

## BETWEEN 'SLAVES OF RUFFIANS' AND 'THE DECISION OF THE SWORD': IN SUPPORT OF THE COMMON LAW TRADITION OF SELF-DEFENCE

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It would be quite wrong to suggest that the issue of self-defence (and the law relating thereto) is a libertarian issue. But it is probably true that, for many years, there was next to no debate about it as an issue outside of libertarian circles.

For free market advocates, self-defence (and the natural right thereto) is not just an important issue, it is a cornerstone of individualist philosophy. Yet, while libertarian scholars and writers debated passionately about the issue, it barely registered a blip on the radar of wider public interest.

That is, until a certain Tony Martin shot two intruders who had broken into his remote Norfolk farmhouse, killing one of them. The news that he had been arrested and charged with murder, led to a broken-dam deluge of furious and passionate debate about the right of self-defence and which flooded every medium.

Overnight, it seemed, self-defence had become a 'hot' topic, not least because, as with so many debates, it has tended to generate more heat than light.

I do not intend to simply re-hash the Martin case and the various reasons why his actions either were or were not justified. That has already been done in some length here and elsewhere. What I want is to examine the reasons why practical self-defence has, to all intents and purposes, become illegal in the UK.

The obvious starting point is the law itself. While I believe that broader phenomena have played their part in creating the current situation, it is critical to examine how they worked to shape both law and custom as it stands.

There is not, as such, any statutory right of self-defence but self-defence is permissible under the terms of S3 (1) of the Criminal Law Act 1967: "*A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.*"

Thus a person may use force to prevent the commission of a crime which includes a crime being committed against that person (such as assault, rape etc). However the crucial caveat is that the use of force must be limited to 'such force as is reasonable in the circumstances'. This means that a person who is subjected to an attack must have regard to proportionality in their response to that attack. Their actions can, and will, be judged objectively after the event.

It is often said, indeed it is widely assumed, that the 1967 Act merely codified the previous common law position. But, on closer scrutiny, I think that claim holds no merit. The English common law (which, in theory at least, still exists) managed to establish some important and meritorious distinctions reference to which can be found in *The Law of the Constitution* by A.V. Dicey (MacMillan, London, 1885).

That is not to say that the lines were straight or the issue black-and-white. In fact, Judges struggled to maintain a balance between the individual right and wider public interest: "*Discourage self-help, and loyal subjects become the slaves of ruffians. Over-stimulate self-assertion, and for the arbitrament of the Courts you substitute the decision of the sword or the revolver.*"

Despite grey areas (which are unavoidable), the Courts dealt with self-defence cases by eschewing dogma in favour of applying common-

sense principles. The result of this was the emergence of two separate doctrines. The first, according to Dicey: *“In defence of a man’s liberty, person, or property, he may lawfully use any amount of force which is both “necessary” - i.e. not more than enough to attain its object - and “reasonable” or “proportionate” - i.e. which does not inflict upon the wrongdoer mischief out of proportion to the injury or mischief which the force used is intended to prevent; and no man may use in defending his rights an amount of force which is either unnecessary or unreasonable.”* Clearly the 1967 Act is a codification of this doctrine (“legitimacy of necessary and reasonable force”).

However, Dicey goes on to describe a second doctrine (“the legitimacy of force necessary for self-defence.”), thus: *“A man, in repelling an unlawful attack upon his person or liberty, is justified in using against his assailant so much force, even amounting to the infliction of death, as is necessary for repelling the attack - i.e. as is needed for self-defence; but the infliction upon a wrongdoer of grievous bodily harm, or death, is justified, speaking generally, only by the necessities of self-defence - i.e. the defence of life, limb, or permanent liberty.”*

A far more robust doctrine and one which does not require of the citizen the employment of either proportionality or reasonableness provided the use of force is strictly in defence of life or limb.

Dicey concludes from these two doctrines: *“If, however, it be necessary to choose between the two theories, the safest course for an English lawyer is to assume that the use of force which inflicts or may inflict grievous bodily harm or death - of what, in short, may be called extreme force - is justifiable only for the purpose of strict self-defence.”*

But extreme force is expressly stated to be ‘justifiable’ in those circumstances and, indeed, this doctrine was reaffirmed by the ruling of Lord Chief Justice Parker in the case of *Chisham* (1963 - 47 Cr App Rep 130): *“... where a forcible and violent felony is attempted upon the person of another, the party assaulted, or his servant, or any other person present, is entitled to repel force by*

*force, and, if necessary, to kill the aggressor ...”*.

