crime and Beyond - Enforcement Trends in the United States and the United Kingdom	BURLINGTON
	Dealing Carbon in a Climate of Uncertainty	NORTH SUITE
	Showcase Program: Money-Laundering Regulation: Keeping Gates, and Keeping Clients	GROSVENOR
	Buying Trouble: Avoiding Purchasing and Outsourcing Traps in Customs, Trade and Export Laws	FITZROY
	Cross-Cultural Client Development	DEVONSHIRE
12:30 pm - 2:00 pm	Luncheon with Sir Howard Davies, Director of the LSE, formerly Chairman of the Financial Services Authority and Deputy Governor of the Bank of England	AUDLEY
2:15 pm - 3:45 pm	Shoot-Out at the High Court - Comparative Cross Examination	COURT SUITE
	Showcase Program: Cross-Border M&A and Protectionism in Europe	GROSVENOR
	Employment Discrimination in Europe - Lessons from the US Experience	NORTH SUITE
	Transparency and Trade Agreements	FITZROY
	Deans' Roundtable	BURLINGTON
	Global Rainmaking Training (Non-CLE)	DEVONSHIRE
4:00 pm - 5:30 pm	Showcase Program: Terror, the Courts and the Black Hole of Justice	GROSVENOR
	Debt Financings in Private Equity Acquisitions	NORTH SUITE
	The International Movement of Art & Cultural Property	FITZROY
	Starting Out as an Arbitrator	COURT SUITE
	International Family Law for the Globetrotting Executive	DEVONSHIRE
6:00 pm - 7:00 pm	SOLD OUT - Royal Courts of Justice - Permanent Exhibition Visit	
7:00 pm - 10:30 pm	Reception and Dinner at Middle Temple (Black tie optional) The Principal Speaker: the Lord Chancellor - The Rt Hon Jack Straw MP, Secretary of State For Justice (formerly Home Secretary and Foreign Secretary)	

US lawyers need principles

Howard Davies of the London School of Economics talks to **Daniel Andrews** about the need for principles-based regulation in the US

Howard Davies' view is that New York is losing out to London in financial services, and lawyers are partly culpable. But they can also be part of the solution.

There is real interest in the US in changing to a principles-based system, says Davies, and law firms should encourage it. It is the only way of stimulating reform in the country's regulatory system – a system that is problematic in terms of its complexity, overlap and adversarial nature.

For Davies, business chooses its location based on a four-point checklist. First comes the skill pool. What business needs more than anything is a supply of talented people. Both New York and London are awash with talent. "Whether it's a quant trader or a compliance lawyer, each are abundant in both cities," says Davies. "In terms of the dexterity of the available workforce there is nothing to choose between New York and London."

For the congenial nature of the city, the second element on our checklist, both cities have their strengths and weakness. Davies thinks London wins the cultural vote thanks to its music and theatres but loses out on transport – though he points out that this is not a strong point for New York, especially for those that live outside Manhattan.

The third criterion is cost. "At the moment New York is cheaper," says Davies. Cost is exchange rate-dependent and at two dollars to the pound it is difficult to make any sort of argument for London.

The final consideration is regulatory and legal environment. "London wins on regulation," says Davies, who breaks this last category down into three sub-sets: simplicity, style and certainty.

On simplicity, Davies makes the point that there is one place for business to go in the UK for authorization – the Financial Services Authority. He is quick to declare his interest, having helped put together the modern FSA in the late nineties. But he points to survey evidence in the various reports on the competitiveness of New York as evidence for the assertion.

On style, Davies says the UK regulator is more approachable. "People adversely contrast New York and London on approachability," he says. "There is a feeling that US authorities are harder to approach and more suspicious. They are somewhat less user friendly."

Davies also thinks that lawyers are complicit in this style of regulation, by virtue of their domination of US institutions. "There are massively more lawyers at the SEC than the FSA," he says. "Most of the supervisors at the FSA are non-lawyers and the approach is very much 'lawyers on tap but not on top'. It's the other way round in the US."

CV

London School of Economics – director, 2003 to present

UK Financial Services Authority – chairman, 1998 to 2003

The Bank of England – deputy governor, 1995 to 1997

Confederation of British Industry – director general, 1992 to 1995

The Audit Commission – controller, 1987 to 1992

McKinsey & Company – 1982 to 1987, including secondment to the treasury as special adviser to the chancellor of the exchequer, 1985 to 1986

"At the FSA the approach is 'lawyers on tap but not on top'. The US is the other way round"

On certainty Davies says the strict adherence to subsidiarity contributes to London's success. "In the UK, courts will not take action where the regulator has the power to act. The court will only act where it can be shown there has been some procedural impropriety and that all the available regulatory remedies have been exhausted." In the US this is not the case and a situation often arises where both types of action, regulatory and civil or criminal, proceed in parallel.

Davies concedes that how investors are best served is open to interpretation, and that it is difficult to disprove the notion that more action against business is better for a marketplace. But, as a practical matter, business is likely to put a cross next to New York and a tick in the London box on potential litigation.

The Schumer/Bloomberg report at the beginning of the year criticized the "complex and fragmented regulatory regime" in the US, where the SEC regulates securities firms and the Commodity Futures Trading Commission handles the futures markets. Davies points to the recent Chicago court case in which a judge was left incredulous that the SEC and the Commodity Futures Trading Commission took opposing views on investment company Sentinel's failure to meet client redemptions.

The multiplicity of regulatory bodies is a problem that is difficult to resolve in the US, says Davies; difficult because you are dealing with a political problem. Regulation begins in Congress and there is little incentive for it to initiate reform.

Davies identifies positive movement in the US in the wake of the surveys commissioned on the topic of competitiveness of New York as a financial centre. He points to "Sox softening" – the amelioration of Sarbanes-Oxley rather than anything to do with fabric conditioner – for small business as evidence for progress. But he cannot see how New York is going to be able to reform, despite a growing consensus that change is needed.

Others see the move away from New York as a natural progression, a consequence not of flawed regulation or misguided enforcement but of the development of emerging markets and the progress of technology facilitating listing and trading outside the US. Davies is unimpressed. "People can exaggerate this [foreign markets role in London's success]. The big growth in Asia is really a story about the development of Hong Kong, Shanghai and Singapore as financial centres." London has a slight advantage on time thanks to geography, but not much. "The real question is where people centre their global business."

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