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Climate, Conscience and Cabs

By Robert Blackett

Laws are spider webs through which the big flies pass and the little ones get caught.

Honoré de Balzac

Lawyers' professional conduct rules rarely produce exciting headlines, but the last few months have witnessed a highly public row over what is described by the Guardian (24 March 2023) as "*Top lawyers defy*[ing] *bar to declare they will not prosecute peaceful climate protestors*" and by the Daily Mail (23 March 2023) as "*Fury at woke barristers refusing to prosecute eco warriors*". This article seeks to look behind such headlines and present a more considered analysis of the arguments being advanced.

Just Stop Oil

St. Valentine's Day 2022 marked the start of a campaign of disruptive protests by the group Just Stop Oil ("**JSO**"). JSO demands that the UK government stop licensing new oil, gas and coal projects. JSO claims that since the start of that campaign its activists have suffered more than 2,100 arrests and 138 have received custodial sentences. In the two month period 1 October 2022 to 14 December 2022 the Metropolitan Police reported having made around 750 arrests relating to these protests. JSO's protests appear to have been nonviolent (at least, not to have involved any violence against persons). Some of the most high-profile incidents have included protestors causing £100,000 of damage to the Government Offices Great George Street (aka the Treasury Building) by spraying red paint over the Portland stone facade, obstructing the M25 London orbital motorway, gluing themselves to the road outside Buckingham Palace, locking themselves to goalposts at football matches, throwing tomato soup over Van Gogh's *Sunflowers* (albeit the canvas was protected by glass) and gluing themselves to Constable's *The Hay Wain* at the National Gallery and Van Gogh's *Peach Trees in Blossom* at the Courtauld Gallery, disrupting sporting and media events such as the World Snooker Championship, English Premiership Rugby Final, British Grand Prix and BAFTAs. On 17 October 2022 two protestors climbed the Queen Elizabeth II Bridge (a major crossing point over the River Thames between Essex and Kent) unfurled a "*Just Stop Oil*" banner and rigged up hammocks, causing the bridge to be closed for 33 hours and causing gridlock for miles around. In April 2022 those two protestors were convicted of causing a public nuisance and sentenced, respectively, to three years and to two years and seven months imprisonment.

The public's view of JSO

Such protests divide public opinion. A Techne poll in April 2022 reported 53% of those surveyed supported tougher laws to tackle climate change activists blocking roads, transport and other infrastructure. An Omnisis poll for the Guardian in October 2022 on the other hand suggested 66% of those surveyed "*supported taking nonviolent direct action to protect the UK's nature*" though the methodology is unclear and this asked about 'nonviolent direct action' in the abstract, rather than specifically referencing the tactics used by JSO. More recent polls seem more consistent in showing a majority having an unfavourable view of JSO's tactics. A survey by theecoexperts.co.uk in March 2023 reported that, while 75% of those surveyed thought they were experiencing a climate emergency, 50% did not agree with the protest tactics of Just Stop Oil and 16% did agree. A YouGov poll in April 2023 similarly reported 51% of those surveyed having either a "*somewhat unfavourable*" or "*unfavourable*"

view of JSO as against 4% "*very favourable*" view and 12% "*somewhat favourable*". A DJS research poll in April 2023 similarly reported 51% of those surveyed had an unfavourable view of JSO, with 16% having a favourable view.

New legislation

Since the start of JSO's campaign in February 2022, the government has imposed new restrictions on public protest. In April 2022 parliament enacted the Police Crime and Sentencing Act 2022 which imposed new restrictions on 'noisy' protests (extending the police's existing powers to ban or impose conditions on public processions to situations where, in the police's judgment, the noise generated by persons taking part may result in serious disruption to an organisation, or to the community, or cause alarm or distress). This legislation had been opposed by several charities and campaigners and was not universally welcomed by the public either. A nfpSynergy poll commissioned by Liberty in June 2021 had found nearly two thirds of respondents were concerned about these proposals to restrict protest rights.

On 2 May 2023 Parliament enacted the Public Order Act 2023. This created new offences of 'locking on', 'going prepared for locking on' and 'interference with use or operation of key national infrastructure' (including road transport infrastructure) and offences related to tunneling. It extends police powers of stop and search and provides for 'serious disruption orders', imposing restrictions on people who have committed 'protest-related offences', such as preventing them attending a future protest. Several of these powers and offences are defined by reference to 'serious disruption', which term is defined so as to present a low threshold ("*the individuals or the organisation … are by way of physical obstruction prevented, or hindered to more than a minor degree, from carrying out … their day-to-day activities (including in particular the making of a journey*").

Such legislation has been criticised by groups like Amnesty, Human Rights Watch and many social and legal commentators as appearing to place unnecessary restrictions on the freedom of protest. The policy paper justifying the new Act made extensive reference to JSO's protests and the costs of policing them as justification for the new laws, despite there being no suggestion that any JSO activists had escaped prosecution due to any gap in the existing law. JSO protestors all seem to have been prosecuted under long-established laws against criminal damage, public nuisance, obstructing the highway and so on.

