

JUSTICE KARNAN'S CASE – DID THE SUPREME COURT HAS GONE OFF ITS LIMITS ON THIS ONE?

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INTRODUCTION

“Whenever an institution settle for something which is not constitutional, there arise a danger that it is being empowered beyond the empowerment given to it by the Constitution”²

On 9th May 2017, J. Karnan a sitting Calcutta high court judge had been sentenced to six months imprisonment by the Supreme Court (hereinafter SC) on the charges of contempt rendering in an unprecedented situation in the history of Indian judiciary. The contempt saga of J. Karnan had begun when in 2015 he was serving in Madras High Court (hereinafter HC) where he barged into a courtroom shouting slogans against the appointment of judges. Later that year he initiated a *suo motu* proceeding against the Madras HC chief justice Sanjay Kishan Kaul accusing him of harassment because of him being a *dalit*. Consequently, in 2016 he defied the SC's order of his transfer to Calcutta HC. In the light of these events he was summoned by the then Chief Justice of India(hereinafter CJI) T.S. Thakur to whom he apologized for his inappropriate behavior citing ‘mental frustration’ being the reason for his conducts³. However, he never stopped making headlines for his scandalous acts thereafter.

The extent of Justice Karnan saga had reached its crescendo when recently he wrote a letter to the Prime Minister Office(hereinafter PMO) listing 20 names of the judges both serving and retired accusing them of being corrupt and sought an inquiry against them. Because of which a special ‘seven-judge’ bench comprising the senior most judges of the SC were constituted and *suo motu* proceedings for contempt were

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²Indira jai singh (senior advocate in SC) speaking on this matter.

³ Samanwaya Rautray, *Justice CS Karnan apologises for staying transfer*, THE ECONOMIC TIMES (June 20, 2017, 3:21PM), http://economictimes.indiatimes.com/articleshow/51114164.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

initiated against him. Failing to appear before the court, an arrest warrant was issued against him and when he did turn up he questioned the authority of the SC to take action against him. Accordingly, he passed an order against the 7 judges-bench under the SC-ST Atrocities Act⁴ and sentenced them to 5 years imprisonment while stating the reason that he was getting targeted by the upper-case judges because of him belonging to a lower caste. This is when the SC issued a non-bailable warrant against J. Karnan sentencing him to six months jail.

However, it is true that it has happened for the first time that a judge has acted in such blatant way. But, apart from J. Karnan's misdemeanor, writing of letter to PMO, refusal to undergo medical examination and issuance of warrants against the SC judges, the real question which arose in this tussle between the judge and the judiciary is whether the SC has dealt with this matter unconstitutionally or did the SC has taken an easy way out. In this case, the SC has unfortunately given "a judgment of sentence without a judgment of conviction."⁵ Considering that the SC has not loosened any official statement as for what reason J. Karnan has been held guilty of contempt, where the SC has also even gagged the media from reporting anything "on him".

Though the apex court has convicted J. Karnan guilty and sentenced him to imprisonment it seems like that the SC has gone off its limits on this one. Since removing or impeaching a judge is not within the purview of the SC -the situation has resulted in the creation of a constitutional enigma.

The paper aims to deal with the serious questions that have been arising in this saga on the account of rule of law and tries to evaluate the term 'contempt' in the reference of this matter while also giving deliberation to the jurisdiction of the SC to decide the issue. It proceeds with the analysis of fallacious order by the SC of gagging media. From there, it steers into looking for the lacunas that have resulted in the birth of this situation. The paper also tries to elucidate if the apex court has acted in haste in deciding this matter, where the role of parliament in the saga has also been scrutinized. Hence, the paper at the end deals with certain suggestions about the whole proceeding leading to a conclusion.

⁴The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989.

⁵S. Sanal Kumar, *Justice Karnan – A Constitutional Conundrum*, Live Law (June 22, 2017, 12:04 AM), <http://www.livelaw.in/justice-karnan-constitutional-conundrum/html>.

CONSTITUTIONALITY

CONTEMPT

The prima facie question that arose when this saga is reckoned through constitutional perspective is that- why did J. Karnan was charged with contempt by the SC for writing a letter to PMO alleging corruption charges. As Indian constitution guarantees freedom of speech and expression to every citizen of India⁶ and since J. Karnan had made the complaint to the PMO which is a constitutional office it could not amount to contempt because every Indian citizen holds a right to complain in a constitutional office. And being the head of the government prime minister holds the power to constitute an inquiry under S.3 of the Commission of Enquiry Act, 1952⁷ and after the report of the inquiry committee, he can act accordingly. And yet, how the SC is perceiving the allegation of corruption charges into contempt is quite contentious. Where it is also unknown whether any inquiry has been conducted by the authorities on the accusations of J. Karnan or not.

