The Met and The Common Law

So the Metropolitan police commissioner sees the Prime Minister with concerns about 'support' for the police using firearms, indicating that the law may not be strong enough.

Hmm. The law in question is the Common Law. Police officers carry firearms on a personal basis for their defence, as Parliament would not sanction, when creating the police in the 1830s, an armed force. Senior police officers have always been able to issue weapons – cutlasses, firearms, batons, shields – to suit the circumstances, but always with the caveat that such weapons are used solely for defence under the Common Law.

Which allows that to us all. The difference between policing and being a member of the public is that the police are trained to use their various law enforcement powers (and weapons) to preserve the Queen's peace. Police officers are hired by the rest of us to uphold the law on behalf of all of us. The right to arms, for citizen and police officer both, is limited to the right to defend life, liberty and property.

The twentieth century saw the Home Office trying to erode that right. It was a war of attrition, given that the Common Law is inviolate. The government of national unity of the 1930s and its police service spent the run up to WW2 trying to make sure that Britain was disarmed and easy pickings for an invader. That policy was intended to provide job security for those same politicians and policemen, who expected to carry on being politicians and policemen under any new regime that turned up: as they did in France (Petain and the Vichy government) and Holland, the Channel Islands, Norway (Mr Quisling!) etc. under German occupation.

The policy worked well until 1940 when the maverick backbencher Winston S Churchill became Prime Minister. He didn't 'get' any policy that prevented Brits fighting His Majesty's enemies. He tried to mobilize the police as an armed force, which didn't work, because he didn't understand policing. His London-centric view of the police was their massed ranks as he saw them during the general strike of 1926; not the lone Bobby living in a country cottage police station on the edge of a village; these numerically were the bulk of police numbers in the 142 forces across the country at the time.

The problem, in a nutshell, was that policemen and politicians are civilians, who aren't supposed to go mixing it with enemy alien invasion forces, courtesy of the Geneva Convention. In 1914, the Germans arbitrarily executed 'armed civilians' who engaged them as 'francs-tireurs' or free shooters. There is some doubt as to whether these were the Belgian defence force, whose uniform was a good overcoat and a bowler hat, or actual civilians with guns and attitude. Either way, they derailed the Schlieffen Plan by stopping three German armies in their tracks, at horrible cost to the Belgian population and infrastructure.

Firearms training, never mind combat training, was not a normal requirement of policing. Officers found themselves 'defending' potentially vulnerable public buildings with an assortment of short-range firearms, but by 1940 it was too late to train anyone. That didn't stop the police commandeering gun dealers' stock and repeatedly asking firearms owners to hand them in for official use.

Men – mostly veterans – joined the LDV (later renamed the Home Guard) and found themselves in a quasi-policing role, manning roadblocks and such. That resulted in some four-dozen fatalities, mostly of people who didn't stop at checkpoints until fatally wounded. A Cabinet Office circular summarized the police dilemma in September 1940.

'The general principles governing the position of the police in the case of invasion are (a) that the police are not part of the armed forces of the Crown, and that therefore, in the event of a landing and effective occupation of an area by the enemy in force, the police should not use arms, nor carry arms, in the occupied area; but (b) that in the event of a landing by isolated parties who do not form part of an occupying force and whose object is, or must be assumed to be, to attack civilians, destroy property and cause confusion and devastation, neither the police nor civilians are debarred, either by international law or domestic law, from resisting and, if possible, destroying the enemy, in order to prevent him carrying out these objects'.

This is a clear restatement of the Common Law; the thinking behind it relates to fifth columnists or parachutists. The British mainland wasn't invaded, but the Channel Islands were. Police officers there used the firearm certificate records to collect everything up before the Germans arrived and then carried on being the police throughout the occupation.

The Prevention of Crime Act, 1954, distinguished *offensive* weapons from the rest: stuff that was proscribed and an offence to possess in public, regardless of why it was carried. Flick knives and knuckledusters, for example. This list has been added to from time to time, so 'butterfly' knives went that way in 1988.