New legislation put to controversial uses

This new legislation was enacted a few days before the coronation of Charles II. On the day of the coronation the Metropolitan Police arrested six members of the long-established, campaign group Republic (which campaigns for abolition of the monarchy, and its replacement with an elected head of state). The police apparently relied on the new law to prevent Republic's members protesting the coronation, on the basis that string and zip-ties which formed part of the placards they had been planning to display could have been used for 'locking on'. After the coronation, the six people were, however, released without charge, having in some cases apparently been detained for around 16 hours.

The night before the coronation, the Metropolitan Police also arrested three people in Soho (an area of London replete with bars and clubs and located around a mile from Westminster Abbey and Buckingham Palace) on suspicion of conspiracy to commit public nuisance based on their allegedly having been in possession of a rape alarm which it was said could have been used to frighten police horses during the coronation procession which was due to take place the following day. The people in question proved to be volunteers working for Westminster Council's 'Night Stars' programme and tasked (according to Westminster council's website) with "*providing assistance and support to women and those in need or who are vulnerable due to intoxication. This can range*

from giving directions and handing out water or slippers, to assisting someone on the street who has lost or had their property stolen, or someone who has become vulnerable due to alcohol intoxication". Again, the people in question were released without charge after the coronation.

The 'cab rank rule'

The so-called 'cab rank rule' (Code of Conduct Rule C29) requires self-employed barristers in England and Wales to accept instructions from any client regardless of the barrister's beliefs or opinions regarding the client's character, reputation, cause, conduct, guilt or innocence. There are some exceptions such as not being required to accept instructions unless a proper fee is offered, or if the work is outside one's area of expertise, or if the case is such that one cannot maintain one's independence.

The term 'cab rank rule', incidentally, is an analogy to section 35 of the London Hackney Carriage Act 1853 which obliges the driver of a cab for hire at a cab rank to carry any person desirous of hiring it and provides for a penalty for drivers who refuse.

For the purpose of this discussion, it is also relevant to note Core Duty CD1 (to observe one's duty to the court, to act with independence in the interests of justice, which overrides all other duties) and Rules C3.1 (you must not knowingly mislead the court) and C3.2 and guidance C5 (you must take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions, and draw to the attention of the court any decision or provision which may be adverse to the interests of your client). The intention is that lawyers are partisan only up to a point, with their ultimate loyalty being to the law and the courts charged which administering it.

"*Lawyers are Responsible*"

On 29 March 2023 a group called "*Lawyers are Responsible*" ("**LAR**") announced that over 140 people who described themselves as "*prominent lawyers*" had signed its "*Declaration of Conscience*" which included the following:

> *"**(5) 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."*

Certain signatories who were barristers in independent practice reported themselves to the Bar Standards Board for breaking the cab rank rule. Their attitude to the rule was articulated by one of the signatories, Jolyon Maugham KC, writing in the Guardian:

> *"The cab rank rule is bound up, inseparably, with the idea that the law is right and its ends are worth upholding. But the law is not always right. Sometimes the law does not reflect the democratic preferences of the people."*
>
> *"… I would act for those accused of crimes of violence but not for the fossil fuel industry. The difference is that I support the law that imprisons those convicted of violence but I cannot support laws that permit new fossil fuel projects."*

> *"We should not be forced to work for the law's wrongful ends by helping deliver new fossil fuel projects. We should not be forced to prosecute our brave friends whose conduct, protesting against the destruction of the planet, the law wrongly criminalises."*

Maugham's view seems to be that there should not be a rule to compel a lawyer to represent someone who is seeking to enforce or rely upon a law which the lawyer personally considers is wrong, or considers not to reflect what the lawyer presumes to be "*the democratic preferences of the people*".

What is the cab rank rule for?

The rule has its roots in two principles which few people disagree with and one unfortunate truth about the society in which we live. The principles are: (i) that everyone should be equal before the law; and (ii) that people's rights and obligations, and criminal charges against them, should be determined in public by impartial tribunals established by law. The law – good or bad – should at least be consistent, so that for any given set of facts, the rights and obligations of those involved would be the same, even were the identities of those involved to be changed. And decisions as to people's rights and obligations should be made publicly by the courts to whom society has entrusted that responsibility.

The first principle is reflected in Article 7 of the Universal Declaration of Human Rights: "*All are equal before the law and are entitled without any discrimination*"; Article 26 of the International Covenant on Civil and Political Rights "*All people are equal before the law and are entitled without any discrimination to the equal protection of the law*" and Protocol No. 12 to the European Convention on Human Rights which refers to "*the fundamental principle according to which all persons are equal before the law and entitled to equal protection of the law*". The second principle is reflected in Article 6: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

Alongside these ideals, the unfortunate (but indisputable) truth is that people whose rights are in issue suffer disadvantage if they lack specialist legal representation. If a given person is unrepresented, even a conscientious and impartial court, may reach a different decision to that it would have reached had the litigant been represented. In theory, the law is the same in every case for everyone but, in practice, the rights of the represented and unrepresented end up being different. To use Balzac's metaphor: legal representation makes the fly bigger.

When a lawyer withholds representation based on their opinion of a person's character, reputation, cause, conduct, guilt or innocence, the result may be that the case is decided differently, and the person's rights end up being different, than if the person had been represented. This contravenes both principles. Instead of the person's rights being determined by the impartial public tribunal which society has tasked with the role, their rights are (to some degree) being determined by the lawyer's decision not to represent them. And, instead of the person's rights being determined according to the law they are (to some degree) being determined according to the lawyer's, private, subjective view of the person's character or the desirability of their cause. By withholding their services, the unelected lawyer has imposed a result which differs from that which the law, correctly applied, actually required and has subsumed to themselves the role of deciding what people's legal rights should be / are, in place of the legislature and judge / jury whom society has tasked with those decisions.

