

situation in the Kashmir Valley. They also expressed their concern that he was looking for personal aggrandisement. The General, in the interview, had called on the Army to introspect and apply corrective measures, where necessary. A wise suggestion, indeed, but did it have to be made on national TV, the veterans pointed out, especially since the very senior retired officers have free and total access to the current hierarchy to convey their views? Rumours also claimed that, perhaps, the General was batting for an opposition political party.

Whatever one's position on the matter, this debate will continue for times to come because it represents, to each one of us, a compelling moral dilemma. Seen in purely military terms this is, perhaps, a unique example of out of the box thinking in a rapidly deteriorating tactical scenario,

which, arguably, helped retrieve a seemingly hopeless situation without any loss of life. Berating the officer and censuring him would result in constraining junior leaders to strictly following the Rules of Engagement the next time they are faced with such a scenario. This would unquestioningly lead to a few deaths amongst the protestors, at worst, or serious injuries, at best. Besides, the long-term effects of such a step would almost certainly lead to a curbing of initiative on the part of the junior leadership of the Indian Army, which it can ill afford. Initiative, the cornerstone of success, which is often in short supply, is perhaps the most important ingredient necessary on the tactical battlefield that helps a nation win its wars.



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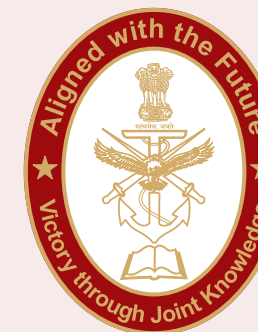
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SHOULD UNORTHODOX MEASURES IN COUNTER TERRORIST ENVIRONMENT BE ALLOWED TO TRUMP RULES OF ENGAGEMENT ?

SYNODOS PAPER

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The Conundrum

With the Indian Army operating in an active counter-insurgency role in the Kashmir Valley for well over 28 years now, every once in a while there comes a case that grabs eyeballs, draws national and international attention and is so compelling that people soon take sides and there begins an animated and heated discussion of what is right and what is wrong. Such cases question our beliefs, our values, and get us to inexorably examine

ourselves, who we are, what we represent and whether the stands we take are correct or serious errors of judgement. Here, we are not talking about excesses committed by men in uniform, custodial deaths, murders, rapes or encounter killings, which ought to be condemned by any right-thinking individual, in uniform or not. Neither are we talking about a courageous action on the part of one individual or a small group of men who went beyond the call of duty and laid their lives on the line. Or of the numerous real-life stories of understanding, integration, empathy, love and brotherhood where the Army and the local Kashmiris have worked together through initiatives such as Sadbavna and the Goodwill Schools.

This particular incident occurred on 9 April 2017 and it hit the headlines a few days later with a tweet by a former chief minister of J&K and a short video clip of the incongruous image of a hapless Kashmiri youth trussed up to the front of a jeep while a small military convoy winds its way through the idyllic

villages of the Kashmir valley. A loudspeaker announces in staccato bursts that all stone pelters would meet this fate.

The emotions it evoked ranged from incredulity to disgust, from triumph to despair, and reflected either creativity or sheer brazenness, depending on where you stood in this debate. This is a case where it is very difficult to be neutral. As the facts slowly emerged, two opposing narratives came to the fore. One of an innocent bystander, who happened to be at the wrong place at the wrong time, who was picked up by a callous young officer to be used as a human shield against stone pelters. The other of a young major who was sent an SOS by eight or nine polling officials who were surrounded by a crowd of over 900 violent protestors baying for their blood. The major, on the spur of the moment, in a brilliantly creative tactical move, decided to take one of the stone pelters hostage and complete the mission with which he was tasked.

Observers, far removed from the action beaming into their living rooms, had the luxury of expressing their opinions from the safety, provided by their distance from the scene of the action, of their homes, offices and TV studios. Either one supported the young major's actions or one castigated him for taking the law into his own hands, subjecting an innocent bystander to danger and aggravating the already vitiated atmosphere of resentment, depending on the narrative that one accepted as the Gospel truth.

The Legal Justification

There is no gainsaying the fact that every soldier has to understand the essentials of jurisprudence and has to operate within

the four corners of the law, especially in a counter-insurgency environment where he is facing his own belligerent and often violent fellow citizens. Not only can this not be wished away, it has to be adhered to scrupulously by the army. To many, the young major acted in the best interests of the men he was rescuing, the troops he was commanding and also in the best interests of the stone pelters. I, for one, unabashedly supported his action and commended him for his out of the box thinking that led to a situation where not one hair was harmed on anyone's body. If, at all, any hurt was caused, it was to the dignity of the young lad who was tied up, which I believed he could live with.

There are a number of legal maxims, which have come into popular use based on thousands of judgements over the years in various courts across the world, that clearly support the young major's actions. A quick search online will also yield a number of judgements that can be used to uphold and justify the correctness of the stand taken by him.

The first of the maxims that come to fore is that he acted in good faith (*bona fide*), in self defence and in public interest.

The others are:

Actus non facit reum nisi mens sit rea—The act does not make one guilty unless there be a criminal intent. (Was there any criminal intent on his part? The answer is an obvious 'No'.)

