

**PRE-MEDIATED TO MURDER WITH CONCOCTED CHARGES -
JADHAV'S CASE STUDY**

***Y.V.KIRAN KUMAR**

1. Facts of the case

Kulbhushan Jadhav, who was a former naval officer had been caught on 3rd March 2016¹ and tried in Pakistan by FGCM under Section 59 of Pakistan Army Act (PAA) 1952² and Section 3 of Official Secrets Act of 1923.³ The proceeding took place between 21st September 2016 to 10th April 2017 based on the confessional statement of Jadhav's which was released on 29th March 2017. At last, he received the death sentence after the Pakistan Military Court found him guilty of espionage and sabotage on 10th April 2017.⁴ India had approached International Court of Justice against the death sentence on 8 May 2017⁵ and The court has stayed the execution order on 10 May 2017.⁶

2. Issue involved

The following are the issue drawn from the case, those are

- Is there any credible, specific evidence to proving Jadhav's involvement in espionage and terrorist activities in Pakistan.
- whether Jadhav is an agent of India's external intelligence agency research or an Indian business person in Iran
- Whether Jadhav was given a transparent trail at all or not
- Do the Pakistan's decision to hang Jadhav offend and disapproval by the international community.

3. Pakistan's Argument

As stated by the Pakistani government, Jadhav was detained within Balochistan in a counterintelligence attack performed by security forces near the border region of Chaman, having made illegal entry into Pakistan via Iran. Pakistani security forces accounted Jadhav as an officer in the Indian Navy. They stated that he

*Research Scholar, Dr.B.R.Ambedkar College of Law, Andhra University, Visakhapatnam, Andhra Pradesh - 530003., e-mail: yarijarlakiran@gmail.com Mobile: +91 8008722820.

¹ Syed Ali Shah, "RAW officer' arrested in Balochistan". DAWN. Retrieved 26 March 2016

² Section 59 of Pakistan Army Act (PAA) 1952 deals with Civil Offences

³ Section 3 of Official Secrets Act of 1923 deals with Penalties for Spying

⁴ Report by Inter-Services Public Relations (ISPR), Pakistan, Vide Report No. 193/2017, Dated 10th April, 2017

⁵ ICJ, Press Release No. 2017/16 dated 09/05/2017

⁶ ICJ, Press Release No. 2017/17 dated 10/05/2017

was made to order by RAW, which is India's outside intelligence agency and he got in touch with Baloch separatists and terrorists stimulating racist violence in the region and the country.⁷ They charged that he engaged in subversive (rebellious) activities in Balochistan and they further addition that Jadhav was concerned in monetarily supporting terrorists and declared his participation in Karachi's disturbances. Jadhav was moved to Islamabad for interrogation. Pakistani officials stated that during interrogation Jadhav furnished information in relation to his backing and strategies to subvert the country. They added that Jadhav also revealed the company of other Indian intelligence functionings in the said activities.⁸ In support of their allegations, Pakistan army and the government officials released Jadhav's confession video to the public.⁹

4. India's Argument

India raised a voice when the Kulbhushan Jadhav arrest was declared a year ago. It had unconditionally denied Pakistan's charges on Jadhav. The Government of India has acknowledged right from the begin that Jadhav was an Indian national and a retired naval officer. It also rejected that he was in any way allied to the government. At the same time, it strongly claims that Jadhav was kidnapped and taken to Pakistan from Iran, where he ran a legitimate business.¹⁰ India has rejected the legitimacy of the video and alleged that it was instructed or recorded under enormous mental and physical force.¹¹ Indian Government piercing that consular access to Jadhav would be necessary in order to verify the facts and understand the circumstances of his presence in Pakistan. In relating to that India has made 16th attempts for consular access to Jadhav since his custody to 26th April 2017.¹² But Pakistan has been denied those requests. India waiting for Pakistan's constructive reply on counselor access.

⁷ Dawn.com , "Govt airs video of Indian spy admitting involvement in Baluchistan insurgency". Dawn. Pakistan. Retrieved 30 March 2016

⁸ Naveed Ahmad, "Analysis: Kulbhushan Yadav's RAW move". The Express Tribune. Retrieved 7 April 2016

⁹ "Pakistan releases 'confession video' of Indian man arrested for 'spying'". The Indian Express. 29 March 2016. Retrieved 30 March 2016.

¹⁰ "New Delhi admits spy served in Indian Navy". The Express Tribune. 26 March 2016. Retrieved 26 March 2016.