Indirect promotion of rule of law

A cab rank type rule potentially promotes equality before the law and the right to a fair hearing both directly and indirectly. It can operate directly to secure representation in the individual case - someone gets representation

because a lawyer, who would otherwise have refused to represent them, does not want to break the rule. The authors of a 2013 report entitled *The "Cab Rank Rule" A Fresh View* (commissioned by the Bar Standards Board) note that the rule also operates in a more subtle way, suggesting that the rule also enables a lawyer:

> *"… to represent odious clients without incurring the wrath of the media or a social stigma. The existence of the Cab Rank Rule and the media and public's awareness of it … distances the barrister from the views and conduct of his client. When a barrister or law student is asked at a social outing (as we all have been) "would you represent a murderer?", he or she is able to answer that he would do so because it would be his professional duty and it is important for the proper functioning of the legal system that everyone – even an odious murderer – is able to obtain competent legal representation. This in turns helps to ensure that the primary objective of the rule is achieved."*

LAR's position is notably antithetical to this goal, with LAR deliberately inviting criticism to be visited on lawyers who represent clients and causes which LAR considers objectionable. Maugham was quoted as saying (*Reuters*, 2 May 2023):

> *"What we are trying to do is direct more scrutiny towards lawyers who choose to bring these infrastructure projects into existence … We want them to face public criticism for doing so."*

Criticisms based on efficacy

Criticisms of the rule (notably Flood and Hviid's 2013 report for the Legal Services Board entitled *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market*) have tended to focus on its *efficacy* rather than its *aims*. It is frequently suggested that the rule makes little practical contribution to supporting the rule of law because it only applies where a proper fee is being offered. But the fact that the rule is not sufficient, in itself, to *guarantee* equality before the law unless there is also a means of funding in place is hardly a criticism of the rule, provided that the rule does *contribute* towards that goal.

A similar criticism is that the rule is widely ignored, easily avoided and rarely enforced. Again, if that were true, it would not really be a criticism of the rule, still less of the underlying principles which it seeks to promote. We have prohibitions against littering which are commonly flouted and difficult to enforce, but that does not change the fact that littering is undesirable. If one accepts that more widespread observation of a rule would promote a desirable end, the answer is to promote compliance with the rule, not to abolish it.

LAR's attack on the rule is of a different character: not that the rule is ineffective but that it has undesirable effects which outweigh any positive ones, insofar as it compels lawyers to collaborate in enforcing what LAR consider immoral laws, and shields lawyers from criticism for doing so.

Some superficial criticisms of LAR's position

At the time of writing 179 people had signed LAR's pledge, making a public commitment to withhold their services in respect of supporting new fossil fuel projects and action against climate protestors exercising their democratic right of peaceful protest. Critics have been quick to point out that all or most of the signatories will never be asked to do either of those things, still less compelled to by the cab rank rule. Most signatories appear to be academics, solicitors, law students or foreign lawyers, none of whom is subject to the cab rank rule. Many of the barristers who have signed the declaration are retired, non-practicing, employed or (in at least one instance) have been disbarred so, again, are not subject to the rule. One barrister stated that he was signing for 'moral support' only and would not, in reality, refuse any instruction. None of the signatories seem to practice in planning law or to be

on the Crown Prosecution Service panel, so are never going to be instructed to seek a license for a new fossil fuel project or prosecute a climate activist (or anybody else).

Kirsty Brimelow KC, Chair of the Criminal Bar Association suggests (Legal Futures, 29 March 2023) that once one considers the identity of the signatories this "*pulls away the curtain of headlines to reveal a performative, protest document … It is a magician's trick*" with the signatories "*posturing to a fantasy future of instructions suddenly arriving from BP or a career in criminal law and entry onto the CPS panel*" where in fact "*the signatories will never be in a position of refusing cases*". Maugham, in particular (whose practice is in tax) has also been accused of hypocrisy, with critics pointing to a blog he wrote in 2015, where he defended his having acted for tax avoiders by saying: "*I am subject (as are all barristers) to the 'cab rank rule'. That rule obliges me to accept such instructions as I am offered. It exists to protect the principle that everyone is entitled to a fair trial*".

Unsurprisingly, the Bar Standards Board has declined to take any action against Maugham and other barristers who reported themselves for signing the declaration. The signatories have not breached the rule, because they have not declined any instruction – they had merely said that they would decline an instruction if it were offered. Like someone who says they would steal the crown jewels if the opportunity arose, they have the *mens rea*, but have not committed any *actus reus*. Unlike those who Maugham terms his "*brave friends whose conduct, protesting against the destruction of the planet the law wrongly criminalises*" those who signed LAR's declaration were risking little for their cause.

