

What After the ICJ Judgement in Jadhav Case?

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The judgement of International Court of Justice (ICJ) delivered on the 17th of July, 2019 has strongly supported and upheld India's case on most issues. The Court held that the Vienna Convention binds both the countries which effectively provides for consular access. Consular access is an extension of the principles of natural justice and fair play. An accused held in custody or detention in a foreign country has to be immediately informed that he has a right to seek consular access. The country to which the accused belongs has to be immediately informed that their national is in custody and, upon request, consular access has to be mandatorily provided. Such access enables an accused in a foreign land to get legal representation so that the trial against the accused would appear to be a fair trial. The ICJ has rightly held that each one of these pre-requisites were violated by Pakistan and, therefore, a conviction based on violation of such basic human rights cannot be allowed to be executed.

A plain reading of the judgement showed that India had won on almost all counts. What surprised many was the official claim of Pakistan that the judgement is, in fact, a Pakistani victory. Supporters of this viewpoint gave two primary reasons for such a boisterous and bravado claim. Firstly, Jadhav had not been released by ICJ and secondly, that the military courts in Pakistan had been upheld and the case will go back to the military courts itself which are entirely state controlled. The relevant question, therefore, when the case has been referred back to Pakistan, what will be the forum and the process of the review and reconsideration that will be available to Jadhav.

On Military Courts

The ICJ, in paragraph 135 of the judgement, clearly states that though India has asked for a declaration that Pakistan military courts are violative of international law, the ICJ was of the opinion that Tribunal/ Court had been constituted with the limited jurisdiction for the interpretation and the enforcement of the Vienna Convention. It's jurisdiction does not extend to claims based on other rules of international law. It is, thus, clear that there is no opinion of the ICJ because of the limited jurisdiction of this Tribunal to the validity of the military courts. That question, thus, would remain open before an appropriate forum for adjudication in future.

ICJ's requirement of an effective review and reconsideration mechanism

The ICJ's subsequent observation on the nature of review and reconsideration is an example of legal craftsmanship in judgement writing. Thus, while not going into the question of the validity of the military courts, the observations of the court in paragraphs 139 to 147 give a clear indication amounting to a mandatory direction as to what is the nature of remedy available to Jadhav. The court has made observations which speak for themselves. I reproduce some of them:

- *“The Court considers that a special emphasis must be placed on the need for the review and reconsideration to be effective. The review and reconsideration of the conviction and sentence of Mr. Jadhav, in order to be effective, must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined. It presupposes the existence of a procedure which is suitable for this purpose.” (Para 139)*

- *“The Court notes that, according to Pakistan, the High Courts of Pakistan can exercise review jurisdiction. The Court observes, however, that Article 199, paragraph 3, of the Constitution of Pakistan has been interpreted by the Supreme Court of Pakistan as limiting the availability of such review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952. The Supreme Court has stated that the High Courts and the Supreme Court may exercise judicial review over a decision of the Field General Court Martial on “the grounds of coram non judice, without jurisdiction or suffering from mala fides, including malice in law only” (para 141)*

After noting that the Pakistan constitution provides that any law which is inconsistent with the fundamental rights guaranteed under the Constitution is void but this provision does not apply to the Pakistan Army Act. The ICJ notes in para 142 that the Peshawar High Court has already held:

“it had the legal mandate positively to interfere with decisions of military courts “if the case of the prosecution was based, firstly, on no evidence, secondly, insufficient evidence, thirdly, absence of jurisdiction, finally malice of facts & law”

- *“In light of these circumstances, the Court considers it imperative to re-emphasize that the review and reconsideration of the conviction and sentence of Mr. Jadhav must be effective.”(para 144)*

In paragraph 145, the ICJ recorded the confession given by the Counsel for Pakistan where he contends:

“The process of judicial review is always available”. Counsel for Pakistan assured the Court that the High Courts of Pakistan exercise “effective review jurisdiction”, giving as an example the decision of the Peshawar High Court in 2018”.

The ICJ to this adds its own observation in the same paragraph stating:

“The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process.”

This effectively means that for a review and reconsideration, the denial of consular access amounting to violation of principles of natural justice would be a relevant ground for challenging the conviction. The key observation is made in paragraph 146 where the ICJ observes:

“The obligation to provide effective review and reconsideration is “an obligation of result” which “must be performed unconditionally..... Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation”

An onerous responsibility through mandatory directions has been cast by the ICJ on Pakistan to ensure that the review and reconsideration has to be extremely broad ensuring that it takes into consideration all relevant grounds stated above by the ICJ. Obviously, where consular access is not granted and confessions made in custody are considered the most important piece of evidence before a military court, judgement delivered by such court on the face of

the facts and law does not meet the requirements laid down by the ICJ. The nature of the judicial authority which will go into the question of review and reconsideration cannot be the military court. That is perhaps why the ICJ suggests that the creation of a new forum, if necessary, by a legislation.

Pakistan lost conclusively before the ICJ. It's farcical processes through which innocent are held guilty, stand exposed. The ICJ has given Pakistan an opportunity to comply with the rule of law and reform its processes. Will Pakistan use this opportunity or will they squander it? Pakistan is now under a global gaze as to what direction it follows. The ICJ judgement in this case is a comprehensive victory for India.