On the account of contempt another thing that should be taken into consideration is that it has not happened for the first time that a judge has committed an act of misdemeanor. There were judges who have been accused of sexual harassment, corruption, and other offenses where no such contempt proceeding was initiated against them by the SC whereas, J. Karnan has been convicted for making a complaint of corruption⁸. Thus, it indicates toward the arbitrariness of the apex court as there is no saying how did they 'pick and choose' a matter for the contempt proceeding.

JURISDICTION OF THE SUPREME COURT.

Addressing arbitrariness Firstly, there was no clear-cut answer to the fact as to why a 7-judges bench has been constituted by the SC to decide the matter of J. Karnan. According to the law a matter of criminal contempt should be heard and determined by a

⁶ INDIA CONST. art. 19, cl. a.

⁷The Commissions of Inquiry Act 1952.

⁸ Apoorva Mandhani, *MP Judge Harassment allegations: Indira Jaising and Vrinda Grover demand impeachment proceedings; HC Judge denies all allegations*, LiveLaw.in(June 24, 2017, 2:14PM), <http://www.livelaw.in/mp-judge-harassment-allegations-indira-jaising-vrinda-grover-demand-impeachment-proceedings-hc-judge-denies-allegations/>

divisional bench of not less than two Judges⁹ and if there arises a question of constitutional interpretation than it is requested to the Chief Justice that the matter should be put before the constitutional bench of 5 judges. Yet still, if there are conflicting opinions only then the matter can be taken to a 7, 9 or 11 judge's bench. But in the case of J. Karnan, the SC had completely neglected the procedure and directly constituted a 7 judge bench which sounds irrational.

Secondly, the much debated and significant issue of the matter is that in Indian judiciary, judges are appointed by the president¹⁰ and can only be impeached in the manner prescribed in Article 124 of the Indian constitution¹¹.i.e. by parliament. Although in this case, it appears that the SC has taken the power of the parliament in its own hand by sentencing J. Karnan to jail amounting in his impeachment. The question is why the SC has not followed the procedure prescribed in Constitution for prosecuting a judge where it appears to be a fit case for the apex court to request Parliament for impeachment proceedings. Even the attorney general (being the government's chief legal advisor and its primary lawyer in the SC) has also stated the act as "reckless and scurrilous"¹². And for a party which enjoys such great majority in parliament (B.J.P) deciding this matter does not seem like a difficult task. However, it is not certain that what haste did the SC had in convicting J. Karnan that it has taken constitution for granted.

The sentence order of imprisonment was also given without hearing the side of J. Karnan or conducting a trial. Where even the rough martial courts also follow the principle of *audi alterm partem*¹³ the sudden order passed by the SC looks completely unreasonable. The outcome of this decision is that it has settled a dangerous precedent for the Indian judiciary. By discharging J. Karnan from his powers the SC has shown a kind of its superiority over the HC where it can take charge of correcting an erring judge. This imposes a serious question on judicial independence. Because through

⁹The Contempt of Courts Act 1971, s 18.

¹⁰ INDIA CONST. art. 217.

¹¹ INDIA CONST. art. 124, cl. 4.

¹² PTI, *Justice' C S Karnan making 'scurrilous' allegations: Attorney General MukulRohatgi*, The Indian Express (June 24, 2017, 2:22 PM), <http://indianexpress.com/article/india/justice-c-s-karnan-making-scurrilous-allegations-attorney-general-mukul-rohatgi-4577676/>.html.

¹³"listen to the other side"

collegium system the SC is already an appointing authority of the judges and if the SC also becomes their removing authority then it will result in unlimited power to one institution of the constitution which would prove to be calamitous. In the words of Lord Acton, this situation is completely justified when in an assembly he quoted “*power tends to corrupt and absolute power corrupts absolutely.*”¹⁴

SC has adjudicated a matter without the ambit of its jurisdiction and there is no telling that a situation like this will not appear again and the SC would not act in the same manner. Our constitution has given the power of impeachment of judges to the parliament instead of the judiciary so that it cannot be exercised in an arbitrary manner and which should remain as the way it is to maintain the constitutional integrity.

WHY THE GAG ON MEDIA?