Such criticisms of the signatories are, however, unsatisfactory because they fail to engage responsibly with the substance of LAR's argument. LAR's position is that a lawyer should not represent someone who is seeking to enforce or rely upon a law which the lawyer considers to be wrong, and the law should not compel them to do so. The fact that this moral position is being espoused by students or people who do not practice in the relevant areas does not make it wrong. The fact that someone was acting hypocritically by espousing a given position tells us nothing about whether the position is correct. For an extreme, and somewhat laughable, example of an argument from hypocrisy consider the Daily Mail headline (24 December 2022) "*EXCLUSIVE: REVEALED: How "hypocrite" Just Stop Oil activists are using adhesives made from FOSSIL FUELS to glue themselves to the roads and works of art*".

There is irony in seeking to justify the cab rank rule as promoting equal treatment before the law irrespective of litigants' individual characteristics, but then dismissing LAR's declaration based on *ad hominem* arguments about the characteristics of its signatories. The better approach is not to dismiss LAR's position as a publicity stunt, but to take it seriously, examine it carefully and consider whether it might have any merit.

Some questions regarding LAR's position

The wording of LAR's declaration immediately raises some questions. An oil well or coal mine (which extracts fossil fuels) is clearly a "*new fossil fuel project*" and presumably an oil or coal burning power station (which generates demand for them) is too. But what about a runway, a road, a car factory, an aircraft, a vessel, a carpark, or a home fitted with gas central heating – are these "*new fossil fuel projects*" which lawyers should face public criticism for helping bring into existence? There is also ambiguity as to what constitutes "*supporting*" a fossil fuel project. Representing a project's developers in a planning tribunal or judicial review presumably amounts to 'supporting' a project, if the success or failure in that case will determine whether a project goes ahead. But such projects give rise to a far broader range of disputes, the outcomes of which will not make any material difference to whether the project gets built. Fossil fuel projects engender disputes in respect of industrial action, claims for workplace injuries, disputes with contractors seeking extension of time or additional payment for building the

project. It is unclear whether LAR considers representing a client in that kind of incidental dispute amounts to 'supporting' a fossil fuel project and is something for which LAR say lawyers should be subject to censure.

Of course, a vast swathe of lawful everyday activities (selling, hiring or driving cars, building, manufacturing, buying or transporting almost anything, cooking a meal, turning on a light) generate demand for fossil fuels and thus 'support' fossil fuel projects. A lawyer who successfully defends someone accused of a road traffic offence and secures that they retain their driving licence so that they continue driving is arguably supporting new fossil fuel projects. The lawyer who represents a consumer's rights in a dispute about a foreign holiday is encouraging flying and thereby supporting new fossil fuel projects. And so on.

The second limb of LAR's declaration states that signatories will "*withhold their services in respect of … action against climate protesters exercising their democratic right of peaceful protest*". Again, this raises questions. Is the intention to refrain both from prosecuting and defending such people? Also, strictly speaking, someone who was exercising a *"right"* of peaceful protest would be at no risk of prosecution. So, presumably, the cases in which LAR's signatories object to acting are those where action is being taken against climate protestors for carrying out peaceful protests in circumstances where the protestor had no **legal** right to do as they did, but where LAR considers that they **should** have had such a right.

It is unclear how far LAR's critique of laws regulating protest by climate protestors extends. It is important to recall that most climate protestors who have been prosecuted do not appear to have been charged under the recently introduced, controversial, laws regulating noisy public processions, or locking-on but under existing, long-standing, laws which prohibit public nuisance, or criminal damage or obstructing the highway. LAR's objection seems not to be that any particular law is immoral *per se* and should be abolished outright, but that it is immoral that certain laws should apply to certain people – prohibitions on obstructing the highway or damaging paintings should not apply to climate activists but should continue to be offences if committed by anyone else. Insofar as that is not the law, there is a moral duty on lawyers not to prosecute it. Insofar as the cab rank rule compels them to do so, the cab rank rule is immoral and should be abolished.

LAR's position thus seems very much at odds with the idea that there should be one uniform law for everyone. The suggestion is that new fossil fuel projects and preventing people protesting against climate change represent such great moral evils as to trump the ideal that everyone should be equal before the law, and that people's rights should be determined by public courts according to that law rather than according to the whim of lawyers deciding who deserves representation.

Lawyers as arbiters of what "*the people*" want

LAR's position is that certain laws which have been publicly scrutinised and promulgated by elected politicians pursuant to our democratic system (laws which permit new fossil fuel projects and laws prohibiting criminal damage and so on but do not provide an exception for climate activists) do not "*reflect the democratic preferences of the people*". The source of LAR's confidence in pronouncing what "*the people*" want, and why the 179 signatories of LAR's declaration are better arbiters of the common will than our democratic institutions is not clear.

The majority of "*the people*" do undoubtedly think that climate change is a global emergency (2/3 of the world's population is of that view, according to a 2021 UN Poll of 1.2 million people across 50 countries) and are concerned about climate change (with 75% of adults in Great Britain worried about the impact of climate change according to the Office for National Statistics 2021 Opinions and Lifestyle Survey). Within that majority, however, there is undoubtedly a range of opinion about how best to respond to that crisis and disagreement about the speed of the energy transition, about its funding, about any continued role for fossil fuel projects within that, as a bridging

measure or a means of providing energy security, about the potential role of fossil fuel projects using carbon mitigation, about the wisdom of acting unilaterally given the freerider problem, and about how best to balance the mitigation of harms caused by climate change against harms which might be caused by foregoing improvements in living standards potentially delivered using fossil fuels.

