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To kill a mockingbird

Lawyers must not be drawn into choosing cases based on their beliefs… or even worse, their prejudices, says John Gould

A lawyer's willingness to represent a pariah was once acknowledged as the paradigm of professional honour and integrity. It is a trope which has made heroes of fictional lawyers, from Atticus Finch in *To Kill a Mockingbird* to James B Donovan in *Bridge of Spies*. Perhaps now, however, times are changing, and lawyers fall to be judged not by their own character and skill, but by the clients they come to represent. A lawyer who chooses not to turn away a controversial client may find themselves vilified and their reputation damaged by a very public association with their client.

Guns for hire?

Earlier this year, the respected Queen's Counsel, David Perry (pictured), found himself under an intense media spotlight for accepting instructions from the Department of Justice of Hong Kong to represent them in the prosecution of nine pro-democracy activists for unlawful assembly under the Public Order Ordinance. This appears to be essentially a colonial era provision rooted in English common law. The defendants contended that a relatively uncontroversial long-standing law was being misused for repressive purposes.

Pressure on Mr Perry came from many directions. Dominic Raab, the UK's foreign secretary, described him as 'mercenary'. Lord Adonis, a former minister, suggested that he had become part of the repressive apparatus of President Xi's dictatorship.

Lady Helena Kennedy QC was reported by *The Guardian* as commenting: 'The truth is that we are not hired guns. We are not mercenaries that take a brief that might involve the erosion of the rule of law… A member of the English bar should be very careful about going to China and acting on behalf of the state in order to prosecute people under a really questionable law that was produced at the behest of China and when the consequences could be very serious in terms of individual liberty of those involved.'

Another barrister commented that Mr Perry was bringing the Bar into disrepute by prosecuting offences 'under a law that has been condemned by international human rights bodies'.

Perry QC's few defenders spoke of the 'cab rank rule' and the need for even evil criminals to be properly represented. In the end, Mr Perry withdrew from the case, citing the pressure and the need to self-isolate, presumably because of COVID.

Many commentators appeared to assume wrongly that the prosecution was under China's new and controversial 'national security law', which illustrates neatly the point that commentary exerting pressure may in some cases be ill-informed and less focused on the facts than gaining publicity for the views and opinions of the commentator.

If I may also express respectful disagreement with Baroness Kennedy; barristers are 'hired guns'. It is not necessary (or even desirable) that they express anything but the position of their clients. They argue and represent others for money. They are not soldiers in their own country's cause.

The final point made against Mr Perry is that he had agreed to become not a servant of the administration of justice, but the instrument of repression. There is an important point here about the extent to which lawyers may become the instrument of something morally unjustifiable, but first I should deal with the cab rank rule, which is rather more than a cherished British system to maintain the integrity of the queue.

The rule's roots

The detailed formulation of the rule has changed over time but, in its present form, if all other things are equal, a barrister must not withhold his or her services on the basis of the identity of the client, the nature of the case, whether the case is privately or publicly funded or '… any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client' (Bar Standards Board (BSB) Code of Conduct, Rule C29, 31

December 2020).

The 2012 BSB Code of Conduct was slightly but significantly different: '… on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to him *or any section of the public*' [emphasis added].

The point is not whether Perry QC was obliged to take a foreign case (he wasn't: Rule C30.5) but whether these principles are still correct and, if they are, how should they be applied by lawyers generally.

A 2013 report for the Legal Services Board ('The Cab Rank Rule: Its meaning and purpose in the New Legal Services Market', John Flood and Morten Hviid) concluded that the principles underlying the rule were laudable, but that in terms of an actual beneficial effect, the rule was a waste of space.

The report referred to the long history of the rule, stretching back to the 17th century in England. An early adopter of the rule was John Cook, the then Solicitor General. He was instructed to prosecute Charles I after all other potential prosecutors had remembered reasons why they had to leave immediately for the country (leaving town to avoid unpleasantness, usually involving a king, was a recurrent theme for lawyers and judges in 17th century England—the consequences of 'fearless representation' were then potentially much more serious than the sanctions now available to a disciplinary tribunal). Charles decided to defend himself (often an error) and was convicted and executed. When the monarchy was restored in the form of Charles II, Mr Cook's defence that he had a duty to accept the brief as it was accompanied by an appropriate fee did not get much traction, and he was hanged, drawn and quartered as a regicide.

