Is the Cab Rank Rule now redundant at the self-employed Bar?

Introduction

The declaration made earlier this year by several barristers, as well as other legal professionals and academics, that they would refuse to act in certain cases concerning climate change reinvigorated the debate at the Bar about the continued value of the cab rank rule.[1] The rule provides that, much like a taxi driver at a rank, barristers are not allowed to turn away clients (provided they fall within their area of practice and can pay an adequate fee). This essay will attempt to defend the cab rank rule and argue that, despite the very real issues that it faces, it is worth retaining.

This essay proceeds in two Parts. The first section will set out why there is a strong case, which needs to be answered, for seeing the cab rank rule as redundant. However, the following section will argue that the cab rank rule remains a cornerstone of the self-employed Bar and is far from obsolete.

Part I: The Case against the Cab Rank Rule

In a recent article for Counsel Magazine, Patrick O'Connor KC questioned the continuing value of the cab rank rule beyond cases confined to those involving "personal liberty".[2] Whilst conceding that the rule still plays a role in ensuring representation for those accused of the gravest criminal offences, he contends that it otherwise plays little role in promoting access to justice. Citing a "disconnect between symbol and substance", he argues that multiple issues mean that it is now virtually obsolete, at least in its current state.

To this end, he identifies limitations to the scope of the rule itself. An important one being that solicitors can and do refuse clients. He gives the example of the Law Society's advice that 'climate-related' issues may be relevant when choosing clients and the well-known example of City firms publicly distancing themselves from Russian clients following the Russian invasion of Ukraine.[3] If the cab rank rule only prevents barristers from refusing clients but the very solicitors who

---

[1] See 'Declaration of Conscience', *Lawyers are Responsible,* <https://www.lar.earth/sign/> accessed 2 Nov 2023.

[2] Patrick O'Connor KC, 'Is it time to re-assess the cab rank rule?' (Counsel Magazine, 20 July 2023) <https://insights.doughtystreet.co.uk/post/102ijwr/is-it-time-to-re-assess-the-cab-rank-rule> accessed 28 October 2023.

[3] For example, see 'The impact of climate change on solicitors' The Law Society, 19 Apr 2023 <https://www.lawsociety.org.uk/topics/climate-change/impact-of-climate-change-on-solicitors> accessed 31 October 2023. Here, Law Society guidance stresses that solicitors have "wide discretion in choosing whether to accept instructions" and so, they should seriously consider "climate-related issues [which] may be valid considerations in determining whether to act".

instruct them are able to do so, this is a significant limit (both in theory and practice) on the impact the rule has.

Another limitation O'Connor observes is that the rule cannot effectively cover the types of cases typically brought by poorer clients. He specifically uses the example of cases brought by direct access as these clients cannot rely on legal aid – and so, are more likely to be affected/deterred by the financial pressures of litigation. Prospective litigants who find themselves in this situation often rely on conditional fee arrangements which BSB guidance states that barristers are free to reject (gC91).[4]

The point can be made even more strongly given general difficulties in obtaining legal aid. The BSB handbook's rules and guidance on the cab rank rule do provide for cases brought through legal aid; but widespread cuts to the accessibility of legal aid mean that there are swathes of prospective litigants that are still left essentially unable to access representation.[5] Whilst the question of whether the carve-out for conditional fee arrangements is defensible falls outside the scope of this essay, the fact remains that this is another substantial exception to the rule which acutely affects those in particular need.

Other limits to the scope of the cab rank rule that he notes include its inapplicability to foreign work and how easily its concerns are evaded in practice by simply being nominally "too busy" to take on the case.[6] All of these limits identified by O'Connor undoubtedly demonstrate how the effectiveness (and therefore importance) of the rule is mitigated. However, this is not enough to prove that the rule is now redundant. Successfully making the case that the cab rank rule is obsolete requires showing that the cab rank rule accomplishes nothing that is not already achieved through other means or that it has become actively detrimental.

