

Defending the Indefensible

By Tan Zu Hao

"So you're a lawyer? I suppose you defend bad guys to earn a living?"

"Accomplice", "cunning", "evil", "greedy without conscience" are just the few labels that have been ascribed to lawyers. More often than not we can also see the netizens condemning the defence lawyer of the accused charged with any heinous crimes. I believe that the general dislike for lawyers comes from ignorance and misconception about the whole criminal justice system, the lawyers' role in it, as well as the ethical mandate of the legal profession. Here are the reasons why lawyers "help bad guys".

First, it is procedural fairness and natural justice that makes the criminal justice system meaningful.

Procedural fairness and natural justice refer to the idea that the justice system is tied more to the perceived fairness of the process, rather than the actual outcome itself. This necessarily implies that the legal procedures must be complied with. Natural justice has been thought to be based on two fundamental constituents of fair hearing, which are the rule against bias, or "no man a judge in his own cause", and the right to a fair hearing, or "hear the other side". Clearly, it would be a gross violation of our Federal Constitution (Article 5 which confers on everyone the right to consult and be defended by a legal practitioner), as well as of procedural fairness and natural justice, if a person who is prosecuted and tried is being denied his right to legal representation.

The criminal justice system has to constantly demonstrate its legitimacy to the public it serves, and retain the public confidence in it, if a society is to be governed by the rule of law. If every lawyer now succumbs to public pressure and starts refusing to represent what the public views as the worst criminals, dire consequences will undoubtedly ensue. This is because any court decision under a criminal justice system that, in denying the accused's right to legal representation, disregards procedural fairness and natural justice simply lacks legitimacy and ultimately, would fail to enjoy any public confidence. After all, any force of law that the court decisions bear lies in the legitimacy of the criminal justice system and the public confidence in it. Hence, the prerequisites for imparting such legitimacy to our criminal justice system include protecting the accused's right to be represented, to cross-examine adverse witnesses, to challenge the evidence adduced by the prosecution, to call witnesses, etc.

Second, every suspect and accused must be presumed innocent until proven guilty.

This presumption relates to procedural fairness and natural justice, because the former is the underlying reason behind the latter, and can only be secured with the existence of the latter. In criminal trials, the standard of certainty to be met in finding the guilt of an accused is what is known as "beyond reasonable doubt". This standard of proof means that any accused can only be found guilty if the court concludes that there could be no "reasonable doubt" in the mind of a "reasonable person" that the defendant is guilty.

Most importantly, the burden of such proof falls on the prosecution, rather than the accused. This would mean that the "worst criminal" must be proven to be so, based on the standard of "beyond reasonable doubt" in a court of law. Before this is done, the accused is legally innocent. This is the reason why the people and the media must avoid using the terms "criminal" and "victim" before judgment is given, as the usage of such terms prejudices both parties who are supposed to be in an equal position before the law. To say that the accused who has allegedly committed heinous crime does not deserve a lawyer is to put the cart before the horse as the accused is prejudged to be guilty, when it is not the onus of the accused to prove that he is innocent, but the other way around. Without lawyers representing the unpopular accused, the accused may not be able to disprove or cast doubt to the prosecution's case effectively.

Third, even if the accused pleads guilty or is found guilty, the mitigation process requires the assistance of lawyers.



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Graduated from University of Leeds, Tan Zu Hao is now a CLP student who is a law nerd that never stops learning and thinking about law to quench his inner curiosity. He will also commence his internship at Thomas Philip on March. He believes that the fact that law shapes the foundations of societies implies that to change the society we must change the law. He also believes that truth seeking and facts finding must take precedence over political correctness.

In criminal trials, when the accused has pleaded guilty or has been found guilty, the judges hear and consider evidence of mitigating and aggravating factors present in the case, before arriving at an appropriate decision on the sentence. Hence, despite the fact that the “worst criminal” has pleaded guilty or has been found guilty, the lawyer’s role is still relevant to ensure that the court will take into account all the circumstances.

Fourth, separation of powers is a critical part of our nation’s foundation.

Ideally the executive, legislative and judicial powers should be vested in separate branches in order to ensure there is an effective system of checks and balances. This means that the police, whose function it is to enforce the law, must not usurp the function of judiciary, which is to interpret and apply the law and to decide a case.

Hence, the police can only cooperate with the prosecution in the sense that once the police have completed their investigation, the case will be passed to prosecutors who are responsible for charging the suspect, and who will decide if the evidence is strong enough to take to court. At no point can the police or prosecution, or even the public, decide the guilt or innocence of the suspect or accused.

Fifth, it is unfair to expect an unrepresented accused to contend with the police and prosecution who are armed with considerable resources.

It goes without saying that the police and the prosecution have a lopsided advantage over the accused when it comes to collecting evidence. Although section 51A of the Criminal Procedure Code requires that the prosecution must, before the commencement of trial, deliver to the accused the documents such as information made to police regarding the commission of the offence, documents that would be tendered as prosecution evidence and a written statement of any fact favourable to the accused’s defence, there is no way we can ensure that evidence in favour of the accused is not being suppressed without the professional assistance from lawyers.

Like the oft-quoted legal aphorism goes, “not only must justice be done; it must manifestly and undoubtedly be seen to be done”. Without legal representation, the mere existence of the rules can hardly be seen to be observed, and the accused’s rights will not be seen to be protected.

Sixth, defence lawyers have an ethical mandate to uphold by giving their best in defending their clients.

Rule 9(a) of Legal Profession (Practice & Etiquette) Rules 1978 provides that a lawyer “who undertakes the defence of a person in any criminal matter shall by all fair and honourable means present every defence that the law permits”. Rule 9(b) of the said Rules also provides clearly that a lawyer must “undertake the defence of a person accused of an offence regardless of his personal opinion as to the guilt or otherwise of the accused”.

Rules like these actually go hand-in-hand with the so-called “cab-rank rule” which has been incorporated into the said Rules. Rule 2 states that a lawyer “shall give advice on or accept any brief ... he professes to practise at the proper professional fee ... but special circumstances may justify his refusal ...”.

Hence, subject to the exceptions such as professional embarrassment, likelihood of professional conduct being impugned, difficulty of maintaining professional independence, etc, every lawyer must adhere to the cab-rank rule. This also explains why we have legal aid centres and the National Legal Aid Foundation, in order to ensure that impecunious individuals will have access to legal advice, regardless that financially motivated lawyers may be reluctant to represent an accused who cannot afford legal fees that may be exorbitant to some.

It all boils down to one principle: everyone is entitled to legal representation. Therefore, lawyers cannot and should not refuse to represent an accused simply because the accused is seen as the “worst criminal” in the eyes of the public.

In conclusion, a criminal justice system that prejudges a “bad guy” would certainly also prejudge a “good guy”. It is only when lawyers are willing to represent everyone, that the legal system will be not be paralysed. To encourage otherwise is to set the worst precedent as it will only do harm to the criminal justice system and hamper justice.