A Home Office policy ended the practice of recognising defence as a good reason for having a firearm on certificate; yet the debates relating to the 1920 Act, the Cabinet Office memo to chief constables in 1940 and the 1949 case Greenly v Lawrence are clear that firearms legislation did not prevent possession of a firearm for defence of life, liberty and property. In effect, one did not need a certificate for it, as the Common Law exemption applied to all. Firearm certificates were for sporting firearms, not for weapons.

Nevertheless, the police stopped issuing firearm certificates for defence (or changed the 'good reason' to 'pest control' – same thing, sir, honest) and in the 1980s/90s revoked the certificates of people who applied for a firearm for defence, while continuing to benefit from the Common Law exemption themselves. There was an interesting undercurrent during the 1988 firearms bill debates in which the police service actively sought the restriction of certain products to 'police only'. That wasn't possible, of course, so the police shopping list turned into prohibitions for the rest of us; the 1988 Act prohibited folding stocks on repeating shotguns, for example, so they became *de facto* 'police only' as they possessed their SPAS 12s and Remington 870s with folding stocks without certificates. The rest of us had to buy bigger cars, as the primary function of a folding stock is to transport the gun; repeaters don't break down as doubles do and when assembled are much longer because of the receiver. It remains a mystery why the L1A1 rifle had a rigid shoulder stock, with all the complications that caused troops exiting vehicles and aircraft that Argentine forces, with a similar rifle didn't have on account of their folding stocks.

The extent to which the Common Law protects policemen using firearms in the course of their duties is quite straightforward, while being complicated by the *offensive* aspects of their duties on the state's behalf. The complication is that

when on the *offensive,* they have to be reasonable and proportionate in the force they bring to bear, and that force should always be reactive, or defensive. So when they shot Guy Savage's tyres out with Hatton rounds as he drove to work in 2010 it must have been a reasonable and proportionate defensive act to be legal. Yeah, right.

When the Home Office revised its instructions relating to the police use of firearms in the 1980s, the whole document presumed 'planned' operations and did not envisage arming policemen for the off chance of their being attacked. Or being in the right place to provide an armed response when someone else is attacked. The whole document was thus directed at the *offensive* aspects of policing, where being reasonable and proportionate matter.

The test is whether a reasonable and prudent person, *knowing what s/he (the officer) knew at the time,* would have acted the way the defendant did. A trained man, in the office of constable, can be misled by defects in his perception of what is going on, by his assessment of the situation, by his training and/or briefing and will always be given the benefit of the doubt if those outside influences lead him into error; usually by investigators, but where their nerve gives way or politics intervenes, by a judge or jury.

The last three decades have seen firearms crime declining; precipitously if one strips out the regulatory convictions of firearm certificate holders and registered dealers found in breach of conditions etc. This means every armed police officer is progressively less likely to encounter armed aggression. The trend on the streets is that firearms are bling, or status symbols. The comparatively rare use of guns by criminal gangs is usually against each other, which Massad Ayoob would refer to as 'misdemeanour homicides': the point being that the public are not on their radar. Public safety is actually jeopardized to a greater extent by police misconceptions and agendas than it is by scrotes involved in turf wars.

That does not seem to be informing police behaviour. Registered firearms dealers, are used to the fact that police investigating their businesses treat it as an armed operation, but shooting Guy Savage's tyres out in a public street in 2010 as he drove to work marked a new escalation in the police policy of trying to scare people out of legitimate firearms ownership.

One has to wonder what possible 'intelligence' made such drastic *offensive* action proportionate and reasonable in the circumstances. Offensive it was, since it would stretch credulity somewhat to claim that the tyres on the BMW were performing an offensive act against which officers had to pre-emptively defend themselves. Mr Savage was on a Metropolitan Police firearms liaison committee and thus someone whom they could have telephoned with an appointment place and time and he'd have attended. Unarmed, as usual. The likely explanation for this overt display of machismo is that the Americans wanted to interview Mr Savage about aspects of his federal firearms dealer's business and had some of their law enforcement representatives present at this contrived street fight where the Met wanted to show off their prowess and test their Hatton rounds.