Leaving aside all of the unpopular, disreputable and seditious individuals who got advocates into trouble in the intervening period and the difficulty of finding lawyers prepared to act for suspected IRA members in the 1970s, in 1969 Lord Pearce explained his belief in the rule in *Rondel v Worsley* [1969] 1 AC 191:

> 'It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full hearing to be in the right. And it is a judge's (or jury's) solemn duty to find that out by a careful and unbiased investigation. This they simply cannot do if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits'

This rationale assumes that representation is before a court which is capable of making a just decision. If it is not, the representative's participation may, if she is not careful, amount to a validation or endorsement of an unjust process.

The cab rank rule has never applied to solicitors (although the position of solicitor advocates is slightly different), but the issues of principle and morality are the same. Lawyers should not choose their cases based on their beliefs, or even worse, their prejudices. The cab rank rule is reported as having little practical benefit, but lawyers of integrity should aspire to choices based on justifiable principles. If courage is required to withstand the pressure of the opinions of others, so be it.

Representing a person charged with a criminal offence is perhaps the most straightforward situation. It will hardly ever be right to decline to act on the basis of what is alleged: a client's abhorrent actions or their character or beliefs. Bad people are just as entitled to their defence as paragons, and probably need it more.

A lawyer should never accept that, simply by acting, they are to be associated with their client's moral worth, actions or beliefs. They should push back against pressure intended to make it harder for a person to be properly represented. There is no threshold of moral worth below which a person is to be judged by a lawyer to be unworthy of representation.

The independence of lawyers, not only from third party pressure but also from their own clients, needs to be constantly reaffirmed.

Conversely, lawyers should not identify themselves personally with their clients' beliefs and objectives, even if they are ones which signal virtue. There is already too wide a perception that lawyers and their clients are morally equivalent with shared objectives. Lawyers should always speak for their clients, and not express views as if they were general supporters of a cause. Lawyers can be fearless because they are independent of their clients. A lawyer's role should not involve their endorsement of their client or their client's non-legal objectives.

The reputation of lawyers is likely to be damaged if lawyers accept or refuse clients on the basis of a calculation of their self-interest, particularly in relation to opposing the rich, powerful or well-connected. Nobody should want lawyers to be calculating cowards.

Instrumentality & integrity

Which brings me to a key point: namely instrumentality. By instrumentality, I mean the assistance a lawyer may be asked to give to further an immoral but legal purpose. These activities may breach a lawyer's professional duty to act with integrity in any event. Sometimes legal support is required for continuing activity by a client which would be regarded by a reasonable person as reprehensible. It is not difficult to think of examples: a corrupt plutocrat who silences critics by hyperactive and multiple litigation, or a property company whose business model involves commercial leases full of expensive traps for a lessee's unwary solicitor.

Then there is the question of the participation in disreputable processes. A barrister prosecuting in the modern equivalent of one of Joseph Stalin's show trials of the 1930s might find the cab rank rule the smallest of fig leaves. There is, of course, a difference between acting for a prosecutor or a claimant and acting for a defendant. Usually, defendants are on the receiving end of a process and the risk of instrumentality is lower.

Perhaps in the end, Mr Perry's dilemma was not so difficult. The government of Hong Kong was not likely to be denied any representation and there was opposition to his participation from local competitors. Although the law was an old one and the process full of lawyers and common law formalities, the suspicion of instrumentality and an inevitable outcome might have been difficult to dispel. The Hong Kong government's desire for an English QC's endorsement of the process might have led someone of Mr Perry's experience to have concluded that he might not be wanted just for his outstanding skill as an advocate and prosecutor. It was, after all, a case of worldwide political significance.

A lawyer withdrawing from a case under media and commentator pressure is the worst of all outcomes, because it reinforces the misunderstanding of the role of lawyers more generally and encourages pressure on all lawyers. We may be one small step closer to a system in which lawyers turn people away for fear of pressure, or leave town to avoid becoming a modern-day Mr Cook under social media carpet bombing. **NLJ**

John Gould is senior partner of Russell-Cooke LLP and author of *The Law of Legal Services*, Second Edition (2019, LexisNexis) (*www.russell-cooke.co.uk*).