

The rights of others: Don't repeal the Human Rights Act. Give it teeth [1]

Type: [Think Pieces](#)^[2] Written by **Preston Byrne** | Tuesday 12 March 2013



'Is that you, John Wayne? Is this me?'

The other day I stumbled upon *Justified*, a newish series about a thirtysomething, cowboy-hat-wearing, gun-toting U.S. Marshal named Raylan Givens. Raylan, the story goes, has been reassigned from sunny Florida to sleepy Kentucky ? ?punishment? for carrying out what amounts to a daylight assassination of a Miami mobster ? following which he promptly misbehaves, sleeping with material witnesses, failing to recuse himself where conflicts of interest arise, and killing a number of human beings per episode. These are problems that the characters, treading the fourth wall, openly acknowledge but do little to fix.

It?s not *The Wire*. But then, it?s not 2002, and Raylan is a better fit for the conscience of today's United States. Pining for [John Wayne](#) ^[3], America reminiscies as Raylan, self-loathing, naïve and eager to wield raw, unbridled power, apes him; we admire him for falling short. He is a John Wayne for the Drone Age, angry, uncertain, broke and [extra-judicial](#) ^[4].

It is impossible to suspend disbelief and enjoy the show. in real life, the only thing this cowboy could ride is a desk. Killing is an unfortunate and traumatic possibility in the life of an armed policeman. When it occurs, it is very contentious. Administrative concerns kick in, a lawsuit or public inquiry is often involved and it is often cause for mandatory suspension or early retirement, on account of which ?[it would be hard to ?imagine a set of facts? that would lead a cop to be involved in the deaths of six people](#) ^[5],? especially in the first season alone.

But the show's producers grant Raylan the magical power, as well as a pervasive obligation, to do always the right thing; all of his homicides are justifiable, all his warrantless entries effected only after drawing out consent through his wide-eyed southern charm and a buttery-smooth Kentucky drawl.

His plausibility before an American audience depends on it. Obtaining consent or a warrant before you barge into someone's house is a crucial part of being a policeman in the United States, which has a robust and longstanding culture of rights: pursuant to the 4th Amendment of the U.S. Constitution, Americans have a right to be ?secure... from unreasonable searches and seizures,? which courts protect vigorously. As a hypothetical example, if police found a bale of contraband in your car boot but didn?t have probable cause (or your consent) to search the car, it is entirely plausible that its discovery, tainted by illegality, could blossom into ?the fruit of the poisonous tree,? becoming inadmissible and sending the state?s case

up in smoke ([you might even get your stuff back](#) ^[6]).

Don't mess with tennis

Not so in England. While the Human Rights Act 1998 (?HRA?) [gives us the ?right? to be free from interference](#) ^[7] with ?with peaceful enjoyment of property, (deprivation)? of... possessions or (subjection of) a person?s possessions to control,? interference which is carried out ?lawfully and? in the public interest? is above board. Furthermore, evidence obtained from illegal searches and seizures is prima facie admissible in an English court ([which has a discretion, not an obligation, to exclude it](#) ^[8]). Lacking a credible prohibitory function, the HRA's provisions are less rights, more self-imposed guidelines. They flow from the state rather than delineating its boundaries, their function being to restrain only transgressions deemed by the state itself to be sufficiently grave.

Other ?rights? under the HRA are similarly wet. As was made very public over the course of last year's [Reform Section 5 campaign](#) ^[9] relating to the Public Order Act 1986, freedom of speech is far from absolute in Britain, especially when compared to the United States. In America, [picketing the funeral of a murdered seven-year-old](#) ^[10] is permissible; in Britain, however, what is fairly ordinary political speech in the U.S. is not protected, [and often criminal](#) ^[11], even despite the Section 5 campaign.

It is thus by design. Convention rights are subject to express restrictions, including such as ?are necessary in a democratic society... for the protection of the reputation or rights of others.? This is a contentious concept from a civil liberties standpoint and has most publicly been brought to the fore in the context of Section 5. But the debate pre-dates the 21st century, an early iteration taking place in the context of the Public Order Act 1936, the 1986 Act's predecessor.

Quite how far this concept of the rights of others has moved Britain down the slippery slope is only evident when one compares cases decided under the old rule, prior to the passage of the HRA (under section 5 of the 1936 Act), with cases after it. The 1936 legislation reads:

"Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

This is very similar to [the Section 5](#) ^[12] we know and love. However, in the absence of the HRA the rule was applied far differently, as illustrated by the case *Brutus v Cozens* from 1973. In *Brutus*, the defendant dared to interrupt a tennis game at Wimbledon by staging a sit-in while throwing anti-apartheid leaflets in the air; after being peacefully removed from the grounds of the All England Club, Brutus was arrested and charged with ?using insulting behaviour.?

