

LAW OPINION

In defence of a criminal defence lawyer

RAFID AZAD SAUMIK

In recent times, we have seen an alarming phenomenon in our country: criminal defence lawyers in sensational cases are often painted as villains by many. Fearing the repercussions, some lawyers also refuse to accept certain cases, resulting in accused individuals receiving below-standard representation, even in death penalty cases. This populist sentiment unknowingly hinders our struggle to realise a society with rule of law as envisioned in the preamble to our Constitution.

If we look for reasons underlying this tendency to vilify the criminal defence lawyers, we get mainly two: first, the people are frustrated with a high rate of crimes and how our criminal justice system is failing the victims; and second, they believe the reason why criminals do not get punished lies with the "malicious" support provided by the criminal defence lawyers. Needless to say, the concerns about the high crime rate and the frustration with our criminal justice system being practically broken are genuine and deserve both our due attention and acknowledgement. Unfortunately, painting the defence lawyers as the bad guys does not help us; rather, it derails us from the real issue and breeds further injustice.

First, this anger against the defence lawyers for helping criminals go free is misguided. Criminal defence lawyers do not have supernatural powers to make black into white or otherwise. In reality, they only have to analyse evidence adduced by the police and prosecution, question the prosecution's evidence and witnesses, and present their own evidence and witnesses (if any). They can win cases if the prosecution frames an innocent person, or if the prosecution fails to build a strong case. Hence, the liability for failing to build strong cases, make strong arguments, or obtain sufficient evidence lies solely with the state and its various agencies, e.g., law enforcement agencies, prosecution lawyers, forensic department, etc.

To add to this, we need to remember that the state has all the resources, manpower, and almost everything, including forensic labs, the latest technologies, and the best lawyers, at its disposal to build a strong case against the accused. In contrast, all the accused have is just one person in their corner. Moreover, after an accused

is arrested, their movement and other freedoms remains curtailed. Oftentimes, even the family members and friends of the accused stop helping them, a phenomenon known as social death, which is common in the lives of many accused with lower socioeconomic circumstances. It is essentially state as the leviathan versus one individual. Regardless, if the state still fails to do its job properly, only the state can be blamed. Hence, our focus should be on building a strong, cultivating a criminal justice system that bends to neither power nor money, applies laws judiciously, has police do their jobs properly, and skilled prosecution lawyers

Even where the accused individuals are actually guilty, they still require quality representation to protect themselves from disproportionate or unfair sentences and to safeguard their procedural and substantive rights. For instance, they have a right not to be tortured in custody, the right to be treated humanely before and after trial, the right to privacy, the right to communication with family members and lawyers.

giving their best efforts. Because if the prosecution's case has loopholes, and even if good defence lawyers refrains from taking up cases, a reasonably prudent (and independent) judge would still not convict the accused.

The other concern with this irrational blaming of the defence lawyers lies at the heart of the concept of "justice". When we hear the word, we may immediately only think of the alleged victim. However, in reality, to ensure true justice, it must be allocative. Just how an aggrieved person has the right to *enjoy the protection of law*, the accused also has the right to be treated *only in accordance with law* (Article 31 of the Constitution). In the absence of either, the justice system can be deemed neither fair nor just.

The reason the accused has *the right to be defended by a legal practitioner of his own choice* (Article 33 of the Constitution, section 340 of the CrPC) is owing to an established principle of law, "*the burden of proof is on the one who accuses*". We often forget that an accused is not necessarily a guilty person. In our country, it is common for many innocent individuals to be framed as guilty, either out of malice (corruption, vindictiveness) or due to incompetence on part of law enforcement. The fact that mass and social media also make similar mistakes, or willfully contribute to them, is also well known to us. Hence, even in sensational cases where it may seem that someone is in fact guilty, we need to step back, act sensibly, and let justice take its course. As a result of the relentless vilification of defence lawyers, many genuinely innocent individuals would otherwise be deprived of proper representation.

Moreover, even where the accused individuals are actually guilty, they still require quality representation to protect themselves from disproportionate or unfair sentences and to safeguard their procedural and substantive rights. For instance, they have a right not to be tortured in custody, the right to be treated humanely before and after trial, the right to privacy, the right to communication with family members and lawyers, etc. However, when the populist culture of bashing defence lawyers persists, we risk creating a society where the rights of detainees or convicts, who are already vulnerable, in that most of their rights are restricted at this stage, are threatened.

Fortunately, our apex court has shown genuine concern regarding this right in many cases. In *Md. Saifuzzaman v State* (2003), the HCD noted, "*the arrested person has the constitutional right to be defended by a legal practitioner. Section 340 of the Code also provides that any person accused of any offence before any criminal court may, as of right, be defended by a pleader [..] The word 'defended' clearly includes the exercise of the right so long as the effect of the arrest continues.*" In *Babu Khan v State* (2003), the HCD remitted the case for a fresh trial after finding that the accused did not receive proper

representation at the trial stage.

