



Cherie Theron Photography / UK in USA

ROSE'S MORAL FAILING LAY BEYOND THE CAB RANK RULE

Peter Kroon SC's account of his visit to the Dublin World Bar Conference relates how our critique of Ms Dinah Rose KC came to his mind. We condemned Ms Rose for accepting a brief to defend the Cayman government's prohibition on same-sex marriage after she'd accepted a senior position as head of an educational institution.

Our error, Mr Kroon says, was to equate Ms Rose with the cause she represented. But we did nothing of the kind. Our critique of Ms Rose was based on the supposition – which Ms Rose and her defenders, and now Mr Kroon, appear to reject – that Bar duties and rules do not supersede other moral and institutional obligations.

Our criticism made four things clear.

First, and obviously, everyone has a right to legal representation. And even unpopular causes and litigants are entitled to counsel.

Second, Ms Rose's appointment as head of an educational institution created not just a conflict of interest for her, but an intolerable conflict. This was because innate to her duties as head of an establishment caring for young people now imposed on her an obligation to all in her care. These included LGBTQI (or queer) students, as well as other groups vulnerable to discrimination and stigma.

What duty did Ms Rose have? It was to provide a safe haven for them from bullying, taunts, assaults, ostracism and discrimination that all too often target vulnerable communities.

Ms Rose could not advance a homophobic cause, as counsel, while professing to nurture and protect vulnerable young minds and personalities in her care.

The Bar Standard Board's Code of Conduct is explicit: "A Barrister may not accept a brief when to do so would create a conflict of interest".



Third, Ms Rose became head of Magdalen College, Oxford, while an appeal to the Privy Council was pending. She was not obliged to accept the Cayman government's brief to argue a homophobic case in that forum. This is because an appeal in the Privy Council constitutes "foreign work" under the Code of Conduct. Barristers are not obliged by the Code to accept "foreign work". Hence Ms Rose had a clear option. This was to refuse the brief. Yet she elected to hang on to it despite her manifest duty to the queer and other vulnerable students at Magdalen.

Fourth, that hoary old Bar all-purpose stand-in: the cab-rank rule. This simply found no application. Ms Rose sought refuge in that rule, but quite wrongly so. She managed to deflect the brunt of our critique by a sleight of hand: she invoked a rule of professional practice that was inapposite and irrelevant.



Ed Webster

Regrettably, Mr Kroon neither seriously presents nor engages with these arguments. Instead, he extols the virtues of the cab-rank rule. Of course the rule has virtue in the first proposition we outline above: everyone is entitled to counsel. And you may not evade your duty as counsel when a pilloried or unpopular litigant calls you to their defence.

Mr Kroon invokes David Pannick KC in support¹ of his miscast observations. But he never provides an answer to the propositions we actually advanced. This is because Mr Kroon appears to have misunderstood both our arguments and the issues at stake.

We were not concerned with the technical import of the cab-rank rule behind which Ms Rose took refuge. Our concern was solely that in carrying out what she conceived to be her professional duties, she betrayed a greater and higher duty, as head of an educational institution.

That duty was not to act professionally in a cause that undermined the human standing of some of those in her charge as head of the institution and, in harming them, inflicting damage upon the institution as a whole.

In prosecuting the case against equality in marriage for queer men and women, on behalf of a homophobic government which long sought to deny equal dignity and worth to queer people, Ms Rose damaged Magdalen. She damaged Oxford as well as her own reputation.

Reduced to its fundamentals, Mr Kroon's argument implies, quite wrongly, that an advocate is only and always an advocate and not also a human agent, with cross-responsibilities and conflicting responsibilities.

It also implies, equally wrongly, that the duties of advocacy not only must always come first, but that they must prevail – whatever the cost to the person's humanity and their wider engagement with society.

Significantly, in the same edition of your journal, Justice Zak Yacoob is reported to have said that we should all be "human first, a human rights activist second and a lawyer last".²

Mr Kroon reverses this. In so doing he ignores another issue we raised about the moral probity of Ms Rose's conduct.

As we have pointed out, three previous chairs of the English Bar Council and the former chair of the Bar Standards Board all stated in public that it is "right and proper that the Barrister should confront the moral questions which they consider to arise before deciding to accept the brief".

The Caymans prohibition on same sex marriage is no different from the Nazi Purity Laws which forbade marriages between Jew and non-Jew. It is similar in kind to the criminalisation of marriages between a "European and a non-European" in the now-disgraced Prohibition of Mixed Marriages Act.³

Had the subject of Ms Rose's appeal been a prohibition of the sort in apartheid South Africa or Nazi Germany, we assume that even Mr Kroon would have been morally outraged. **A**

Edwin Cameron
Gilbert Marcus
2 September 2024

Notes

- 1 Lord Pannick's defence of Ms Rose is likewise flawed for his failure to engage with the arguments actually advanced.
- 2 Ziphlo Mbuyazi "A human first, human rights activist second, and a lawyer last" *Advocate*, Vol 37, No. 2, August 2024 at 27.
- 3 Act 55 of 1949

ERRATUM

The April 2012 edition of *Advocate* incorrectly cited the High Court judgment in the case of *Mansingh v The President RSA and others*. In that case, the high court upheld an argument that the practice of conferring silk status did not fall within the power of the president to confer constitutional honours. The judgment was subsequently overturned on appeal by the Supreme Court of Appeal [2013 JDR 0529 (SCA)], and the SCA decision was then confirmed by the Constitutional Court 2014 (2) SA 26 (CC). The correct citation for the judgment in the High Court is *Mansingh v President of Republic of South Africa and Others* [2012] 2 All SA 295 (GNP); 2012 (6) BCLR 650 (GNP).