

## CONSULAR RIGHT IS INDISPENSABLE: CRITIQUE OF KULBHUSHAN JADHAV CASE

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### ABSTRACT

*Whenever the immunity and privilege of a person or official are talked about, we must keep in mind the concept of international law i.e. consular law. One of the key documents addressing the parties' consular relations is the Vienna Convention on Consular Relations. Consular assistance is assistance rendered by states to its nationals, it's a way through which the state protects its nationals abroad, it's an ability of foreign nationals to have access to embassies of their own nation in the nation that is hosting them. Consular access is also an important instrument of human rights. In recent years right to consular access has been developed and has been in the limelight. The Vienna Convention on Consular Relations (hereafter VCCR) 1963 grants a person who is suspected of being a terrorist the right to consular notice. Consular access must be granted by the receiving state without undue delay. The Vienna Convention on Consular Relations, one of the most prestigious international agreements, has India and Pakistan as parties. Article 36 of the Vienna Convention on Consular Relations governs communications between the consul and the people from his country. The receiving state is required to tell the detainee or foreign person who has been arrested of his right to speak with his national consul. This paper critically analyses the law of consular relation embodied in the Vienna Convention, in light of the Kulbhushan Jadhav case, it also tries to explain consular access as an instrument of human rights.*

**Keywords:** *Consular access, Human rights, Vienna Convention, Kulbhushan Jadhav case, ICJ, natural justice.*

### INTRODUCTION

The obligations of signatory governments to detain foreign nationals are outlined in the Vienna Convention on Consular Relations. Article 36 mandates that consulates "without delay" notify detained foreign nationals of their right to counsel, communication, and representation throughout their detention. The Vienna Convention reflects the principle of

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pacta sunt servanda, which states that once an agreement is entered into in good faith, it must be abided by. Pakistan's failure to uphold its rights and obligations under the Vienna Convention has caused resentment in the international community. The International Court of Justice has the competence to adjudicate cases in which one state lodges a complaint against another under Chapter 14 of the United Nations Charter, but both parties must submit to the International Court of Justice's jurisdiction.

According to the preamble, the goal of the VCCR 1961 was to develop peaceful ties and cordial relations between states. This is why, as was already noted, ambassadors and consuls serve their host countries in helpful ways. They ensure a constant presence in the host country, keep friendly relations between them, and promote the various interests of their country in those countries.

This article also talks about consular access with human rights. Many human rights accords regulate the conduct of criminal trials and may be cited in cases of abuses of consular access. A clause in the International Covenant on Civil and Political Rights (ICCPR) substantially mandates respect for human rights throughout criminal proceedings.

Due to the Kulbhusan Jadhav case, India was dealing with a severe issue with consular access. The swift and decisive judgement of the International Court of Justice has brought up several moral and national sovereignty-related problems. The Indians saw the judgement in the aforementioned case as a moral victory, while the Pakistanis saw it as a blatant injustice. The first factor to be taken into account when evaluating rights in such a situation is whether the person who has been arrested is being treated properly while being held under the country's jurisdiction. Before adhering to international conventions, a nation must uphold the standards of the right to equality, which is a fundamental freedom for every individual and thereby India has considered the judgment of Kulbhusan Jadhav in consonance with the mandates a thereby justified the aspect of morality.

### **CONSULAR ACCESS IS A HUMAN RIGHTS INSTRUMENT**

The detained foreign national is generally viewed as having a right to consular access. Those detained for crimes with international definitions must be allowed access to consular services under treaties that provide for their prosecution. According to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if a person arrested for violating the Convention is a foreign national, that person must be assisted in

getting in touch with the State's nearest appropriate representative as soon as possible. This situation is covered under both the International Convention for the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Rights of All Migrant Workers and Their Families. Any foreign national detained for breaking these agreements has the right to consular access.

Many human rights accords regulate the conduct of criminal trials and may be cited in cases of abuses of consular access. A clause in the International Covenant on Civil and Political Rights (ICCPR) substantially mandates respect for human rights throughout criminal proceedings. That clause would be broken if a foreign national held in detention was denied consular access. The Convention on the Rights of the Child mandates compliance with "relevant clauses of international agreements" by states who are holding children on criminal charges. States must "ensure that everyone under their authority is given appropriate protection from and remedies for any racial discrimination" in order to comply with the International Convention on the Elimination of All Forms of Racial Discrimination.

In some countries, consular protection is enshrined as a consular right. For instance, the constitution of Hungary states: "During a lawful stay abroad, every Hungarian citizen is entitled to enjoy the protection of the republic of Hungary." Some jurisdictions utilize legislation rather than a constitution to guarantee consular protection for their citizens jailed on foreign soil.

## **KULBHUSHAN JADHAV CASE AND EFFECT OF CONSULAR ACCESS**

### **Facts of the case & legal issues:**

On 3.03.2016, Kulbhushan Jadhav was arrested by Pakistan in Balochistan, he was accused of being a spy from India by the military establishments of Pakistan, on the grounds that Jadhav is committing espionage terrorism. After being arrested, Pakistan shared a confessional statement made by Jadhav, wherein he is seen confessing the allegation made against him and was put to military court where he was declared as a spy. As a retired naval officer who was forcibly abducted by Pakistani officials while allegedly conducting business in Iran, India deemed the accusations against Jadhav to be unfounded. They also said that Jadhav was falsely accused of terrorism and espionage.