Already surrounded with much criticism for its fallacious orders, the SC has also gagged the media from reporting anything on J. Karnan. The apex court has not only gagged the media but gagged the judge himself. And as long as the gag order is concerned the constitution says that every citizen of India has a right to freedom of speech and expression where the state can restrain it on certain “reasonable grounds”. Yet, the argument given by the SC for barring media from publishing J. Karnan’s statements was quite opposite of reasonable which can be evaluated in the following lines of the order:

*“...Since the incident of contempt includes public statements and publication of orders made by the contemnor, which were highlighted by the electronic and print media, we are of the view, that no further statements made by him should be published hereafter. Ordered accordingly...”*¹⁵

Media who had no role in issuing false orders or scandalous accusation against anyone has been stripped of its duty which has created the matter more ambiguous. Putting a

¹⁴ Lord Acton quote archive, *Acton institute for the institute for the study of religion and liberty* (June 25, 2017, 1:34 PM), <https://acton.org/research/lord-acton-quote-archive.html>.

¹⁵ Manasa Venkataraman, *Who is in contempt of justice, Karnan or the court?*, *The Hindu* (June 26, 2017, 10:20 AM), <http://www.thehindu.com/thread/politics-and-policy/who-is-in-contempt-of-justice-karnan-or-the-court/article18456851.html>.

prior restraint on media in the assumption that J. Karnan might make more contemptible statement is absurd and when the subject of prior restraint is contemplated the much-celebrated case of *Sahara vs. SEBI*¹⁶ also Known as “media guideline case” can be recalled where the SC had held that it has inherent power to:

*“Prohibit temporarily, statements being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate courts.”*¹⁷

Perceiving this judgment in the light of J. Karnan’s case. The gag order that has been put up by the SC on media was neither temporary nor there was any statement being made that could have interfered with the administration of justice. As J. Karnan was pointing out corruption and looking for an inquiry for the same. Therefore, the SC’s bar on media as well as J. Karnan seems to be running unparallel with the constitution.

LACUNAS

When this whole issue has been reevaluated the root of the problem seems to be lie in the collegium system. The issue to ponder is that if a judge who was constantly making headlines for his scandalous acts of misdemeanor and scurrilous accusations, how did he got appointed as a HC judge and even got confirmed as permanent after two years where both these action were taken by two different collegiums. Cleary, it appears to be a fault in the functioning of collegium system because when the SC is appointing a judge –a proper research should have been done on the background of the concerned judge. And his emotional stability, integrity, and capability should be put in check but that probation has not being made.

However, still, there is no question if collegium system is the right way of appointing judges or the NJAC (which was quashed by the SC as unconstitutional). Indeed, Collegium is an authentic way of assignment of judges because in a country like India

¹⁶Sahara vs. SEBI, (2012) 10 SCC 603.

¹⁷Gautam Bhatia, *Karnan case: The Supreme Court has acted like Humpty Dumpty in its gag order on press*, Scroll. in (June 29, 2017, 1:04 PM), <https://scroll.in/article/837190/karnan-case-the-supreme-court-has-acted-like-humpty-dumpty-in-its-gag-order-on-press.html>.

where most of the political parties are facing some major criminal or civil charges giving the power of appointing judges in the hand of the executive would prove to be calamitous. But still Judiciary holds a responsibility of doing its job properly but the way collegium system is working as of now something is going terribly wrong. The entire saga of J. Karnan reflects a bad image of Indian judiciary to the common masses while showing the failure of the SC in performing its job responsibly.

DELAY AND HASTE

As already noted, it has not happened all of a sudden that J. Karnan has started doing this kind of scandalous acts. When he committed acts of misdemeanor in Madras HC with three CJ's thereafter there were several instances where he had acted in the same manner. The question is why these acts were taken lightly by the SC in the past where it had many opportunities to make J. Karnan accountable for his behavior. If the matter should have been taken seriously by the SC before, maybe it could have established an inquiry. Which, if found J. Karnan guilty then the matter might have been referred to the parliament for proceedings like it happened in the case of J. Soumitra Sen¹⁸ (Charged for misappropriation of funds however he was not impeached because he had given his resignation before it). But no such thing has been done by the SC except transferring him from Madras HC to Kolkata HC where also he continued on his path of misdeeds. And then in a span of 2-3 months the SC in an abrupt way has convicted J. Karnan guilty of contempt without giving him a chance to explain himself. It may also be taken into deliberation that J. Karnan is retiring in June and it may be the reason why the SC has acted in such a haste to avoid the lengthy process of impeachment. Where senior jurist K.K. Venugopal has also opined to the SC to leave the matter alone till his retirement stating the reason that it will be a blemish for the SC to send a sitting HC judge to jail¹⁹. But the SC was of different opinion and has put an end to this unpleasant situation in an unpleasant way.