LAR's assumption that "*the people*" universally favour bestowing legal rights on climate activists to damage art, disrupt sporting events, obstruct highways and so on seems unlikely to be correct, given polls which seem to show a majority as being opposed to JSO's tactics. The fact that there is widespread public concern about the new legislation introduced during 2022 and 2023 restricting rights to protest does not prove that the people agree with LAR, since the JSO activists seem not to have been prosecuted under that new legislation but under long-standing laws against criminal damage, public nuisance and so on to which everyone is subject.

Godwin's law

Godwin's Law states that, as any online discussion grows longer (regardless of topic or scope) the probability of a comparison being made to the Nazis approaches 100% (it often being added that whomever makes such comparison loses the argument). Inevitably, discussion around climate change is no exception, with participants frequently drawing such comparisons or accusing their opponents of doing so. In 2019, for example, ex-leader of the Green Party Caroline Lucas MP apologised for having compared climate-change denial to Holocaust-denial while William Happer, appointed by Donald Trump to lead a panel to assess the threat posed by climate change, was reported to have said that "*the demonisation of carbon dioxide is just like the demonisation of the poor Jews under Hitler*". In 2021 Justin Welby, the Archbishop of Canterbury (and a former oil trader) apologised for having suggested that, if leaders at the COP26 climate summit took insufficient steps to combat climate change they would be "*cursed in history*" and that "*people will speak of them in far stronger terms than we speak today of politicians of the 30s" for having "allow[ed] a genocide on an infinitely greater scale*". In 2022 German Chancellor Olaf Schulz was accused of having implied that climate activists who interrupted an event he was attending reminded him of the SS, saying that "*these black-clad enactments at various events by always the same people remind me of a time that is, thank God, long gone*". Even suitably cautioned against the dangers of such comparisons, however, it is hard not to notice LAR's position – that lawyers should not be required to represent someone who is seeking to enforce or rely upon a law they consider immoral is at least redolent of a famous debate regarding the status of laws propagated by the Nazis.

1933 Enabling Act

On 23 March 1933 an "**Enabling Act**" (*Gesetz zur Behebung der Not von Volk und Reich* - Law to Remedy the Distress of People and Reich) was passed by the Reichstag (parliament) and Reichsrat (second legislative chamber) and signed into law by President von Hindenburg, pursuant to the Weimar constitution. This Enabling Act empowered Germany's cabinet (meaning, in effect, its Chancellor, Adolf Hitler) to enact legislation into German law without the involvement of the Reichstag or President. Although this Enabling Act had been set to expire after four years, the Nazis swiftly enacted laws which rendered Germany a one-party state, and the Reichstag was swiftly reduced to a rubber stamp, which voted repeatedly to renew the Enabling Act each time it expired.

1938 KSSVO §5

On 17 August 1938 Germany, pursuant to the Enabling Act, enacted the Wartime Special Penal Code (*Kriegssonderstrafrechtsverordnung* or KSSVO) into German law. KSSVO §5 provided (translation at http://www.lexexakt.de/index.php/glossar/kssvo05.php):

"(1) The following shall be punished with death for undermining military strength:

1. Anyone who publicly demands or incites people to refuse to perform their duties in the German or an allied armed forces, or who otherwise publicly seeks to paralyze or undermine the will of the German or allied people to defend themselves; …

(2) In less serious cases, a penitentiary or prison may be imposed.

(3) In addition to the death penalty or imprisonment, confiscation of property is permissible."

This prohibition on publicly seeking to undermine the will of the German people to defend themselves (i.e. to undermine the war effort) was interpreted extremely widely, as prohibiting people from express doubts about or criticism of the Nazi leadership or ideology, disseminating news about military setbacks or expressing doubts about official news reports.

Nuremburg trials

At the Yalta Conference in February 1945 Churchill proposed the Nazi leadership simply be executed or imprisoned without trial. Roosevelt and Stalin both favoured trials however, and their view prevailed. There seems little direct evidence as to what was the rationale for Churchill's position. It may have been felt that any trial would inevitably be a show trial, with retroactive laws having been written after the fact by the victors to produce the desired outcome, so that it would be more honest to arrive at the same result by an act of attainder, rather than to seek to apply a patina of legalism to the process. Some modern critics speculate that Britain was also reluctant to set a precedent and acknowledge supervening international laws to which Britain might be subject in any future conflict.

On 8 May 1945 Germany surrendered, bringing an end to the war in Europe. Germany and Austria came under the control of the Allied Control Council ("**CC**"). Two months later, on 8 August 1945, the Allies ratified the Nuremburg Charter, establishing an International Military Tribunal ("**IMT**") with jurisdiction to try individuals for conspiracy to crimes against peace, war crimes and crimes against humanity. The Nuremburg Charter provided that no one would enjoy immunity based on their office and that "*the fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation*".

The CC also enacted various laws which applied to the territory now under its control. CC Law 1 expressly repealed the Enabling Act and a list of discriminatory laws which had been enacted under the Nazis (though it left KSSVO §5 untouched) and contained the catch-all provision that: "*No German enactment, however or whenever enacted, shall be applied judicially or administratively in any instance where such application would cause injustice or inequality, either (a) by favouring any person because of his connection with the National Socialist German Labour Party, its formations, affiliated associations, or supervised organisations, or (b) by discriminating against any person by any reason of his race, nationality, religious beliefs, or opposition to the National Socialist German Labour Party or its doctrines*" and that "*Any person applying or attempting to apply any law repealed by this law will be liable to criminal prosecution*".

