

KULBUSHAN JADAV CASE COMMENTARY

AUTHOR – DEVANADHAN R, STUDENT AT SCHOOL OF EXCELLENCE IN LAW, THE TAMILNADU DR. AMBEDKAR LAW UNIVERSITY, CHENNAI

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ABSTRACT:

The Jadhav Case (India v. Pakistan) revolved around Pakistan's arrest, detention, conviction, and death sentence of Kulbhushan Sudhir Jadhav, who India claimed as an Indian national. Jadhav was convicted by Pakistan for terrorism and espionage. This case marked the third time the International Court of Justice (ICJ) addressed the interpretation of Article 36 of the Vienna Convention on Consular Relations (VCCR). Unlike previous cases concerning consular rights, India sought more extensive relief, including the annulment of Jadhav's conviction, his release from detention, and his safe return to India. The ICJ, with only Judge ad hoc Jilani dissenting, unanimously confirmed its jurisdiction and found that Pakistan had violated VCCR Article 36. Specifically, Pakistan had failed to inform Jadhav promptly of his consular rights, did not notify the Indian consular post in Pakistan of his detention, and denied India the right to communicate with Jadhav, visit him, and arrange for his legal representation. The Court ruled that Pakistan must immediately inform Jadhav of his rights and allow Indian consular officers access to him. The Court also determined that Pakistan must provide a means for effective review and reconsideration of Jadhav's conviction and sentence to address the rights violation. Finally, the ICJ, with Judge ad hoc Jilani dissenting, stated that a continued stay of execution was essential for ensuring an effective review and reconsideration of Jadhav's conviction and sentence.

HIGHLIGHTS: Consular Rights, Jurisdiction, Provincial Measures, jus cogens.

INTRODUCTION:

The Jadhav Case (India v. Pakistan) revolved around the arrest and sentencing of Kulbhushan Sudhir Jadhav, an Indian national, who was captured by Pakistan on charges of espionage and terrorism. He was sentenced to death by a Pakistani military court without being granted access to Indian consular authorities. India took the case to the International Court of Justice (ICJ), arguing that Pakistan had violated Article 36 of the Vienna Convention on Consular Relations (VCCR), which guarantees consular access in such situations. The ICJ agreed with India, ruling that Pakistan had breached its obligations under international law by not informing Jadhav of his consular rights and by denying India access to him.

As a remedy, the ICJ ordered Pakistan to provide an "effective review and reconsideration" of Jadhav's conviction, including a stay on his execution. This decision created significant geopolitical reactions, with both India and Pakistan claiming partial victories. While India was satisfied with the stay of execution and the requirement for a review, Pakistan noted that the ICJ had not annulled Jadhav's conviction or ordered his release.

The case has broader implications for international law, particularly in how provisional measures are applied in urgent situations and the obligations of states to implement ICJ decisions. The case has also raised questions about the role of bilateral agreements and whether consular access can be denied in espionage cases.

MATERIAL FACTS OF THIS CASE:

1. Detention and Charges: On March 3, 2016, Kulbhushan Jadhav, an Indian national and former navy officer, was detained by Pakistani authorities. Pakistan alleged that Jadhav had crossed into its territory from Iran and was involved in espionage and terrorism activities in the Balochistan region. A video was released by Pakistan in which Jadhav appeared to confess to these charges.
2. Pakistan's Request and India's Response: On January 23, 2017, Pakistan's Minister of External Affairs sent a "Letter of Assistance for Criminal Investigation" to the Indian High Commission in Islamabad, but India did not respond. India maintained that Jadhav was abducted from Iran, and the charges against him were baseless. India requested consular access to Jadhav on March 29, 2016, but Pakistan denied this request, rejecting 16 petitions from India over the course of a year.
3. Death Sentence: On April 10, 2017, Jadhav was sentenced to death by a Pakistani military court on charges of espionage and terrorism.
4. India's Response: On April 14, 2017, India sought diplomatic intervention, demanding a copy of the charges and the military court's judgment. Frustrated by Pakistan's refusal to grant consular access and cooperation, India filed a case with the International Court of Justice (ICJ) on May 8, 2017, challenging the legality of Jadhav's death sentence.
5. ICJ's Intervention: On May 9, 2017, the ICJ issued a stay on Jadhav's execution, preventing Pakistan from carrying out the death sentence.

6. Humanitarian Visit: After diplomatic negotiations, Pakistan allowed Jadhav's wife and mother to visit him on November 10, 2017, on humanitarian grounds, ensuring their safety and freedom of movement.

7. Summary: Kulbhushan Jadhav, a 50-year-old retired Indian Navy officer, was sentenced to death by a Pakistani military court on charges of espionage and terrorism. India challenged the sentence at the ICJ, resulting in a stay on Jadhav's execution and ongoing legal and diplomatic efforts.