At first instance, the judges hearing the case acquitted Brutus; however the prosecutor, perhaps a closeted tennis fan, appealed, arguing that ?insulting behaviour? under the 1936 Act was that which was ?disrespectful and contemptuous.? The Court of Appeal agreed, and interpreted the statute to also include:

"behaviour which affronts other people, and evidences a disrespect or contempt for their rights..."

...however, this view was decisively overruled on further appeal to the House of Lords, which found that ?an insult has a narrow meaning which is... aimed at or intended at a person's susceptibilities... the words must hit the man in question.? The Lords opined that ?behaviour which evidences a disrespect or contempt for the rights of others? does not ?of itself establish that that behaviour was threatening, abusive or insulting.?

Brutus, therefore, set down two principles. First, insulting, threatening or abusive behaviour must be insulting, abusive, or threatening per se in order to fall within its scope; second, it is perfectly possible to be disrespectful and even contemptuous of the rights and sensibilities of one's fellows without falling within its ambit. The statute banned insults, abuse and threats, it did not ban contempt for the rights of others. The two types of conduct, while potentially very similar in certain circumstances, were legally not the same.

The rights of others

As of 1973, then, the 'rights of others' were not a consideration in question relating to freedom of expression. Thirty years later, however, the formalisation of the protection of the 'rights of others' by the HRA changed the landscape. In *McCann* (2002), Lord Hope pointed to it as an express justification to interfere with freedom of speech, adding that 'respect for the rights of others is the price that we must all pay for the rights and freedoms that it guarantees.' *McCann* was followed by *Norwood v DPP* (2003), where it was found that a criminal conviction for hanging a poster that read 'Islam out of Britain' was 'a necessary restriction of... freedom of expression... for the protection of the rights of others' (those rights being, as argued by counsel for the prosecution but not expressly confirmed by the Court of Appeal, the convention rights of freedom of conscience and belief, and freedom from discrimination).

Or, for example, see *Abdul v DPP* (2011), where the convictions of seven Muslim activists picketing the Royal Anglian Regiment on its return from Iraq (using fairly explicit language, but language only) were upheld on the grounds that 'it can properly be said, in this particular case, that prosecution and conviction was proportionate in pursuit of... the protection of the reputation or rights of others.'

The decisions in the three individual cases mentioned above do not make express mention as to which 'rights of others' are being protected in each; what is clear from each, however, is that the courts are willing to employ a broad-brush application of Article 10(2) of the HRA to justify restraining freedom of speech.

From a civil liberties standpoint, this is unacceptable. The starting point about the 'rights of others' is a simple one: in each, the defendants were speaking on matters which they believed 'were not abusive and insulting because they were true.' None has a monopoly on truth in politics, and the protest outlined in reported cases, though distasteful, does not involve the application of coercion by the speakers upon their listeners. It is merely the meeting of widely differing points of view in a public space.

Caution is advisable, then, when one hears that the Government is planning to '(pull) Britain out of the European Convention of Human Rights' because, [per Chris Grayling](#) ^[13], 'we cannot go on... where people who are a threat to our national security... are able to cite their human rights when they are clearly wholly unconcerned for the human rights of others.'

Where one day the 'rights of others' serve to justify the deportation of a [particularly infamous philosophical opponent](#) ^[14] of the British state, on many other days our own courts 'not European ones' have shown considerable willingness to construe these 'rights of others' to criminalise offensive and inflammatory, yet honestly held, political beliefs of ordinary people.

As the debate on the HRA and its possible repeal unfolds in the run-up to the next election [we should not, therefore, be lulled](#) ^[15] into [the commonly held, and false, impression that the HRA protects us as fully as we might like it to](#) ^[16]. Relating to speech alone, expression relating to the merits of political violence - whether such violence takes place at home or abroad - is thoroughly proscribed by section 1(3) of the Terrorism Act 2006, a vexing dilemma for prosecutors before the Arab Spring, in that [their discretion to ignore 'plots against the Libyan regime \(which\) were possibly encouraged years ago'](#) ^[17] was rather fettered by the

"approach? initiated by the Blair government, while concurrently ?plots against Syria are openly tolerated."

Written or electronic communications of an [offensive but nonetheless firmly political nature remain illegal](#) [18]

Furthermore, in Section 5, though ?insulting? is gone, ?abusive? remains ? which gives one pause to wonder whether the Reform Section 5 campaign achieved anything significant as, looking to Abdul, the courts are very willing to conflate the two ideas: ?the words shouted by the defendants were both abusive and insulting,? it was said at first instance, with Mr. Justice Davis adding on appeal that ?it is not... possible to establish in advance a bright line statement of approach whereby prospective conduct or language can be styled as within or without the proper exercise of freedom of expression.?

That the only legally safe speech relating to Section 5 seems to be silence speaks volumes about the nature of the ?rights? created by the HRA. However, we can sum the problem up in just one sentence. It's not that the HRA goes too far, it's that it doesn't go nearly far enough.

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- [18] <http://www.indexoncensorship.org/tag/azhar-ahmed/>