Global perspectives on justice

Alan Dershowitz

Alan Dershowitz has been described by Newsweek as "the nation's most peripatetic civil liberties lawyer and one of its most distinguished defenders of individual rights, and by Time magazine as "the top lawyer of last resort in the country." World renowned as a feisty libertarian, he has defended such controversial and high profile defendants as O.J. Simpson, Mike Tyson, Michael Milken, and Claus von Bulow. A professor at Harvard University's School of Law, Dershowitz was appointed to the faculty at age 25 and became a full professor at age 28, the youngest in the school's history. He has published many books and his articles have appeared in publications such as The Washington Post, The Los Angeles Times, Harvard Law Review and Yale Law Journal.

Alan Dershowitz has represented clients all over the world, requiring him to become a quick study in how the law works from country to country, region to region. His experience has led him to conclude that all legal systems are similar to one another, yet very different. The differences are not just worldwide, but state-based as well. "All law is local," Dershowitz said, pointing out that trying a case in a small southern town is not like trying a case in New York or Washington." The law may be the same, but the context in which the law is heard and applied is different.

"There's always a home court advantage. The locals win, whether it's in the far reaches of some Chinese court or in some American court." No matter how brilliant your legal argument may be, the likely response is, "That's not the way it works here."

Nevertheless, said Dershowitz, "all legal systems share in common a desire for predictability. The legal system can't work without predictability." He referred to a sign on top of Harvard's School of Law, which says: The known certainty of the law is the protection of us all. "In a democracy it's important that we know the law."

In Dershowitz's two-hour dialogue with the Global Executive Forum, he described how the legal system in the U.S. differs from the legal systems in other countries, and invited questions from the audience.

Least Fair

Legal systems the world over strive to create the perception of fairness. In Dershowitz's professional travels, he has found that all legal systems are fair when nobody has a stake in the outcome. He did a study in which he compared cases in the U.S. regular and military courts with those in the Soviet courts. If it were just two people fighting about something that concerned only them, and the government was not involved, then nobody cared how it turned out and the case was resolved fair and square.

"The least fair was the American system," said Dershowitz, "because of the jury system. Juries were unpredictable, and you couldn't tell how they would decide."

The ability of high-ranking officials to influence the outcome of a case can be very subtle. Military justice, for example, is very fair in ordinary cases. "However, when there's an issue that the command wants to influence, it's utterly unfair. A general can determine the outcome of a case just by letting it be known down the line what he wants to have happen. But if the general doesn't care, the system is fair."

Dershowitz stressed that "the question is not whether the system is or isn't fair, but is it fair in the kind of case that you might bring before it?"

The jury system, which we take for granted in the U.S., does not exist in other countries. "England has the pretext of a jury system. The judge tells the jury what to decide, and the jury simply follows the judge's advice."
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Independent judiciary?

The general belief is that the U.S. has an independent legal system. There is a system of checks and balances; the judiciary is not subject to control by the legislature or executive branches. However, the system is not immune to partisan politics and the politics of self interests. Dershowitz said he believes the independence and credibility of the judiciary were somewhat compromised by the Supreme Court's role in the recent Presidential election. "There has never been a case in which the general public had so much doubt about the independence of the judiciary, and had so much concern that they were acting in a partisan way."

Dershowitz also cited the political aspirations of most prosecutors as a hindrance, whether conscious or unconscious, to the neutrality that an independent judiciary demands. "In the rest of the world prosecutors are civil servants who have no career ambitions except to be good prosecutors and be respected among their peers. In the U.S. being a prosecutor is simply a stepping stone, either to a great job in a prestigious law firm or to a job in politics."

Consequently, the U.S. legal system has become politicized. Granted, other countries have legal systems that are tainted by politics, "but it's a matter of degree. Ours is politicized in a different way."

Common law vs. rules

Most other countries have systems that are rule bound, governed by statutes. The legal system in the U.S. is based on common law, governed by precedents. "It's very good for lawyers, very bad for business. That's because we're masters of the precedents, and we have access to them. We know all the cases, you don't. Which is one of the reasons that lawyers are so much more important to business in America than they are in Europe."

