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Introduction

On 24 March more than 120 UK lawyers² organised by a group called Lawyers Are Responsible (LAR) handed a 'Barristers' Declaration of Conscience' to the Bar Standards Board (BSB) which stated:

We declare, in accordance with our consciences, that we will withhold our services in respect of: (i) supporting new fossil fuel projects; and (ii) action against climate protesters exercising their democratic right of peaceful protest.

This announcement did not spring spontaneously out of nowhere, already fully grown like Botticelli's Venus. Like so many modern cultural trends its origins lay across the Atlantic. As a latter day Pliny might have put it, "Ex America semper aliquid novi".

Law Students for Climate Accountability (LSCA) a campus-led non-profit making organisation, established in October 2020, has a scorecard for the extent of their fossil fuel work as a benchmark for judging law firms. It seeks a pledge from such firms not to acquire new fossil fuel clients and to give up existing ones by 2025. Both in the USA and the UK it is, unsurprisingly, the top ranked firms which house the largest number of fossil fuel specialists. Money speaks loud to lawyers.

In the UK there are current campaigns, taking various forms, designed to persuade professional services providers – not only lawyers but also advertising, marketing, and consultancy firms – to cease any work they undertake for carbon intensive industries.

¹ The author's memoir *MJBQC - a Life Within and Without the Law* (London: Hart/Bloomsbury, 2022) considers the cab rank rule and his own experience of it as a practising barrister at pp 258-260 and 265. See also his David Williams lecture at the University of Cambridge (accessible at www.youtube.com/watch?v=AHJEggUrsM), also published in [2011] 1 *Denning Law Journal* at pp 7-10 and his response, with Pushpinder (now Mr Justice) Saini KC, on behalf of Gray's Inn to the Report by Professor Flood and Professor Hviid for the Legal Services Board ("the LSB") entitled "The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market", which suggested that the rule had passed its sell by date.

² I shall omit the adjective 'top' used by the media on this as on other occasions in accordance with hallowed tradition by the media to describe any lawyer who has done anything reportable; and the adjective 'woke' over which the *Daily Mail* headline writers have quasi-copyright.

What marks out the barristers³ declaration of conscience as distinctive is that, if acted upon it will put the barristers in breach of a professional requirement – the cab rank rule, applicable to all barristers in England and Wales. The LAR foreclosed any argument on this issue by putting out a statement that "The barristers now face the prospect of disciplinary action for breach of professional regulations (such as the cab rank rule) which require them to take any case within their competence". Some of the barristers have indeed courted martyrdom by self-reporting to the BSB, which is responsible for the administration of such discipline.

Cab rank rule

The cab rank rule, the core, if not the detail, of which is captured in LAR's statement has a substantial pedigree. The duty to take any case within one's sphere of proficiency and on suitable terms – irrespective of the nature of the client's character, case or cause, or any views Counsel may have on any of them – has, since at least the time of Henry VII⁴ been part of the professional creed and ethos of the profession. It is set out in rules C29 to C30 of the current Code of Conduct for Barristers.⁵ The exceptions listed in C30, concerned mainly

³ The signatories to the Declaration are an eclectic mix of barristers, solicitors, academics and others. One is Tim Herschel-Burns, co-founder of the LSCA.

⁴ The address of the then Chief Justice to the new sergeants-at-law included the exhortation "Ye shall refuse to take no man under the protection of Your good counsel".

⁵ Rule C29. If you receive instructions from a professional client, and you are: (1) a self-employed barrister instructed by a professional client; or (2) an authorised individual working within a BSB entity; or (3) a BSB entity and the instructions seek the services of a named authorised individual working for you, and the instructions are appropriate taking into account the experience, seniority and/or field of practice of yourself or (as appropriate) of the named authorised individual, you must, subject to Rule rC30 below, accept the instructions addressed specifically to you, irrespective of: (a) the identity of the client; (b) the nature of the case to which the instructions relate; (c) whether the client is paying privately or is publicly funded; and (d) any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

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with credit risk, do not undermine the fundamental principle.⁶

A summary of the importance of the rule was provided by Lord Hobhouse of Woodborough in *Arthur JS Hall & Co v Simons* where the House of Lords in removing one ancient element of a barrister's practice reinforced another one. He articulated it in this way:

This is a duty accepted by the independent bar. No one shall be left without representation. It is often taken for granted and derided and regrettably not all barristers observe it even though such failure involves a breach of their professional code. It is in fact a fundamental and essential part of a liberal legal system. Even the most unpopular and antisocial are entitled to legal representation and to the protection of proper legal procedures. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) confirms such right. It is also vital to the independence of the advocate since it negates the identification of the advocate with the cause of his client and therefore assists to provide him with protection against governmental or popular victimisation. The principle is important and should not be devalued...