24 defendants were tried by the IMT, including the most prominent surviving Nazis and military leaders. The Judges and prosecutors came from the US, Britain, France and the Soviet Union. The intention had been to hold a series of further trials before the International Military Tribunal, but by the end of the first trial the Iron Curtain had come down and the Cold War begun in earnest. The Allied Control Council enacted CC Law No. 10, which

authorised each occupying power to conduct trials independently of the International Military Tribunal. CC Law 10 reproduced the requirement from the Nuremburg Charter that: "*the fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation*". There followed a series of twelve further trials at Nuremburg conducted exclusively by US judges and prosecutors. The third of these 'further Nuremburg trials' was termed the 'Judges Trial' (*The United States of America* vs. *Josef Altstötter, et al*) and saw the prosecution of certain judges and prosecutors who had enforced Nazi Germany's racial and eugenics laws. The 1961 film *Judgment at Nuremburg* (starring, amongst others, Spencer Tracy, Burt Lancaster, Judy Garland and Marlene Dietrich) is loosely based on the Judges Trial.

The defendant judges and prosecutors contended that they should not be found guilty because they had acted pursuant to what were, at the time, Germany's laws. CC Law 10, however, (and possibly CC Law 1) made it irrelevant whether the defendants' actions had been mandated by German law, the only issue being whether they amounted to war crimes, crimes against peace or crimes against humanity within the meaning of the Nuremburg Charter. Nor did the judges enjoy any immunity by reason of their having exercised judicial office. The judgment also observed numerous instances where the Nazi's laws had been loosely drafted, had not mandated a particular outcome, but had given the prosecutors and tribunals considerable discretion, and could have been more leniently applied, but the defendants had zealously sought and imposed harsher punishments than the law required – this being relevant not to their guilt, but an aggravating factor when it came to sentencing.

Radbruch

Following restoration of power to (West) German authorities, German prosecutors embarked upon prosecutions of informers, spies and others for things they had done under the Nazi regime which had plausibly been in accordance with what had, at the time, been German law. CC Laws 1 and 10 no longer applied and so the courts had to grapple with the question of whether the fact that what had been done was in accordance with German law at the time provided a defence.

Pre-war, Gustav Radbruch, a German law professor, had been a prominent legal positivist who considered that the validity of a law did not depend on its morality. His experience of the Nazi regime led him to revise this view, and conclude that 'laws' which contravened basic principles of morality, however clearly expressed and however clearly they conformed with the formal criteria for legal validity, were not 'laws' at all if they contravened these 'natural laws'. Actions which had been permitted by the Nazi's 'laws' had been prohibited by some higher laws, which Germany's post-war courts should treat as having remained binding and enforce with respect to the period of the Nazi regime. Radbruch suggested that before the rise of Nazism, positivism had been the prevailing view among German jurists, and that this positivist tradition and the idea that 'law is law' had contributed to people's willingness to tolerate, obey and enforce immoral laws.

The informer

In 1951 the Harvard Law Review reported a case in which, in 1944, a German woman, desiring to get rid of her husband, had reported to the authorities derogatory remarks which he had made about Hitler and had then testified against him before a military tribunal which had sentenced him to death under Nazi statutes which made it illegal to assert or repeat statements inimical to the Reich. Following the defeat of Nazi Germany, she and the judge who had sentenced her husband had been prosecuted under the German Criminal Code of 1871 for an offence of 'unlawful deprivation of another's liberty'. It was reported that the court had directed that the judge should be acquitted, but that the wife was guilty because she had used out of free choice a Nazi law which "*was contrary to the sound conscience and sense of justice of all decent human beings to bring about the death or imprisonment of her husband*".

Hart

HLA Hart had practised as a Chancery barrister before the war. During the war he had worked for British intelligence and reportedly played a major role in Operation Fortitude, the British plan to deceive Germany into believing that the D-Day landings would take place at Pas-de-Calais rather than in Normandy. After the war, disillusioned with work at the Chancery bar which he saw as benefitting the wealthy for little public benefit, he became an academic and came to be considered one of the greatest legal scholars.

In *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958) HLA Hart set out a defence of positivism and a critique of Radbruch's view and of the German court's reported reasoning in the informer case (which Hart took as an exemplar of Radbruch's approach). Hart argued that Radbruch and the German court had conflated the question of what the law *is* with the question of what it *ought* to be, undermining the rule of law. According to Hart there were only two acceptable approaches to the informer case: let the informer go unpunished, or have the legislature enact an explicitly retroactive law to criminalise her conduct retrospectively despite that it had been, at the time, entirely lawful. The courts should not pretend that in 1944 the law of Germany had been different, but should tackle head on the inconvenient fact that the law had been immoral. If the law is educed to being whatever is 'moral' or 'good' or 'right' then it becomes difficult or impossible to say what the law is. To have instead a clear criterion for recognising valid laws (e.g. the law is what parliament has enacted) is a considerable virtue:

> *"Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. … if we adopt Radbruch's view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law be- cause of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If … we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted."*

Hart's article prompted a response by Lon L Fuller. Where Hart had assumed that the Nazi statute met the German law's criteria of validity, Fuller questioned whether that was correct, in particular whether the statute was properly promulgated and had been correctly interpreted by the court. Fuller also argued that for something to be a 'law' does imply some minimum content, and a system of rules which does not meet those standards is not 'law' properly so-called. Fuller's minimal conditions were that laws be general, publicly promulgated, prospective, clear and intelligible, free of contradiction, relatively stable, capable of being obeyed and administered in a way which does not diverge from their apparent meaning. There ensued what is known as the "*Hart Fuller Debate*", in a series of further articles and books expanding on these themes and going far beyond the scope of the present article.