Alternatively, it could have been a poor, if not paranoid, briefing. If one looks back at previous armed police operations we see a succession of unarmed people shot by the police on the false assumption that they posed an immediate threat to police safety. Starting with Stephen Waldorf in 1983 (three officers pumped 14 shots into the yellow mini in which he was a passenger, after he made a 'suspicious movement' in complete ignorance of their existence, never mind their proximity). The Met shot 13 unarmed people between 1983 and 1987

– all of whom survived 'cos the police then used .38" revolvers loaded with 158 grain round nose bullets.

That sequence ended at the Plumstead Slaughterhouse shooting in 1987 where two armed robbers died at the scene. The Met had moved from .38" revolvers to 9mm pistols by then.

By the time we get to Azelle Rodney in 2005, the police officer has a long barrelled prohibited shoulder weapon chambered 5.56mm – the NATO military cartridge that will penetrate a steel helmet at 600 yards – used at a range of six feet from the vehicle he was trapped in at the time. Mr Rodney's firearms collection was, at best, tat. It might do for bling, but not for thinning out the Met's finest. Jean Charles de Menezes was unarmed and the unprovoked attack on him at Stockwell tube station a case of mistaken identity. It smells like a case of the briefing being at fault and the officers' training not encompassing that possibility. But then, nobody could risk hesitating. There will always be such accidents and tragedies proportionately to the number of good calls. The problem for the rest of us is that those occasional failures within the shooting community are used to wrest our hobbies into section 5: one law for them and another for us. Doubly irritating as all the spree killers got guns via the police giving out certificates without consulting the shooting community.

Policing learned no lessons (apart from detectives and guns shouldn't mix) from the Stephen Waldorf incident, which was a case of mistaken identity where officers opened fire before their victim was aware of their presence, never mind their identities and intentions. Mark Duggan (shot in 2011), like Azelle Rodney, had a barely viable lump of bling if one accepts that the piece found near where he was shot was something he'd possessed and managed to discard as he exited the vehicle; and if so, he hadn't had it long enough to leave his DNA on it.

What we perceive as police cock-ups can usually be attributed to either the briefing or the lack of training. It's a fine line; landing on Azelle Rodney and Mark Duggan when they did was good intelligence-led policing: it's the final act in the street that throws up the questions about the brief.

The Azelle Rodney incident started with a police car colliding with the car he was a passenger in. That was an FBI technique – the felony car stop - that agents only learned in theory – like the 4th year at Hogwarts learned defence against the dark arts. The FBI didn't get to try it out in practice, to learn the dynamics of what happens in a car crash, the effect on their orientation; loose weapons, subsequent viability of their door handles and hinges etc. The dynamics of the crash also affect people in the target vehicle, with outcomes in all involved vehicles varying according to whether the occupants had their seat belts on or not. The FBI abandoned the practice after the Platt and Matix incident in Florida in 1986 in which two FBI agents died. So that lesson didn't cross the pond, but give it time; it's only been thirty years.

Michael Waldron's 1986 excellent book 'London's Armed Police' traces the police use of firearms since the Met's inception in 1840 and reports the lack of police training, poor choices being made in terms of weapons selection and the Met's institutional resistance to the possibility that any expertise might exist outside their own ranks. He reports the Waldorf case and subsequent failed prosecution of two of the officers who opened fire. They were acquitted by the judge who took the view that there was insufficient evidence to prove the charge of attempted murder. Our view at the time was that it was the wrong charge. Mr Waldron's only comment on their acquittal was that they wouldn't carry firearms

again in the course of their duties, which is in line with the police policy toward the rest of us - that an acquittal is not evidence of innocence.

James Mathers was similarly jeopardized *at his own request.* He was the District Attorney for Oklahoma City at the time (early 20th century) and pocketed a revolver exhibit for the lunch break, according to his account as related in 'From Gun to Gavel', by Marshall Houts. His first law enforcement action was as a member of the posse that pursued the Dalton Gang after their raid on Coffeyville in 1892. He became a lawyer, prosecutor, DA, judge and after retiring from the bench, a defense attorney. His last client in that role was George 'Machine Gun' Kelly Barnes in 1934.