The rule is not just an English legal anachronism. As observed, no less eloquently by Brennan J, in the High Court of Australia:

Whatever the origin of the rule, its observance is essential to the availability of justice according to law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful.

The rule does not apply to other providers of legal services who can lawfully refuse to represent someone on any grounds other than those which would amount to unlawful discrimination of any kind; nor is it followed by the legal profession in the USA. Nonetheless, the question whether it is in the public interest for a member of the Bar to refuse to act for a client who seeks representation in an area of counsel's professed expertise and who can meet counsel's financial terms and conditions of retention can, in my view, admit of only one answer. In a democracy subject to the Rule of Law, it is no business of counsel to judge his client. That is the role of the Court. It is this critical division of responsibilities which is the historic and contemporary underpinning of the rule.

Commenting on the Declaration, the BSB's director-general,

⁶ Nor can those of C21 which require a barrister to refuse to accept the instructions for such obvious reasons as where the client seeks to curtail the barrister's authority in the conduct of proceedings in court so potentially jeopardising the superior duty owed to the Court, conflict of interest or breach of, confidentiality:

⁷ [2002] 1 AC 615 (HL) at 639.

⁸ *Giannarelli v Wraith* (1988) 165 CLR 543 at 58.

Mark Neale, noted that the cab rank rule was "designed to ensure that everyone can have access to legal advice". In another statement the chair of the Bar Council, Nick Vineall KC, said the cab rank rule "prevents discrimination and improves access to justice" and re-emphasised its importance during an address in a service in Temple Church

Response

How have the signatories responded to this argument?

They focus on the special nature of the threat posed by climate change. A report of the Intergovernmental Panel on Climate Change, published a week before the Declaration, was launched in dramatic language by the UN Secretary-General, Antonio Guterres: "The human time bomb is ticking. Humanity is on thin ice and it is melting fast". Against this background one signatory, Declan Owens, a non-practising solicitor with the Ecojustice Legal Action Centre said, "I have an inherent disdain for laws implemented in the interests of Capital and the unconscionable harms they cause to the poorest and most vulnerable in our societies, especially in the Global South. Similarly, I have a healthy disregard for ethical rules, which enable lawyers acting on behalf of Fossil Capital to facilitate the destruction of human life on the planet and to accelerate the climate and ecological crises". Paul Powlesland, another signatory and a barrister, in protest at Vineall's Temple Church address held up a sign pithily reading: 'How many deaths does 'cab rank' justify?'

So future lives are said to trump the present rule.

The signatories are entitled to express their views as to how to balance the needs of the present generation with those of its successors in terms of available energy sources. Jolyon Maugham KC, another signatory and director of the Good Law Project, went further saying that lawyers should not be "forced to work for the law's wrongful ends by helping deliver new fossil fuel projects", nor be "forced to prosecute our brave friends whose conduct, protesting against the destruction of the planet, the law wrongly criminalises". But implicit in that *cri de coeur* is a recognition that what he objects to is the present state of the law, whose reform he is, like any other citizen, free to pursue.

The issue, which at the same time he avoids, is whether he, as a barrister, is entitled to give priority to his sincere beliefs above those of the principle fidelity to which his chosen profession mandates.

It is obviously no answer that the barrister signatories are represent only a small minority of a profession which numbers now more than 16,500. Nick Vineall asked: "Should a barrister be allowed to refuse to defend a climate change activist because they happen to disagree with that activist's style of protest?" and (correctly) responded to the question he had posed himself: "I don't think so." What's sauce for the radical gander must be sauce for the conservative goose.

Picking and choosing

Nor is it any answer that the signatories' own proposed

abstinence from the rule is so limited in its scope. In relation to the cab rank rule one cannot pick and choose or be, as it were, demi-vierge.