Indian government demanded consular access under Vienna Convention for Jadhav since the day they got to know about his arrest. However Pakistan without providing any such access tried him before the court and breaches the norms of international law as guaranteed under Article 36 of the Vienna Convention. As a result of Pakistan's actions and lack of cooperation in providing Jadhav access, the Indian government petitioned the International Court of Justice to overturn that country's military court's death sentence. The bench of ICJ in 2017 decided that execution shall be on hold till the final hearing.<sup>1</sup>

The Vienna Convention on Consular Relations' Optional Protocol, which states that any dispute arising out of the application of VCCR shall lie within the jurisdiction of ICJ, was signed by India and Pakistan. As a result, the key questions raised in this case were firstly whether this case falls within the jurisdiction of ICJ, and it was determined that it very well does. The VCCR's Article 36, which establishes the conditions for consular staff' access to and interactions with their people overseas, was broken by Pakistan, which was the second major issue. More than 16 requests for consular access were filed from India to Pakistan, but no responses were ever received.

### **Judgment & Analysis:**

With a ratio of 15:1, a resounding majority of the judges declared that Pakistan had breached Jadhav's right to consular access and informed him of the violation. The State of Pakistan's three objections against the State of India's alleged misuse of authority, violation of rights, and illegal behavior were dismissed, allowing India to present its case. By neglecting to inform India of Jadhav's arrest and detention, Pakistan has transgressed Article 36(1)(b) of the VCCR. This entire section of the agreement was accepted by Pakistan without any reservations or statements. As a result, the court determined that Pakistan had broken international law.

The majority decision's primary focus was on the issue of a violation of Article 36 of the Vienna Convention. The court correctly stated that it "is limited to the interpretation or application of the Vienna Convention and does not extend to India's claims based on any other norms of the International Law." The ICJ decision was a just one in which the courts limited their involvement to issues falling under their purview and made a choice that was as

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<sup>1</sup>Journal of Law and Society Law College Vol. L, No. 74 University of Peshawar January 2019, Available at: [http://journals.uop.edu.pk/papers/5\(6\).pdf](http://journals.uop.edu.pk/papers/5(6).pdf) (Accessed: April 15, 2023).

consistent with international law as was reasonably practicable. In the La Grand and Avena case, where the ICJ had awarded a similar relief of "review and consideration" by the country in violation of the Convention, the court had previously determined a similar legal issue relating to the Vienna Convention on Consular Access. The verdict, however, was not very successful. Given these situations, there is a possibility that the ICJ's ruling won't be carried out in a manner that is particularly encouraging.<sup>2</sup>

## **RECOMMENDATIONS FOR CONSULAR POLICY**

In response to demands from cultures that are moving towards more digital literacy, I offer five suggestions for improved consular support to citizens abroad. First, society is setting the standard for consular communications, therefore foreign ministries must thoroughly examine societal communication patterns and modify their communications strategy to be more focused on the needs of citizens. Second, consular services shouldn't succumb to commercial forces and commodification, which could turn people into consumers and work against the goals of foreign ministries looking for public support. Third, while digital inventiveness can go a long way, consular services now require professional coordination of the multichannel landscape rather than the chaotic stacking of communication channels due to the proliferation of online and offline communication channels. Fourth, the Ministry of foreign affairs will be able to stay on the right side of the coming digital gap if they have the organizational capacity to handle and implement significant issues in consular communication. Fifth, foreign ministries should improve their conceptual understanding of consular diplomacy and demonstrate to internal and external audiences how this practical area relates to overall foreign and security policy, while also acknowledging that it is not always the case that these connections make it simpler to manage foreign policy or consular affairs.

## **CONCLUSION**

States Parties to the Convention on Consular Relations have a general duty to grant consular access to foreign nationals; this duty is unaffected by the nature of the crime committed by the foreign citizen. The Court notes in the Jadhav case that this obligation, which is implied from the interpretation of Article 36 of the Convention, is not dependent on the performance

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<sup>2</sup> India, A.L.L. (2020) Analysis: ICJ judgement on Kulbhushan Jadhav, Lexlife India. Available <https://lexlife68840978.wordpress.com/2020/05/28/analysis-icj-judgement-on-kulbhushan-jadhav/> (Accessed: April 20, 2023).

of specific acts, such as assistance in the investigation process by her/his State of nationality, and that this obligation cannot be ignored even by reaching a bilateral agreement in the relations between the parties to the Convention. In this paper, I have highlighted the importance of the Vienna Convention in consular relations and states obligation to abide by the statutes laid down in the convention. The major issue identified in the convention is that it does not explicitly lay down whether it permits for enforcement of individual rights. Moreover, it does not specify a suitable remedy in case of a breach. Effective implementation of consular laws is crucial given the significance placed on consular interactions in the current paradigm. Consular relation is also an important instrument in human rights, consular access is a jus cogens principle of international law, which every state is bound by. The ICJ has been unable to offer consular access violation remedies. The international community should prioritize encouraging states to follow the VCCR guidelines.