This is what makes O'Connor's wider critique so powerful, as he not only contends that the cab rank rule is impotent in face of wider challenges to access to justice, often brought about by governmental policy, but that it can actually be harmful by entrenching and perpetuating "distortions of the market".[7] He argues that the cab rank rule essentially functions as a rule of 'first come, first served' which unfairly benefits those with the resources and familiarity with the legal

[4] The BSB Handbook, <https://www.barstandardsboard.org.uk/the-bsb-handbook.html?part=&audience=&q=Rc29> accessed 31 October 2023; see rC29-C30 and the subsequent guidance.
[5] See Owen Bowcott, "Jump in unrepresented defendants as legal aid cuts continue to bite", *The Guardian*, 24 Nov 2019, <https://www.theguardian.com/law/2019/nov/24/legal-aid-cuts-prompt-rise-in-unrepresented-defendants> accessed 4 November 2023; "A decade of cuts: Legal aid in tatters", *The Law Society*, 31 Mar 2023, <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/a-decade-of-cuts-legal-aid-in-tatters> accessed 4 November 2023.
[6] O'Connor (n2).
[7] ibid.

system by guaranteeing them access to the best representation possible. Meanwhile those who lack these advantages and are most acutely in need of representation are immediately put on the back foot.

Giving the example of Grenfell, he recollects how the public authorities and corporations that were potentially at fault were completely "lawyered up" within weeks of the disaster whilst victims, with little knowledge of the legal system, were left in the lurch.[8] The reason that this is particularly damaging to the value of the cab rank rule is because the rule is not simply meant to guarantee representation but your representation of choice. If this is not the case, it is not clear what unique purpose the cab rank rule serves given that, as O'Connor remarks, "the existing rule against 'discrimination' [already] protects against most improper rejections of clients: [Rule rC12]".[9]

If an unintended consequence of the cab rank rule is exacerbating pre-existing power dynamics, it is not clear that it remains useful today at the self-employed Bar given the practical limitations on its ability to meaningfully promote access to justice. To take O'Connor's line of argument one step further, if the cab rank rule not only struggles to improve access to justice but risks perpetuating inequalities between parties, is there any reason that barristers should not take a more critical approach to who they represent? Richard Moorhead makes this very point:

> Lawyers should take some responsibility for who they act for and what they do for them, not least because the potential for lawyers to be complicit in wrongdoing can be substantial (look at tobacco as an example) and is masked by the superficial gleam of the cab rank's neutrality and non-accountability.[10]

Where some barristers hypothetically refuse to act for the most powerful individuals and corporations, who will undoubtedly still get representation, any infringement on accessing justice seems minimal. With the exception that O'Connor makes for those accused of serious criminal cases, it seems arguable that the cab rank rule is too inflexible and conscientious objection might be entirely justified in cases like the LAR declaration on climate change. The strength of Moorhead's position is in recasting the debate in terms of the moral responsibility of barristers rather than their freedom to choose. In doing so, refusing to act shifts from a decision which they

---

[8] ibid.
[9] ibid.
[10] Richard Moorhead, "Lights out at the rank?", *LegalFutures,* 27 March 2023, <https://www.legalfutures.co.uk/blog/lights-out-at-the-rank> accessed 5 Nov 2023.

feel they can make to one that they feel that they must – making refusals to act appear more principled and, therefore, palatable.[11]

In light of substantial normative reasons to allow barristers to choose who they represent and the previously identified practical concerns about the value of the cab rank rule, there does appear to be a strong case for seeing the rule as redundant. Having fully laid out this case, it is now possible to argue why the cab rank rule is nevertheless far from redundant and should be retained.

Part II: In Defence of the Cab Rank 'Rule'

The major issue with the case against the cab rank rule, as presented above, is that scrapping it is unlikely to rectify any of these problems. Conversely, to do so would not only likely exacerbate several of them, but it would also fundamentally alter the nature of the self-employed Bar for the worse. It is undeniable, to a certain extent, that all the issues identified by commentators like O'Connor and Moorhead do exist in the current system. However, it is unclear that alternatives like allowing barristers to choose whether to take on a case would reduce any of them.

The most serious flaw of the cab rank rule discussed above is O'Connor's argument that it actively hinders the promotion of (equal) access to justice because it perpetuates pre-existing inequalities between litigants. It is likely true that rich and powerful clients are better placed to take advantage of a rule which guarantees them representation of their choosing. However, in the alternative where this rule does not exist, the disparity in bargaining power becomes even more stark. The purchasing power of these clients will still be able to guarantee them the barrister of their choice but now, there is not even a guarantee that the disadvantaged litigant on the other side will be able to find adequate representation at all. In the worst case, the absence of the cab rank rule, in certain specialist areas, "would create a real risk that major players (e.g. banks) could demand exclusivity, depriving potential opponents of much of the talent available at the Bar", as argued by McLaren KC, Ulyatt & Knowles in their report for the BSB.[12]