¹¹ External Affairs Minister's Statement in Rajya Sabha on case of Shri Kulbhushan Jadhav, Indian Citizen, awarded death sentence by a Pakistani military court , Press Information Bureau , Ministry of External Affairs, Government of India, 11-April-2017 13:24 IST

¹² "Pak denies India's demand for consular access to Jadhav for the 16th time", e-paper, DeccanChronicle, Published on 26th April, 2017, 4:04 pm IST

Suddenly a decision is announced awarding a death sentence in this case.¹³ In order to precede this, the Indian diplomats have also requested for the charge sheet and the judgment of the Field General Court Martial (FGCM) which imposed a sentence of death on Jadhav. But, no one has given them so far.¹⁴ To create affairs even more ridiculous the Foreign Ministry of Pakistan made an official communication to the Indian High Commission after three hours of the death sentence. India gave direct caution to the Pakistan Government to consider the costs of bilateral relationship if they continue on this issue.¹⁵

5. Indefinite story with definite plan

The Pakistani story has several ambiguities which have even been questioned by their officials and in their media also. Some experts in world community have expressed concern over the uncomfortable secrecy with which the trial was conducted as well as the lack of consular access made offered to the prisoner. Amnesty International has condemned the sentence and stated that Pakistan has failed to pursue the procedure when it comes to guaranteeing a prisoner's rights and that this decision is a judicial failure of the military court system.¹⁶ Moreover, the Pakistani government was left to justify the army's actions. The conduct of the trial by a military court was a hurried affair. While hurrying the disposal of this case Pakistan violated its own constitution principle i.e., Right to a fair trial. Obtaining confessions under force is always possible and even the strongest would break under some form of pressure. In fact, that confession video also raised so many questions. Does the 3-minute length video has almost 100 cuts and has been taken from different angles using too many cameras is really valid as a confession statement. Forensic experts entirely denied the legality of Jadhav's confession video.¹⁷ Moreover, there is no proof of Magistrate appears in that video as Pakistan Officials said that a confession statement was

¹³ Haider, Suhasini (8 September 2016). "Pak. summons envoy on 'spy' arrest, India rejects claims". *The Hindu*. Retrieved 14 April 2017.

¹⁴ dnaindia.com, "Jadhav case: India hands over mother's appeal to Pak", Wed, 26 Apr 2017-06:33pm

¹⁵ External Affairs Minister's Statement in Rajya Sabha on case of Shri Kulbhushan Jadhav, Indian Citizen, awarded death sentence by a Pakistani military court, Press Information Bureau, Ministry of External Affairs, Government of India, 11-April-2017 13:24 IST

¹⁶ timesofindia.indiatimes.com, "Amnesty International on Kulbhushan Jadhav: Pakistan military court violates international standards", Apr 10, 2017, 11.19 PM IST

¹⁷ Kanika Saini, "This Is Why Kulbhushan Jadhav's Confession Video Is A Proof Of Pakistani Talent!", *infinityspeaks.org*, April 11, 2017

recorded under the Pakistan Code of Criminal Procedure.¹⁸ this entire scenario allows that one can easily understand that whether intentionally or inadvertently Pakistan has made a situation targeting the peace process between India and Pakistan totally damage which is under international law never appreciable.

6. Revealing movements from Indian side

During the time there has been a lot of debates took place on Jadhav's issue in Indian government as well as in media. Many countermeasure activities were taken by the Indian government as not to release about Pakistani prisoners, who were to be repatriated as the government feels that it is not the correct time to release the Pakistani prisoners. Besides that, a petition was filed in Delhi high court for legal help and release of Jadhav. The pleas also sought as to direct the government to place the matter before International Court of Justice. But the court dismissed a plea seeking direction to the government to approach the ICJ. The bench said "Every possible endeavor is being made by the government of India to secure the life of the citizen (Jadhav)... the matter best deserves to be left to the expertise of the government. No intervention by us is called for."¹⁹

Another petition also filed before Lucknow High court praying for a relief that an appropriate direction is issued to the Union of India and it's authorities to ensure that necessary legal steps are taken in order to get Jadhav. The Lucknow bench of the high court observed as "In the instant case, if the negotiations have to take place, there is no reason for us to issue any direction at this stage as we hope and trust that the Union of India through its respective authorities must be taking appropriate steps in order to ensure that full diplomatic, legal as well as moral support is extended to the detainee in order to secure the interest of his life and liberty as prayed by the petitioner."²⁰