A postscript to the informer case

It later emerged that Hart had relied upon an inaccurate report of the court's reasoning in the informer case, which was an early decision of a provincial court, was not clearly reasoned and had, in fact, been widely criticised in Germany. An almost identical case had subsequently come before (West) Germany's Federal Supreme Court, reported in Pappe *On The Validity of Judicial Decisions in the Nazi Era* MLR Vol. 23 No. 3 (May 1960) pp 260-274. There, a wife had similarly denounced her husband for making disparaging remarks about Hitler and he had been prosecuted before a military tribunal at which she had testified. The presiding judge had warned the wife that she was not obliged to give evidence, that the accused was under threat of capital punishment and that without her evidence proof was likely to be insufficient. The wife insisted on giving evidence and the husband was convicted and sentenced to death though, in the event, was not executed but kept under arrest and then returned to his army unit shortly before the German surrender. A jury acquitted the wife at first instance.

The Supreme Court quashed the acquittal and referred the case back to the lower court. The Supreme Court did not resort to saying that the Nazi statutes had violated some higher legal norms. Rather, it took the view that the court had misapplied the Nazi statute, which required that the remarks to have been made publicly, where the soldier had made the remarks in private, to his wife. Also that the court had imposed the death sentence when that was not mandated by law, and was arbitrary and excessive in the circumstances. The wife was thus an accessory to the attempted murder, having had the intention to use the court's unlawful procedure to dispose of her husband. Hart's understanding that Germany, inspired by Radbruch, had resorted to 'natural law' as a solution to 'informer' cases was thus incorrect.

Prosecutors and judges

Hart's commentary on the informer case focused on the informer without discussing the position of the judge or prosecutor. The fact the judge was acquitted went unremarked.

As regards the fact that judges were not prosecuted, Pappe states:

> *"… condemnation of the accused as an accessory to the crime does not conflict with the fact that the judges of the court-martial (though they were the immediate agents of the crime) were not prosecuted and accordingly not punished. The reason for nolle prosequi in their case was not that they had been acting lawfully in the execution of public justice, but that they had the defence of intimidation, and that, therefore, no court would sentence them. This defence, under section 53, Criminal Code, exempts from punishment if the offence is committed, inter alia, under a threat of immediate danger of life and limb to the actor or a relative, provided the threat could not have been averted in any other way.*
>
> *A judge refusing to obey Nazi orders was assumed to be in danger of his life. This construction lets convinced Nazi judges go scot free ... It represents, in fact, an extremely weak point in post-Nazi judicature, as the threat in most cases would really have been averted through resignation on the part of the judge. In the final event, however, it appears to be materially justifiable as resignation of the judge would not have benefited the prisoner. Even in the case of an acquittal by the court-martial the prisoner would have fallen victim to the Gestapo or SS, with the same result as that of a death sentence."*

Positivism in LAR's critique

Positivism's virtue is in allowing us to sidestep any debate about whether the laws to which we object are, for that reason, really laws at all. LAR's critique has the virtue of being rooted in that liberal positivist tradition. There is no suggestion that the laws to which LAR object are so immoral as not to be laws at all. Their criticism is that the laws to which they object (laws which permit new fossil fuel projects and laws which prohibit climate activists from causing criminal damage, obstructing highways and so on in the same way as as they do other people) are so immoral (or "[do] *not reflect the democratic preferences of the people*") that they should be reformed, and that the cab rank rule, which nominally requires people to represent those seeking to enforce these immoral laws is, to that extent, likewise immoral and should be reformed or, if not reformed, that there is a moral duty on lawyers not to comply with it and bear the consequences of that. Presumably LAR might consider judges who enforce these immoral laws equally deserving of public opprobrium, though this has never been stated explicitly.

Competing ends

The fact KSSVO §5 had formed part of German law from 1938 to 1945 presented post-war Germany (per Hart's understanding of the position) with a choice between two evils: (i) letting the informer go unpunished because they had acted in accordance with that law; or (ii) enacting a new explicitly retroactive law criminalising the informer's lawful conduct.

The cab rank rule (per LAR) presents us a choice between: (i) leaving the cab rank rule unchanged, potentially forcing some barristers to choose between representing people who are seeking to enforce laws which those barristers consider immoral, or else breaching the rule and being made subject to some kind of sanction for that; or (ii) abolishing the rule, or amending it to include some kind of 'conscientious objection' exception, protecting those lawyers' consciences, but at the expense of eroding whatever benefit the rule might deliver in promoting the present rule of law.