Other issues that differentiate the U.S. system:

- Litigation. The court is too frequently used to solve cases involving money, when these cases should be settled or arbitrated outside the courtroom. "Court should be reserved for great crises of the day - capital cases, civil liberties cases."
- Class action suits, which have many benefits and many more disadvantages. "There's a whole class action bar now; they simply read the newspapers and provoke litigation." Their major concern is not in redressing a wrong, but in collecting million-dollar legal fees. "We're the only country that does that."
- Torts. "The personal injury bar has never, to my knowledge, taken a position which didn't put its own economic interests ahead of its clients." Dershowitz favors consumer-oriented tort reform that increases the safety of products, reduces the necessity for litigation and exerts reasonable control over legal fees. Alternate Dispute Resolution needs to be a central part of reform. Built into every consumer contract and warranty should be the consumer's right to ADR. "It has to be inexpensive so that corporations are responsive to it."
- Appellate system. "Appeals are a very important part of the U.S. system. In most other countries you get a trial, you get a result, and that's the end of it. Although appeals take too long, the process produces predictability and keeps the trial judges honest."
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Risky legal systems

Dershowitz pointed out that American companies operating globally are often challenged to balance the costs and benefits of a large market against what might be a very risky legal system. In response, a Forum member recounted how his U.S. company came up against such a system in the Philippines, where the government acted in defiance of a U.S.-Philippine treaty and demanded that the company pay 20 percent of the profits it earned by selling off its minority interest in a Philippine-based company. After fighting the government for two years, with the help of local counsel, the U.S. company ended up having to make a settlement on the 20 percent.

What do you do in a situation like this?

"When it comes to issues of taxation, dispute resolution, getting a third party involved, doesn't work. Governments won't do that. And you cannot do business abroad the way the locals do business; you are subject to American bribery laws," said Dershowitz, referring to the Foreign Corrupt Practices Act.

The FCPA makes U.S. companies noncompetitive abroad and many companies find ways to circumvent it, usually by partnering with people and not asking any questions. But if you want to sleep well at night, you follow the law, he said.

The "right" attorney

In response to a Forum member's question about finding the "right attorney," Dershowitz said, "There's no such thing. A lawyer who's great for one case may be terrible for another. I spend half my time telling people who want me to represent them that I'm the wrong person. I am good for certain kinds of cases."

As an example, Dershowitz pointed to David Boise, who represented then-Vice President Al Gore in the Supreme Court of Florida and won. Because of that win, he was tapped to pursue the case in the U.S. Supreme Court. Said Dershowitz: "He wasn't the right lawyer for the Supreme Court of the United States. What they needed in that case was a political lawyer. They needed somebody who was really savvy about politics and about election law."

But finding the right lawyer for the right case is difficult, and it's not always about the expertise of a particular lawyer, a Forum member suggested. The lawyer's personality and style also come into play. "Sometimes you need somebody with a soft touch; sometimes you need somebody with a hard touch. But most lawyers tell you 'I'm your guy.' "

"Lawyers are cheerleaders," said Dershowitz, adding that too often lawyers claim they can win when they know the case is not winnable. "You can't have a professional relationship with somebody, whether it's legal or medical, unless you're willing to stare him in the eye and tell him the absolute truth. You're not paid to be a cheerleader."

In choosing a lawyer, look beyond the reputation of the law firm, Dershowitz advised. "There's no such thing as a good law firm. There are only good lawyers."

Hiring Restrictions

Hiring an employee away from a competitor often results in the employee and hiring company being sued. "There is a whole class of employees that are somewhat enslaved because their movements from
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one company to another are restricted," said a Forum member. "It happens in Europe, particularly the U.K., and it happens here."

This is a difficult situation, Dershowitz agreed. "If you've educated somebody with all of your trade secrets and he or she just wants to go to the highest bidder, you get winners and losers. You have to change the nature of the system so that it works for everyone. But the problem is, you can't sit down with your competitors and work it out because the antitrust division is looking over your shoulder.

"So I'll have to think about it more, but it's a very, very good question, a very intriguing question."

About jury systems

The unpredictability of the jury system makes it "the best and the worst of all possible systems. This is especially so for business, which needs predictability, the ability to anticipate."

About elected judges

"I don't favor elected judges. Elected judges run on campaigns, they take in contributions. Who do you think pays for the election? Lawyers. And these judges have lists of contributors in their drawers. I think states that have elected judges generally have a lower quality of justice than states that have appointed judges. Democracy has its place, but it doesn't have its place in the criminal justice system. The jury isn't a democratic part of the system. The judges should be professionals. Prosecutors should be professionals. The essence of justice is predictability and fairness, but we're not there."