QUESTION OF LAW:

1. What is the legality of the punishment imposed by the military court of Pakistan?
2. Is Pakistan's refusal to provide Jadhav consular access a violation of the Vienna Convention on Consular Relations and the international covenant on civil and political rights (ICCPR)?
3. Whether the ICJ (International Court of Justice) was authorised to oversee this case and consider an application within it?
4. Whether the Vienna Convention on Consular Relations were implicitly inapplicable in cases of terrorism or espionage?
5. Whether the rights contained in the Convention could be limited by a subsequent bilateral agreement?

ARGUMENTS BY INDIA:

In representing the REPUBLIC OF INDIA, Senior Advocate Mr. Harish Salve initiated proceedings against Pakistan "under Article 36, paragraph 1, of the ICJ Statute, and Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations (VCCR) concerning the compulsory settlement of disputes." India claimed that Pakistan had violated its obligations under the VCCR.

As per recognized interpretations of the Vienna Convention on the Law of Treaties and key

principles of treaty law, particularly Article 41(1), the obligations under the VCCR “can be modified or supplemented by bilateral agreements but cannot be altered or nullified.” Additionally, the restrictions listed under Article 36(2) of the ICJ Statute do not apply to the exercise of jurisdiction under Article 36(1); thus, the VCCR remains the authoritative legal framework for addressing issues of consular access.

India argued that Pakistan’s failure to provide consular access to Jadhav constituted a violation of Article 36 of the VCCR. Since consular access is essential for ensuring a fair trial under international law, including international humanitarian law, the right to legal counsel cannot be denied in any circumstances.

Pakistan’s failure to provide consular access to Kulbhushan Jadhav constituted a violation of Article 36 of the Vienna Convention on Consular Relations (VCCR). Counsel for the Republic of India argued that any individual detained in a foreign country has the lawful right to communicate with consular representatives of their own nation, which is essential for ensuring a fair trial—a principle known as consular access.

The counsel further emphasized that consular officers must have the right to meet, communicate, and visit their nationals detained abroad, with complete freedom in correspondence. As a result, the right to legal representation cannot be denied under any circumstances, as consular access is a fundamental requirement for guaranteeing a fair trial under international law and humanitarian law.

Pakistan’s actions, therefore, violated its obligations under the VCCR, the International Covenant on Civil and Political Rights (ICCPR), and the ICJ Statute by:

- failing to promptly inform India of Jadhav’s detention,
- not informing Jadhav of his legal rights, and
- denying India and its consular officers their

guaranteed right of consular access under Article 36 of the VCCR.

REMEDIES:

In the final part of its submissions, counsel representing India clearly outlined the remedies sought from the Islamic Republic of Pakistan at the International Court of Justice (ICJ). The key remedies India requested were as follows:

- 1. Immediate Suspension of the Death Penalty:** India sought an immediate suspension of the death sentence imposed on Kulbhushan Jadhav, in line with the precedent set by the ICJ regarding such cases.
- 2. Declaration of Pakistan’s Violations:** India called for the ICJ to declare that the military court’s death sentence was a “brazen violation” of the Vienna Convention on Consular Relations (VCCR) and the International Covenant on Civil and Political Rights (ICCPR), as Pakistan had failed to provide India with consular access to Jadhav.
- 3. Annulment of Military Court’s Decision:** India urged the Court to order Pakistan to annul the military court’s decision and to make reparations by releasing Kulbhushan Jadhav.
- 4. Restitution in Integrum:** India further requested the ICJ to declare that the sentence imposed by the military court was in complete violation of the VCCR, ICCPR, and international law. As a result, India argued it was entitled to “restitution in integrum,” meaning the restoration of Jadhav’s position to what it was before his arbitrary arrest, which would include his deportation back to India.

ARGUMENTS BY PAKISTHAN:

Mr. Khawar Qureshi, Legal Counsel and Advocate for the Islamic Republic of Pakistan, argued that India made three critical errors in its approach to the case. Pakistan contended that India engaged in an abuse of process,

abuse of rights, and unlawful conduct by failing to acknowledge the following points:

1. Non-applicability of the VCCR: Pakistan asserted that the Vienna Convention on Consular Relations (VCCR) does not apply to cases involving espionage and terrorism, given the severity and unique nature of such crimes. As a result, the VCCR lacks the requisite jurisdiction to adjudicate these matters.
2. Existence of a Bilateral Agreement: Pakistan referred to a bilateral agreement between India and Pakistan from 2008, which explicitly states that in cases of "arrest, detention, or sentence on political or security grounds," the two countries have the discretion to determine the merits of such cases on their own terms. Pakistan argued that this agreement supersedes the VCCR, rendering it inapplicable in this situation.
3. Reservations Under Article 36(2) of the ICJ Statute: Pakistan maintained that the reservations made under Article 36(2) of the ICJ Statute are as valid as those under Article 36(1). Consequently, if a treaty or agreement exists between the parties, such as the 2008 bilateral agreement, it takes precedence and becomes binding.