Note that there is no mention of either ‘reasonableness’ or ‘proportionality’.

Put simply, the two doctrines combined represented a judicial recognition of the difference between crimes of a life threatening nature and crimes of a non-life threatening nature. In the case of the latter the force used had to be proportionate and reasonable. In the case of the former, no such qualifications applied. So, for example, a shopkeeper cannot take out a gun and shoot someone who has been merely pilfering from his shop because the act of pilfering does not represent a threat to the shopkeeper’s life and limb. However, if the criminal enters the shop wielding a knife to use on the shopkeeper then, under the common law doctrines, the shopkeeper would be permitted to shoot the miscreant dead.

In my view the fault of the 1967 Act was in ignoring the important ‘second doctrine’ of the legitimacy of force necessary for self-defence and instead using the ‘first doctrine’ as a blanket provision. By doing so the Act also extinguishes the previous recognition of the practical difference between life threatening and non-life threatening crimes. This means that the citizen is in a weaker position post-1967 because he or she required to respond ‘reasonably’ and ‘proportionately’ regardless of the nature of the threat he or she may be facing.

However, my opinion is that the British citizen today has been put in an even more helpless position than they should have been by the 1967 Act and this is due to the pre-eminence of various political and cultural phenomena.

All the common law described by Dicey is predicated on the firm assumption that the ordinary citizen had not just a right to prevent crime but even a duty to prevent crime. Truly the law was in the hands of the people although they were still required to abide by it. Today, this assumption has been turned com-

pletely on its head and although it is difficult to identify the precise provenance of this change or any specific turning point, what does seem clear is that, sometime during, or possibly just after World War II, the business of crime prevention and self-defence was wholly nationalised.

The change in attitude can be illustrated by the extract from a speech given in 1953 by the then Home Secretary, Sir David Maxwell Fyfe: *“The government do not wish to lend themselves to the support of the proposition that it is right or necessary for the ordinary citizen to arm himself in self-defence. The preservation of the Queen’s peace is the function of the police, and ... it would be a great pity if anything were done explicitly by statute to condone actions which imply the inability of the forces of law and order to maintain the Queen’s peace.”* (Joyce Malcolm, *Guns and Violence: The English Experience*, Harvard University Press, Harvard, 2002).

Fyfe was most likely referring to the issue of gun-control but the attitude he exhibits is, I suggest, typical of the political attitude to the subject of self-defence in general. The prevention of and resistance to crime was no longer the duty of the citizen nor even the right of the citizen; it was now seen as being wholly the function of the state to be exercised as a monopoly by its various agencies.

Thus, the citizen who ‘takes matters into his own hands’ is so deeply offensive. Aside from the question of any mischief he may or may not have inflicted upon his tormentor or assailant, his worse ‘crime’ lies in the usurpation of a power that the state regards as being within its sole competence.

The law is now in hands of the government. The citizen is merely required to obey.

Every British government since at least the 1940’s has held as a core belief that safety of the citizen and the prevention of crime is a matter for the government and the government alone. Indeed, so deeply ingrained has this assumption become in every branch of the

state that, in practice, any action taken by the citizen that is more than mere token resistance is regarded by the police and the judiciary as unreasonable. The same culture has fuelled the missionary zeal with which the British state has pursued (with great success I might add) the complete disarmament of its citizens.

But even that is, perhaps, not entirely the picture for I find it hard to believe that the post-1960’s ascendancy of post-modernism has not also left its mark. I say this because of the number of times that, whenever the issue has been the subject of public discourse, I have heard self-defence described as ‘vigilantism’ or ‘retribution’. This is a squalid and reprehensible distortion of the truth but it is one which is entirely consistent with a philosophy by which acts of resistance to barbarism are ascribed a far worse degree of moral turpitude than the manifestations of barbarism itself.

My opinion is that the law should be changed to take into account the greater breadth and depth provided by the common law tradition. But the law itself is only a part of the picture because the real problem has been caused by an unfortunate agglomeration of Conservative Paternalism, Labour Statism and moral relativism that has abolished self-help, stripped the citizen bare, and delivered each one of them up as the ‘slaves of ruffians’.

Though a change of law may be required, of itself it will not be enough. What is required to reverse this situation is also a change of culture and, above all, a reclamation of the kind of common sense and pragmatism that once informed all those English judges.

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