In sum, we need to remember that while it is true that we have a high crime rate and powerful criminals are indeed walking free with impunity, it is also true that innocent people are getting framed and consequently suffering as well. Hence, the solution lies not in weakening the criminal defence system, but in strengthening the prosecution. If we wish to truly solve this problem, we need to channel our anger and frustration in the right place in realising a society where justice is ensured for all.

The writer is Law Desk Assistant at the law page of the Daily Star.



LEGAL PHILOSOPHY

Why the State doesn't define good and evil

SHAHJAD HASIN SADAB

By the time you finish reading this introduction, a law will have been passed somewhere in the world that is technically legal but fundamentally unjust. For instance, if a bill mandating the execution of anyone who spits in a public space were to pass through the Bangladeshi Parliament, it would legally constitute a law, but it would be universally condemned as morally vicious. This leads us to understand interactions between law and morality.

The first question to arise is that: "What is morality?" In short, morality is a set of objective and universal rules, that I believe, originate from the "Divine Good", and are pre-installed in human beings, that can sometimes be rationally discovered. Killing an innocent person, raping someone, or stealing someone's possessions is objectively and morally wrong. Now the question is: what is *objective* morality? I will not use sophisticated academic jargons. Rather, to be quite plain and simple: objective morality implies moral truths which are true regardless of the presence of moral agents (i.e. human beings). In other words, moral truths are true just as *two plus two equals four* is true, regardless of whether mathematicians exist or not. A simpler illustration: "I like strawberry ice cream" may be a subjectively true statement. However, "ice cream melts in heat" is objectively true. Likewise, killing an innocent person is objectively morally wrong, even if the entire world subjectively agrees that it is not.

The most logical follow-up is the question: "How can a moral claim not be true if everyone agrees with it?" The answer is that a claim's truth being contingent on agreement



makes morality subjective. If the bar is consensus among people, then morality is barely an opinion: it is just a modified "we like strawberry ice cream". This question can be answered from two different perspectives.

First, consensus does not equate moral truth, just as "two plus two equals four" will never be false even if the entire world says it is. Second, if consensus were held necessary for an action to be morally right or wrong, then

Nazi Germany could never be condemned for its actions, as the German society of the time reached a consensus that the holocaust was not wrong. Similarly, Israel could not be vilified for the genocide committed in Palestine as the Israeli nation and its allies at large stand in agreement and support thereof.

Another problem with subjective morality is that it leaves no real meaning for the words "good" or "bad". Speaking more academically, there would no longer remain an ontological basis for morality. One might argue that a moral subjectivist can explain why murder is wrong, but I say he will be found profoundly

Consensus does not equate moral truth, just as "two plus two equals four" will never be false even if the entire world says it is.

lost when asked: What is wrong? Is "wrong" made of particles? or can "wrong" be put in a test tube? This is where the remarkable observation of Professor Ian Markham, "Embedded in the word 'ought' is the sense of a moral fact transcending our life and world... The underlying character of moral language implies something universal and external." To elaborate simply, the term "ought" implies that morality is not just a personal feeling, but a universal standard that exists outside of human invention.

Now that the definition of morality and objectivity is established, it is recommended for states to enact laws in line with it. A law (man-made, opinion based) cannot be the standard so to speak. To call a law "unjust", there must be a fixed, objective rule outside the legal system to measure it against. If the

state-sanctioned or man-made rules are the only standard, then every line it draws is straight by definition, and tyranny becomes a legal impossibility.

Second, we must distinguish between legal process and moral purpose. John Finnis, for instance, argues that a bill may follow every parliamentary procedure to the letter, but if it violates the "Divine Good" pre-installed in our nature, it remains an act of force rather than a true law. The validity of a statute is thus seen not as an arbitrary rule, but as a codification of an objective moral truth. Legality is merely a subjective human process; morality on the other hand is an objective reality.

Third, the State does not *create* rights; it only has the duty to recognize them. If rights were merely "gifts" from the government, the government could revoke them at any time. Finally, we must reject the "tyranny of the majority". Just as consensus cannot make "two plus two equals five", a ballot box cannot transform a vice into a virtue. The State's legitimacy does not come from the number of votes it can count, but from its alignment with the objective truth that transcends our world. Without objective morality, injustice could be chosen as the main purpose behind enacting a law.

To summarize, true justice requires that the "Law" of the State bows to the "Right" of the Divine. Because morality is an objective, transcendental reality, immutable as mathematics, and it cannot be manufactured by consensus or legislation. A state only achieves legitimacy when its laws reflect these pre-installed truths, ensuring that power serves eternal justice.

The writer studies law at the Nottingham Trent University.