Therefore, Pakistan argued that India could not invoke the jurisdiction of Article 36 of the VCCR in this case due to the existence of the 2008 bilateral agreement between the two nations.

The counsel for the Islamic Republic of Pakistan argued that India violated certain procedural norms, constituting an abuse of process. Firstly, they claimed India abused the process by requesting the International Court of Justice (ICJ) to issue provisional measures halting the execution of Kulbhusan Jadhav. Pakistan emphasized that its legal system provides every individual, including Jadhav, with the constitutional right to file a clemency petition within 150 days of receiving a death sentence.

By approaching the ICJ prematurely, India overlooked what Pakistan referred to as "highly material facts" and bypassed the available domestic remedy to stay Jadhav's execution.

Secondly, Pakistan contended that India violated Articles 2 and 3 of the Optional Protocol to the VCCR by not allowing Pakistan the opportunity to resolve the dispute through other dispute resolution mechanisms, as required by those provisions. The protocol expects the parties to notify each other about the existence of a dispute and attempt to resolve it through appropriate forums within two months, rather than immediately resorting to the ICJ. Pakistan argued that these procedural violations demonstrate that India cannot subject Pakistan to the jurisdiction of the ICJ in this matter.

The counsel for Pakistan, in their next set of submissions, argued that India should be held accountable for abusing its rights by failing to cooperate in further investigations regarding Kulbhusan Jadhav's case:

1. Failure to Confirm Jadhav's Nationality: Pakistan claimed that India refused to provide clarity on Jadhav's nationality by failing to present his actual Indian passport bearing his real name, despite having a clear duty to do so.
2. Lack of Cooperation in Investigations: Pakistan submitted that India adopted a dismissive stance when asked to assist in further criminal investigations into Jadhav's activities. Despite requests, India did not cooperate in providing any support for the investigation.
3. Assistance in Espionage and Terrorism: Pakistan accused India of aiding Jadhav in carrying out espionage and terrorist activities, pointing to evidence that Jadhav was provided with a "false passport under a cover name." Pakistan argued that this amounted to a violation of anti-terrorism laws and requested the ICJ to consider invoking certain United

Nations Security Council resolutions against India for this abuse of rights.

Pakistan further argued that India was guilty of unlawful conduct, stating that India's claims before the ICJ were undermined by its own misconduct. Pakistan asked the Court to dismiss India's application, citing the legal principles of *ex turpi causa non oritur actio* (a right cannot arise from a wrong) and *ex injuria jus non oritur* (law cannot arise from injustice).

Pakistan contended that India's refusal to assist in the investigation into Jadhav's criminal activities, its provision of a false passport, and its disregard for the 2008 bilateral agreement between the two nations all demonstrate that India has not approached the Court with clean hands. Therefore, Pakistan urged the ICJ to dismiss India's application on the grounds that it lacks merit.

Finally, the counsel for Pakistan submitted that India's refusal to establish Jadhav's nationality is itself evidence of a denial of his Indian citizenship. As establishing nationality is a prerequisite for seeking consular access, Pakistan argued that India's request for consular access should be dismissed.

CONCRETE JUDGEMENT:

The International Court of Justice (ICJ) delivered its verdict with a decisive 15:1 majority. The ruling centered primarily on the issue of a potential violation of Article 36 of the Vienna Convention on Consular Relations (VCCR). The court highlighted that the core issue between India and Pakistan was the denial of "consular assistance" to Kulbhushan Jadhav during his arrest, detention, trial, and sentencing. Both nations are signatories to the Vienna Convention on Consular Relations and the Optional Protocol concerning the Compulsory Settlement of Disputes, without any reservations or declarations.

The court recognized that, apart from the VCCR, no other international agreements had been breached and affirmed its jurisdiction based on

Article 1 of the Optional Protocol, as cited by India in its claim regarding the VCCR violation.

India's petition was upheld, while Pakistan's objections—alleging abuse of authority, abuse of rights, and unlawful conduct by India—were dismissed. The court concluded that Pakistan had violated Article 36 of the VCCR. By failing to promptly inform India about Jadhav's arrest and detention, and by denying him access to Indian consular officers, Pakistan infringed upon his rights under Article 36(1)(b) of the VCCR. As Pakistan had ratified the VCCR without reservations, the court held that Pakistan was in breach of its international obligations under the treaty.

CONCLUSION:

This pending case between India and Pakistan has been provide the great role in the international jurisprudence and developments in the contemporary mechanism in resolving disputes between the parties. That judgement mainly focused on the violation of consular rights under article 36 on the other hand the both countries are the members of the VCCR are also the members of "operational protocol to the Vienna convention on consular rights relations concerning the compulsory settlements of disputes" without any reservation or declaration ". finally September 2 2019 the allowed the Indians to meet Jadhav in Pakistan.

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