Acta exteriora iudicant interiora secreta—Outward acts indicate the inward intent. (A corollary to the earlier one.)

Aequitas nunquam contravenit legem—Equity never contradicts the law. (If his action was fair, it does not contradict any law).

In casu extremae necessitatis omnia sunt communia—In a case of extreme necessity everything is common. (This was certainly a case of extreme necessity).

Intentio inservire debet legibus, non leges intentioni—Intention ought to be subservient to the laws, not the laws to the intention. (Again, it buttresses the first couple of points that he acted in self defence and his intentions were straightforward and clear).

Qui non prohibet quod prohibere potest assentire videtur—He who does not prohibit when he is able to prohibit, is in fault. (This is perhaps the most important of them all. His action certainly prohibited what could have been a situation where people would have been killed or, at least, seriously injured. In fact, had he not done so, he was at fault, as per this maxim).

Quod necessitas cogit, defendit—What necessity forces, it justifies. (Here, too, the situation justified his action).

Lex citius tolerare vult privatum damnum quam publicum malum—The law would rather tolerate a private injury than a public evil. (A public evil, i.e., death or injury to many, was avoided by his actions which the law will uphold).

Above all, I believe, the principle of *jus necessitatis*, which allows the right of a man to do that which he cannot be dissuaded from by any terror of legal punishment, and the fact that 'No law can oblige a man to abandon his own preservation'—Hobbes.

Jus Aequum vs. Jus Strictum

Jus aequum and *jus strictum* are polar opposites in the principles of legal jurisprudence. The principle of *jus strictum* calls for the strict and literal interpretation of legal rules. From an historical perspective, this was the basis of international law. However, over the centuries, treaty practice has allowed interpretation and application to occur in a reasonable and equitable manner, or *jus aequum*.

The clauses stipulating good faith or equitable treatment have gradually come to be regarded as implicit in international transactions of a consensual character. Thus, today it is true to say that in international treaty law, especially the part of international customary law that has its origins in treaties, *jus strictum* has been largely transformed into *jus aequum*. (A Conceptual Comparison of National and International Law-Gordon Campbell).

Hence, even in international law, the principle of a fair act overrides the exactitude of law. The officer, by his so called fair act, although perhaps illegal, saved many lives and his actions, therefore, must be considered to be in public interest. Had he resorted to the legal act of firing upon the protesters, there would certainly have been casualties, people dead or wounded.

Be that as it may, the IPC also supports the young major's actions. In particular, reference need be made to Section 81 (an act likely to cause harm but done without criminal intent and to prevent other harm), Section 96 (things done in private defence) and Section 97 (right of private defence of the body and property).

What people especially forget is that, while the soldier represents the State, he too as an individual enjoys the same protection of the law as his compatriots who are not in uniform and who do not have to deal with life-and-death situations on a regular basis. In this instance, what choice did the young man have? He could have called for reinforcements and waited till they arrived, hoping against hope, that the mob would not carry out their threat of lynching the besieged officials. Or, in an appropriate manner, he could have warned the mob of 900 or so angry and violent Kashmiri youth and ask them to disperse. If that was not heeded, he would have had to shoot one or two of the leading rabble rousers as their actions interfered in his mission, thereby, forcing them to disperse before rescuing the polling officials. This would have certainly resulted in death or serious injury.

We must remember that the army is forbidden to fire blanks or to fire over the heads of the crowd. Its actions are undertaken for effect and not as a threat. The orders, even in aid of civil authorities, is to shoot to incapacitate rather than to kill. The context of a rescue mission far surpasses even this. Shooting to incapacitate would have been perfectly legal. What the officer did was illegal only when viewed in isolation and not in the context in which it occurred.

The Public Debate

In the larger context of the violence in the valley, due to the continued unaddressed aspirations, the political impasse that prevails and, above all, the sense of alienation that the local youth feel, politicians and the commentariat of all hues began voicing their opinions on what ought to have

been an isolated incident that deserved just a passing mention. Reams of newsprint have been churned out on this episode, hours of TV debates have taken place and the ongoing war on Twitter and Whatsapp has yet to ebb.

What has added grist to the mill was the appearance of a former Army Commander, Northern Command, known for his personal integrity and professionalism, on primetime TV and unequivocally stating that the image of the stone pelter tied to the jeep will haunt the Indian Army for times to come, a view that he had tweeted a few days earlier. He then went on to add that the New York Times and the BBC had quoted him on this matter. He also called it the defining image of the Kashmir issue and compared it to the searing image of the young Vietnamese girl running on the street naked after her village was bombed with napalm by the Americans and the image of the Saigon police chief shooting an informer point blank in the head. These images were captured by war correspondents on the scene and were imprinted in the American consciousness, which turned the tide against American involvement in the Vietnam war.

These candid remarks won him great admiration among those who felt the major had indeed exceeded his brief. It was also brave for the General to be brutally frank by pointing out what was wrong and what he would have done had he been in charge. However, his remarks also drew widespread opprobrium and derision from many, especially in the veterans' community, who felt the General had let down his subordinates who were already hard-pressed in handling the rapidly deteriorating