The India-Pak Joint Defence Committee for Prisoners (IPJDCP), a forum of lawyers from both the countries, has petitioned before the Pakistan Supreme Court against the Jadav death sentence. Through this petition they prayed the Pakistan

¹⁸ Section 164 of the Pakistan Criminal Procedure Code, 1898 says that Record statements and confession made before the Any Magistrate of the First Class and any Magistrate of the Second Class specially empowered in this behalf by Provincial Government

¹⁹ Rahul Sharma Vs Union of India and Another (W.P. (C) No.3365/2017), High Court of Delhi, Decision dated 19th April, 2017

²⁰ Mr. Suresh Kumar Gupta Vs Union Of India Thru. Secy. At Prime Minister's Office & Ors. (P.I.L. CIVIL No. - 7997/2017), High Court of Judicature at Allahabad, Lucknow Bench, order dated 17th April, 2017

Hon'ble Supreme Court of to take an appropriate action on this matter and to ensure that rule of law shall rule the mankind and this Hon'ble Court shall lay down a new path for promoting friendly and brotherly relations between Indian and Pakistan which is the will of the people from both sides of international border.²¹ But the Pakistan Supreme Court has maintained a studied silence on this matter.

India handed over to Pakistan an appeal by the mother of Jadhav on sentenced to the appellate court and Indian officials had asked for a list of charges and an authentic copy of the verdict of the military tribunal against the retired officer to launch an appeal process against his conviction.²² If those documents made available to India and it can proceed for appeal against the execution of death sentence. At this juncture, there is some option available for Jadhav's under Pakistani laws. Those are,

- He has the right to appeal to an appellate Court;²³
- He may lodge a mercy petition to the chief of the army staff;²⁴ and
- He may lodge a mercy petition to the President of Pakistan.²⁵

7. Protection under International to rescue Jadhav

Keeping all these in Jadhav's incident one can say that the government's initiatives truly declare that the right to consular access is paramount to India under international law. The government tried to pursuing the issue through diplomatic representations and negotiations from both sides. But in tight situations of a long drawn-out conflict between India and Pakistan, the bilateral attempts not considered and unsuccessful in securing access to Jadhav. India has only way out to initiate legal proceedings against Pakistan before the International Court of Justice (ICJ) for the violation of international law providing for consular access. India approached the ICJ on May 8, 2017, the petition urged ICJ to restrain Pakistan from giving effect to the sentence and direct it to take steps to annul the decision and directing the Government of Pakistan to take all measures necessary to ensure that Jadhav is not executed until the court decides the case.²⁶ ICJ issued an order under Article 74, Paragraph 4 of the

²¹ Kulbhushan Jadhav (in custody in Pakistan) Vs Field General Court Martial (FGCM) under Pakistani Army Act, filed before the Supreme Court of Pakistan at Islamabad on 13th April, 2017

²² dnaindia.com, "Jadhav case: India hands over mother's appeal to Pak", Wed, 26 Apr 2017-06:33pm

²³ Section 133(A) of Pakistan Army Act, 1952 deals with Appeals on the sentence awarded by Court Martial

²⁴ Section 143 of Pakistan Army Act, 1952 deals with Pardon and Remission of Punishment awarded by Court Martial

²⁵ Article 45 of the Pakistan Constitution, 1956 gives power to President's to grant Pardon

²⁶ ICJ, Press Release No. 2017/16 dated 09/05/2017

Rules of Court for staying the Jadhav's death sentence.²⁷ India filed a fresh set of pleadings in the International Court of Justice relating to the case on 17th, April, 2018.

Prior to Jadhav's case India has only once moved toward the ICJ against Pakistan. In 1971, India filed a case against the jurisdiction of the International Civil Aviation Organisation. In this case Pakistan was demanding landing and overflight rights after the India Airlines Lahore flight hijack case. This decision was against India.²⁸ There was another case in which Pakistan has approached ICJ in 1999 against India on shooting down an Atlantique plane of Pakistan navy flying over Rann of Kutch. This incident occurred just around the Kargil war. India told ICJ it had no jurisdiction in the matter. ICJ upheld India's position.²⁹ But this time India approached on Jadhav matter on the basis that the Vienna Convention on Consular relations are being disobeyed by Pakistan.

Vienna Convention on Consular Relations, 1963 (VCCR) provides the right to consular access which is incorporating the right of sending state consuls to visit, converse with and arrange legal representation for nationals of the home-state in custody of the receiving state. "Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action".³⁰ This protecting work executed by the consulates-general of one country inside the country of another is a basic need to ensure the interests of sending state nationals in a foreign land and is also one of the most fundamental duties a sovereign state.