Finally it is no answer that the signatories, who have made so public a proclamation of views hostile to fossil fuels, are in consequence unlikely to be instructed to prosecute members of Stop Oil or to defend directors of Shell or that there are many others who would be prepared, even happy, to accept such briefs. It is breach of the principle itself, not its practical outcome that is the concern.

It might be argued that a refusal to prosecute activists who share a barrister's beliefs gives rise to a less disquiet than a refusal to represent clients who do not, especially when proposed changes to public order legislation will, whatever their merits or demerits, indisputably curb the right to protest. But that argument cannot be sustained. The law is the law. If it is to be enforced, prosecution, subject to the usual caveats, is the necessary default option. Criminal trials inherently require two to tango. Prosecutions require prosecutors who have a duty to ensure that a trial is fair but not to procure a conviction at all costs.

The signatories to the declaration must confront the wider implications of their adopted stance. There is a perceptible and growing tendency to seek to dissuade lawyers from representing persons who excite public hostility. *The Times* itself has moved with the times, commenting in an editorial of 27 January 2023, entitled Slapp Down, on a libel action by a Russian so called "gangster" that it is "shameful" for barristers and solicitors to act for "dubious clients" and that they should take more notice of our "wider ethical obligations to society". Lord Pannick KC, Boris Johnson's lead lawyer, retorted in a letter published the next day: "The primary ethical obligation of lawyers is to the rule of law, which requires that all persons, however "dubious", have access to legal advice and representation. This applies to alleged murderers, rapists, paedophiles and also to Russians. There are exceptions to this professional obligation, and rightly so, in particular that we may not assist litigation which we believe to have no reasonable basis or which is being pursued to harass others. But in general, judges, not lawyers, decide whether litigation by clients is well founded. A hard case should not be allowed to undermine these fundamental principles". He is clearly right.

Hard cases can indeed make good law when barristers adhere to the commandments of their profession, whatever odium they may, in so doing, unjustifiably incur. The cab rank rule for barristers has been likened to the still older Hippocratic oath which bind medical practitioners, obliging them to treat impartially activists and oligarchs alike.

Disciplining the activists ?

Whether and how the BSB chooses to discipline the barrister

⁹ The Public Order Bill introduced in 2022 envisages, inter alia, *serious disruption prevention orders*.

signatories is, at the time of writing unknown.¹⁰ It is possible that unless and until the barristers accompany their words with deeds by actually refusing instructions proffered for the reasons they have given, BSB will for the moment stay its hand. What is crucial is that the profession's representatives continue both to take appropriate action and to speak out so as to prevent any dilution of the Bar's DNA.¹¹ I recall and adapt Pastor Niemoller's warning about the Nazis: "First they came for the socialists, and I did not speak out – because I was not a socialist. Then they came for the trade unionists, and I did not speak out – because I was not a trade unionist. Then they came for the Jews, and I did not speak out – because I was not a Jew. Then they came for me – and there was no one left to speak for me." There is a need to avoid salami slicing of the rule by those who may ask why if X is entitled to breach it, why not Y, and, if Y, why not Z etc *ad infinitum*. The rule cannot admit of any exceptions. It must always apply to all barristers. Otherwise, it will lose its virtue and the public interest it serves will be irreparably wounded.

Conclusion

It is useful, in this fraught atmosphere, to recall the words of Lord Bingham:

It is required of lawyers in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness.... A profession's most valuable asset is its collective reputation and the confidence which that inspires.... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

Public confidence in the legal profession, depends upon lawyers, certainly no less, and arguably even more than others, obeying, until it is changed, the law of the land and upon barristers universally respecting their profession's singular and primary precept.

[Michael Beloff KC is a member of Blackstone Chambers, Temple, London and a former President of Trinity College, Oxford.]

¹⁰ The BSB handbook identifies possible circumstances of breach of the rule and their consequences in terms of starting point as follows:

Possible circumstances	Starting point
Breach of cab-rank rule (financial motive)	Reprimand and medium level fine
Breach of cab-rank rule (discriminatory motive)	Reprimand and short suspension

Aggravating factors: Actions of the barrister adversely affected the course of the proceedings; *Mitigating factors:* Immediate apology.

¹¹ With whom, for the avoidance of any conceivable doubt, I do not equate the signatories.

¹² Sir Thomas Bingham MR, *Bolton v. Law Society* (1994) 1 WLR 512 at para 15.