Alternative dispute resolution: The wave of the future

According to Alan Dershowitz, every business contract should include a provision for some kind of alternate dispute resolution; many do already. The goal is to "keep the local courts to a limit that you can control."

Why is this important? "If the only function that a local court has is to enforce a conclusion arrived at by alternate dispute resolution, and they don't have a lot of discretion to decide who wins and who loses, it will be more difficult for them to cheat on you, and if they do it's going to have to be more overt and visible."

Dershowitz told of a case in Puerto Rico where his client won an enormous judgment against a corporation which was partly a private corporation and partly a government corporation. Late at night, the Puerto Rican government came in and stripped that private-public corporation of all its assets. Only a few pieces of old furniture were left behind. "The assets were put into a new corporation and the new corporation, for a variety of reasons, was much more difficult to sue."

The case is still in litigation.

"Alternate dispute resolution is not the magic bullet that will solve all your problems. But to the degree that it can cap the discretion of local courts, it will help." From an ethical perspective, "Harvard has created a center for alternate dispute resolution; the best people in the world are in it and we're pushing it as hard as we can."

Central to ADR is consumer protection. In the matter of torts, alternate dispute resolution is
critical in reinining runaway legal fees and eliminating frivolous lawsuits. "Tort lawyers are the richest lawyers in the United States and they are a very powerful lobby. The way the system works, lawyers in this country have managed to make themselves indispensable and that is not a good idea. With ADR, lawyers will be a little less indispensable.

"Today, lawyers are a necessary evil and if you can eliminate the necessity, you can eliminate the evil."

Is there such a thing as natural rights?

According to Alan Dershowitz, "whether natural law is true or not, it has no place in democracy. And I'm most critical of legal positives. A legal positive just says the law is the law. But what should the law be? So I've come up with a third approach, which I call nurtural rights, in the sense that I think rights come from nurture not nature. I think they come from experience. I think philosophers are wrong when they try to create an abstract theory of justice. None of us could ever agree on a perfect theory of justice.

"We all know what perfect injustice is. We had slavery; that's perfect injustice. I try to look at the human experience and build upward. What do we learn from the genocides of the past? We learn that rights are essential. We learn that certain rights are more essential than others. So my view of rights is historical.

"There's also the issue of cross-cultural rights. In the Mideast, Israel's Law of Return, meaning that any Jew can find a safe haven in the country, is said to be in conflict with the Palestinians' right to go back to where they came from, Palestine. So you have an irreconcilable clash between what is the most essential human right, the right to a homeland.

"In a democracy, rights should be narrow, because when you call something a right, it's the end of the debate; you can't argue about it. Rights should not be argument enders, they should be argument beginners."

Alan Dershowitz writes about this subject in depth in his upcoming book "Doing Rights.

Wigs and robes

"In the old days, justices wore wigs in an effort to depersonalize themselves so they would be seen not as human beings but as personifications of the law," said Dershowitz.

"I think it's important to take the wigs off. In New York, there's a terrific judge who doesn't wear a robe, he wears a suit in court. He has lowered his seat so that he's on a level with the litigants. His view is that he's entitled to respect only on the basis of his integrity, his honor and intelligence, not on the basis of these old notions of robes and wigs."

Phenomenal law

The Bible is phenomenal law because every rule in the Bible has a reason. When law givers have to explain the law, rather than demanding blind obedience, it really is the beginning of democracy and the end of tyranny."
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Unpleasant case

Dershowitz talked about the O.J. Simpson case, which he became involved in because "I never turn down a capital case, and O.J. was facing the death penalty at the time."

Describing the case as "unpleasant," he said, "You can't quit a case in the middle any more than a doctor can quit a case in the middle of surgery.

"It was a case that I think had a transforming effect on American justice, mostly for the bad. But this, too, we will survive."

Why rich clients risk jail

The common thread that runs through my rich clients is that they have one commodity in completely unlimited amounts; usually it's money. And then they have something they have very limited amounts of: freedom, life, health.

And these people who end up in jail have risked what they have limited amounts of to get more of what they have unlimited amounts of.

It's insanity when people do that and people do it all the time. They do it either because risk is the game or because they've been doing it all their lives, incrementally, and they've never gotten caught. So they figure there's really no risk