According to the texts of VCCR,1963 receiving country is duty-bound to assist as following

- Reporting to the concerning consulate without any delay when an individual of their nationals is arrested or detained;
- Inform about the right to consular access to detained person; and

²⁷ ICJ, Press Release No. 2017/17 dated 10/05/2017

²⁸ India v Pakistan, [1972] ICJ Rep 46, ICGJ 148 (ICJ 1972), Judgment dated 18th August 1972

²⁹ Pakistan v. India (Case on Aerial incident of 10 august 1999), I.C.J. 12 , 21 June 2000

³⁰ Article 36(1)(c) of the Vienna Convention on Consular Relations, 1963

- Assist the protection work performed by the competent consuls in visits, communications and legal arrangements prepared for the detainee.

In Jadhav's case, Pakistan failed to report to Indian Officials of his custody and rejected to grant consular access to Indian authorities even with several requests. This act of Pakistan is a breach of the duties undertaken under the VCCR and international law. India may be can challenge the Pakistan's breach of international law by recourse to the ICJ under this convention effectively. This is, fortunately, open doors in Jadhav's case to the advantage of both India and Pakistan being parties to the Optional Protocol to the Vienna Convention on Consular Relations relating to the Compulsory Settlement of Disputes, 1963.³¹ It grants that disagreements taking place out of the understanding or application of the Convention shall lie within the compulsory jurisdiction of the ICJ. That dispute may be brought before the court by any party to a dispute.

In one instance case, fifty-one Mexican nationals were in jail in the United States on various charges. This included three prisoners who had been convicted of a capital crime and who were on death row. At the time of arrest, the prisoners were not warned that they had the right to contact the Embassy of Mexico. Under the Vienna Convention on Consular Rights 36(1)(b), foreign nationals have the right to contact their embassy at the time of their arrest. The United States was a party to the Convention. Mexico went to the International Court of Justice (ICJ). The ICJ ordered that the United States take all measures necessary to prevent the execution. The main issue Was in this case that the United States in breach of their obligations under the treaty? The ICJ found that the United States was indeed in breach of their treaty obligations and in order to make it good, the United States would have to review the Mexican nationals' sentences.³²

In another case, Germany filed suit in the International Court of justice against the United States, claiming that U.S. law enforcement personnel failed to advise aliens upon their arrests of their rights under the Vienna Convention. Article 36(1)(b) of the Vienna Convention on Consular Relations provides that a state trying an alien in a death sentence case must inform the alien of his rights to have his consular authorities informed of the arrest. The issue was, Do a state that breaches its

³¹ The Optional Protocol, to which India and Pakistan acceded to in November 1977 and March 1976 respectively

³² Avena Case (Mexico v. United States of America), 2004 I.C.J. 1, Judgement dated 31st March, 2004

obligations to another under the Vienna Convention on Consular Relations by failing to inform an arrested alien of the right to consular notification and to provide judicial review of the alien's conviction and sentence also violates individual rights held by the alien under international law? The court said a state that breaches its obligations to another under the Vienna Convention on consular relations by failing to inform an arrested alien of the right to consular notification and to provide judicial review of the alien's conviction sentence also violates individual rights held by the alien under international law.³³

In both cases, ICJ applied the rule of review and reconsideration. An Indian recourse to the ICJ may be accepted to construct comparable results with the ICJ directing the Pakistan to review and reconsider Jadhav's trial, in which he may be afforded sufficient legal representation arranged by the Indian government. This would adequately protect India's and Jadhav's interests in the current heated incident.

8. Conclusion

There is no requirement for India to make any international announcement, as Pakistani involvement in anti-India activities is known the world over. As a part of that Pakistan leveled ridiculous charges against senior Indian official Jadhav who had no connection to this issue. Pakistan will create an impression that India is creating unrest in Pakistan and hence India is the one country who promote terrorism in Pakistani territory. The whole story tells us a lot about the farcical nature of the alleged proceedings which have led to an indefensible verdict against an innocent kidnapped Indian. Remember Spies will come and go. Espionage objectives and plans will change. National interests, although not permanent, will remain paramount. But the truth and only the truth will success. The only hope is that truth will protect Jadav and makes India's heads high.

³³ LaGrand Case (Germany v. United States), 526 U.S. 111 (1999)