This same line of argument applies a fortiori to the practical limits on the scope of the rule, such as solicitors' discretion to choose clients; or that it was easy to evade in practice by claiming unavailability. The force of these objections was to show that the effectiveness of the rule is limited but as argued above, this does not show that the rule no longer serves any purpose. If anything, it implies that a renewed commitment and bolstering of the rule would be desirable, again noted in

[11] The Chair of the Bar Council's Ethics Committee, Stephen Kenny KC, drew a similar distinction when he affirmed the (pre-existing) right of barristers to refuse to take on cases where they are "afflicted by conscience" but this will be more fully explored below. See Yola Verbruggen, "Lawyers against the climate crisis", *International Bar Association,* 26 May 2023 <https://www.ibanet.org/Lawyers-against-the-climate-crisis> accessed 3 Nov 2023.

[12] Michael McLaren KC, Craig Ulyatt & Christopher Knowles, "*The 'Cab Rank Rule': A Fresh View"*, Bar Standards Board (2012), 2-3.

the BSB report.[13] O'Connor's critique, and other attacks on the rule, rely on not just showing how the rule struggles to be effective but its actual harms. If the major harms of the cab rank rule which its detractors identify are worse in a system without the rule, there does seem to be some value in retaining it.

Having overcome the problems identified with the cab rank rule as it stands, we can turn to the positive case for allowing barristers to choose who they represent on the grounds of their moral responsibility. There are two interrelated responses to this line of criticism. Firstly, as the Chair of the Bar Council's Ethics Committee stated, this is already allowed in the current system. Relying on the provisions of the BSB handbook, he argues that where a barrister is "genuinely afflicted by conscience, such that [they] cannot properly do [their] job as an advocate" they are able to refuse instructions based on their inability to "maintain [their] independence".[14] This interpretation of the rules sidesteps Moorhead's criticism that barristers are essentially unable to act according to their conscience.

It is possible to object that this is a high threshold for a barrister to meet to be able to turn down a case, which does not allow them a great deal of discretion, but that is precisely the point. It is a high threshold because it otherwise risks completely undermining the purpose of the cab rank rule by allowing barristers wide discretion to refuse cases with which they disagree. Ensuring that rC21(10) is confined to the most extreme cases of conscientious objection balances the virtues of the cab rank rule alongside the need to allow barristers, in certain cases, the right to refuse to act. This brings us to the second response.

To go any further in allowing flexibility and discretion to barristers in which cases they choose to take on would be to undercut the independence of the self-employed Bar. One unique strength of the Bar, and the cab rank rule, is that it prevents identification of barristers with clients and their causes. Much has been said about how this protects barristers from unfair criticism outside the profession, but its true importance runs somewhat deeper. As Lord Hendy KC notes, the notion that barristers are independent and separate from their cases goes to the core of the professional ethos at the Bar.[15] Dissolving that thin divide between a barrister and their client, which scrapping the cab rank rule risks doing, not only invites criticism and stigma from outside but also, crucially,

[13] ibid, 11-12.
[14] "Fig leaf falls from legal profession, as Bar Council Ethics Committee Chair concedes barristers may act on conscience", *Lawyers Are Responsible: Press Release,* 26 April 2023, < https://www.lar.earth/press/press-release-26th-april-fig-leaf-falls-from-legal-profession-as-bar-council-ethics-committee-chair-concedes-barristers-may-act-on-conscience/> accessed 3 Nov 2023; See also the BSB Handbook, rC21(10).
[15] Lord John Hendy KC, 'The Cab Rank Rule', *Oxford Human Rights Hub*, Mar 27 2021 <https://ohrh.law.ox.ac.uk/the-cab-rank-rule/> accessed 3 Nov 2023.

within the legal profession. Both of which would negatively impact the ability of barristers to represent their clients as well as the general character and solidarity of the self-employed Bar.

Conclusion

The cab rank rule is not perfect. Many of the issues identified with it highlight how it has fallen short. However, given almost all of these harms would be exaggerated by scrapping it, it is clear that the rule remains important. It allows, in exceptional circumstances, for barristers to refuse to take on a case on grounds of conscience whilst still maintaining enough of a divide to prevent barristers being identified with their clients. Whatever issues the cab rank rule has, it is unclear that, in its absence, the invisible hand of the market would sketch a more level playing field; accordingly, it should be seen as far from redundant.

Richard Matheson