It is obviously undesirable to compel people to act in a way which they have declared to be against their consciences, but Chair of the Bar Nick Vineall KC points out that under the existing rules, those subject to it already enjoy a potential get-out:

> *"… a barrister might be able to say that they felt so strongly about climate change issues that they were unable to act in a climate change-related case (civil or criminal) because they were unable to meet the requirement (Rule 21.10) that they maintain independence.*
>
> *But such a person would not, of course, be able to act on either side. If you are genuinely incapable of acting with independence when (say) defending someone charged with hate speech, you wouldn't be sufficiently independent to prosecute either. Similarly, if you were to so lack independence that you could not properly prosecute a climate change activist, you would be incapable of defending a climate change activist with sufficient independence either."*

To this might be added the obvious point that those who consider the cab rank rule, and the people and causes it would compel them to represent, unconscionable could just choose to do a different job, or practice in a different area of law. These are not pacifists being compelled to fight wars by conscription. When asked in 2013 how many proceedings had ever been brought for breach of the rule, the Bar Standards Board was only able to identify six complaints ever having been made of a barrister breaching the rule. Three of the complaints were dismissed, one was unresolved, one resulted in a 'no further action' outcome and only one was ever upheld at a disciplinary tribunal. Punishment of 'conscientious objectors' for breaching the cab rank rule is hardly a widespread problem.

The sanctions which any hypothetical conscientious objector would face also appears modest. The barrister in the one case where a complaint was upheld (Mark Mullins in 2006) was reprimanded and ordered to pay a £1,000 contribution towards costs having refused to represent a Mr J in an immigration matter, because doing so would have required Mullins to argue in favour of Mr J being allowed to remain in the UK on the basis of his having formed a homosexual relationship – a relationship which Mullins, a committed Christian and regional chairman of the Lawyers' Christian Fellowship, considered 'unacceptable'. The reason why there is widespread compliance with the rule and breaches are so rare is therefore probably not that huge numbers of lawyers are being compelled to act against their consciences by fear of harsh sanctions. More likely, the majority simply agree with the principle of the rule and are happy to comply with it. Against that background, it is hard to see a really compelling need for a new 'conscientious objection' exception to the rule to protect (hypothetical) lawyers from being compelled to represent people against their consciences. Insofar as the cab rank rule does result in any such iniquity, it is certainly not wreaking widespread harm on a par with that wrought by indisputably odious laws like KSSVO §5.

Slippery slopes and unforeseen consequences

Turning to the other side of the equation, it does seem credible that reforming or abolishing the rule as LAR wants might conceivably do some real harm. LAR must itself believe that public and media knowledge of the rule does presently serve to distance lawyers from the character and conduct of their clients and protect them from criticism for representing unpopular causes or people. After all, LAR's explicit aim in seeking the rule's reform is thereby to expose lawyers who represent the clients and causes LAR opposes to "*greater public scrutiny*" by depriving them of the excuse that they are required to do so by professional rules. In the internet age, of course, "*greater public scrutiny*" is usually a euphemism for online abuse, harassment and occasional doxing, swatting and other real-world abuses.

To discard the cab rank rule with the goal of implanting in the polarised public mind that whomever represents someone in court agrees with all that person's opinions, and that the lawyer who represents X is not a neutral but a partisan and thus a legitimate target for the ire of those who oppose X, may have some unlooked for consequences. Individual lawyers are easily identifiable, easily reachable proxies against whom those who feel strongly about bigger issues can readily vent their frustrations and take, or incite others to take, concrete actions. If lawyers representing particular clients and causes attract sufficient abuse, those clients and causes might struggle to obtain representation. Who gets legal representation, whose legal rights are upheld and whose are not, what laws get enforced and thus, for all practical purposes, what people's rights are is then potentially being decided, not according to the laws by the courts tasked with applying them, but according to the whim of the most vocal and proactive campaigners, whose views are not guaranteed to reflect any kind of democratic consensus.

LAR might say that was the whole point – vilify those who prosecute climate activists or represent fossil fuel projects and thereby deny the Crown the legal representation it needs to prosecute climate activists and deny fossil fuel companies the representation they need to obtain licenses for new fossil fuel projects. It seems imprudent to assume, however, that the effect of increased 'scrutiny' being applied to lawyers will exclusively be to deny representation to those whom LAR opposes. For any given cause, one can find people with strong views on either side. True, lawyers prosecuting climate activists may find themselves vilified by climate activists. But lawyers defending climate activists might also find they attract the ire of people who object to the activists' tactics, who equate the defence lawyers with the activists. Those representing tax dodgers may find themselves vilified by irate taxpayers. Those prosecuting anti-abortion activists may find themselves targeted by pro-lifers, those representing refugees may find themselves targeted by those opposed to immigration, those representing mothers in custody disputes may find themselves targeted by activists campaigning for fathers' rights, those defending people accused of the worst crimes may be targeted by vigilantes of any stripe - and so on and so on for every

cause one can think of. It seems quite possible that the end result is a stalemate, where no particular cause benefits, and litigation has just become more difficult, onerous and unpleasant for everyone across the board.

Abolishing the cab rank rule, and equating lawyers with their clients in the public mind, risks moving us a little further away from a world where people's rights are determined according to stable, clearly identifiable laws, promulgated, scrutinised and, ultimately, open to reform via our (thoroughly imperfect but still unsurpassed) democratic system, and a little closer to a world in which people's rights instead vary from moment to moment depending on the whims of the most vocal minorities. It is by no means clear that this would represent an improvement.