On returning to the courtroom on that fatal day, an outraged relative of someone he'd previously prosecuted opened fire on him and he returned fire with the exhibit, which he describes as a revolver chambered for two each of three different cartridges. It had been fully loaded before the incident he was arraigning and was empty by the time he got it back into court. The judge took the view that his prevailing in the gunfight was a clear case of self-defence. Mr Mathers nevertheless asked the court to charge him with murder and then acquit him, so that his constitutional right not to be jeopardized again, would prevent the recently deceased bushwhacker's family launching a private prosecution.

It was a private prosecution failing against men suspected of the murder of Stephen Lawrence in 1993 that led to provisions in the Criminal Justice Act 2003 allowing a way round the principle of *autrefois acquit.* The Act does not claim to have amended the Common Law; it mechanically enables the Court of Appeal to quash a previous acquittal (or conviction) thus paving the way to a new trial at which new evidence can be introduced.

That option has been around in various guises for many years. SRA member Bob Kleasen was acquitted, on appeal, of the murders of two Mormon missionaries in Texas in 1974 when the (weighty) circumstantial evidence of his guilt was ruled procedurally inadmissible. The DA had the option of a retrial without that evidence and the option of introducing new evidence if such was to be had. He didn't seek to exercise that option until Mr Kleasen became famous in England in 2000, whereupon the State of Texas sought his extradition on release from British custody. Kleasen died on remand fighting that extradition in 2003.

Returning to the Metropolitan Police problem of the law possibly not protecting its armed officers when they go on offensive operations, the solution is within the Commissioner's remit. To find it, he will have to take a careful look at his force's policies relating to firearms. A good starting point would be to recognize the existence of legally owned and possessed firearms outside of policing.

The police followed up shooting out Guy Savage's tyres in 2010 with a raid on his business premises, which they emptied of product. After that, Met sources confirmed that Guy Savage had committed no firearms offences in the UK and certainly he has never been charged with any. Nevertheless, his multi-million pound business was closed, its trading documents having been withdrawn. James Edmiston subsequently acquired interest in the premises. The Met returned to him various seized items that were not subject to Firearms Act controls, but placed every possible obstruction in the way of his using the premises to manufacture military rifles in fulfilment of an export contract.

James eventually gave up and returned to Shropshire where he makes shotguns. His associate for the military rifle project applied for an RFD in Sussex,

which was refused. At the appeal, the Met gave evidence that it was the Commissioner's policy not to allow the manufacture of military weapons in London that could be used to kill people abroad. The officer's statement refers to 'hundreds of illegal weapons' being 'found' on Guy Savage's premises.

Two problems there; the Met (or at least the officer giving 'evidence') can't tell the difference between a dealer's stock held on the authority of an RFD and a section 5 on the one hand and 'illegal weapons' on the other. Next, section 5 is not Police business. The clause was created originally in the 1930s to remove the police from involvement in military weapons manufacture, etc., so the Met should have no policy relating to what is not their concern. Police Scotland recently confirmed that they have no remit to police constitutional matters, so it is possible for policing to recognize its boundaries.

Moving on, once the Commissioner has retrained his employees to recognize that most firearms are legally owned and held, it becomes much easier to spot anomalies where a genuine danger to public safety might exist from criminal intent or action; such occasions are currently obscured by the assumption that wherever there are firearms there's crime. One only has to refer to the recent outpourings from the Law Commission to see that policing's prime target for future firearms legislation is the law-abiding public. Crime doesn't rate a mention in their plans except as the outcome of moving the goalposts for antiques owners, airsoft owners, de-ac owners, etc.

The reason legal gun owners remain policing's prime target is for statistical purposes. Prosecuting antiques owners in hope of banging them up for five years is intended to boost firearms crime figures to help justify the huge arsenals of firearms the police hold. Real firearms crime is minimal and still diminishing; at least to the extent that it is detected. But while policemen are searching dealers' premises and trumpeting that they found 'illegal weapons' in them, they aren't looking for genuine sources of danger in society. Nor will they until the Commissioner trains them to and then he will be rewarded by the Common Law protecting his officers instead of their being jeopardized by his policies.