¹⁸PTI, *Justice sen resigns ahead of Monday's impeachment motion*, The Hindu (July 1, 2017, 11:26 PM), <http://www.thehindu.com/news/national/other-states/justice-sen-resigns-ahead-of-mondays-impeachment-motion/article2417401.ece>

¹⁹Dhananjay Mahapatral, *Supreme Court sentences Justice Karnan to 6 months in jail for contempt of court*, THE TIMES OF INDIA (July 2, 2017, 1:12PM), <http://timesofindia.indiatimes.com/india/sc-sends-justice-karnan-to-6-months-in-jail-for-contempt-of-court/articleshow/58588872.cms>

PARLIAMENT'S RESPONSE

The SC might have acted in haste and more or less somewhere unconstitutionally yet it has done what it deemed fit according to the circumstances but, the major credit of this mishap has to be given to the parliamentarians because when this war was going on between J. Karan and the SC judges they were sitting silently without giving any serious response. Instead of the fact that prima facie it was the job of the Parliament to take note of a judge doing misconducts and prosecute him for the same. But since there was no benefit coming out of it for the parliamentarians to serve their political agendas, so they left this problem with the judiciary to solve it on their own. And now that this incident has exposed such significant gap in our constitution. It is expected from the Parliament that some steps will be taken by them to prevent a situation like this in future.

WHAT COULD HAVE BEEN DONE?

Things might have ended up differently if the SC or the collegium system has done its job properly in appointing J. Karnan as a HC judge. Or by not neglecting his repeated acts of misdemeanor or at least could have gone along with the procedure provided in the Constitution for his removal from being a judge to avoid this constitutional conundrum. It can also be said that J. Karnan is the result of the absence of any provision to prosecute a judge short of impeachment but it is not the entire truth. It seems like there happens to be a way of correcting an erring judge. In the case of *RavichandranIyer vs Justice A.M.Bhattacharjee &Ors*²⁰ the SC held that:

“It seems to us that self-regulation by the judiciary is the only method which can be tried and adopted. The yawning gap between proved misbehavior and bad conduct in inconsistent with the high office on the part of non-cooperating judge/chief justice of a high court could be disciplined by self regulation through in-house procedure. This in-house procedure would fill in the constitutional gap and would yield salutary effect.”

And yet even after J. Karnan case falling within the ambit of the term ‘misbehavior’, the apex court opted for the illegal method of convicting J. Karnan rather than following a legal in-house inquiry.

²⁰RavichandranIyer vs Justice A.M.Bhattacharjee &Ors, (1995) SCC (5) 457.

IS THE IMPRISONMENT WAS THE ONLY WAY?

There is no questioning whether J. Karnan has committed any act of contempt or not. Indeed, he has committed some serious acts of misconduct which amounts to contempt. But if the imprisonment was the only option left for the SC to deal with this situation is a question to think about.

Since it is quite dubious whether sending J. Karnan to jail will achieve anything at all except staining the image of Indian judiciary because up till now he has constantly challenged the SC's orders on one ground or another. J. Karnan has even tried to challenge the SC's conviction under the section 2(c) of the Contempt of Courts Act²¹ and wanted the apex court to recall the judgment of May 9, 2017 "as no charge was framed" against him. While stating the contempt proceeding as *void ab initio*.²² However, the SC has rejected his plea declaring it as "not maintainable under the law" and called the judgment as final²³. Whereas of now, J. Karnan has asked for president intervention for the suspension of his sentence under art.72²⁴ and he is also looking forward to a personal meeting with him.

The meaning thereby is that the SC having gone to the extent of questioning J. Karnan's mental stability, leaving him alone till his retirement could have been a pragmatic way of handling the situation. And if not so, then a lesser sentence might have also been given like it happened in the case of *Shri Baradakanta Mishra vs. The Registrar of Orissa HC*²⁵, where a judicial official had been sentenced to prison for contempt and the apex court held that:

"In the somber evening of an official carrier, a punishment short of imprisonment would have met the ends of justice and inspired in the public mind confidence in the justice administration by showing that even delinquent judges will be punished if they play with or pervert the due course of justice, as the contemnor here has done".

²¹The Contempt of Courts Act, 1971, s 2(c).

²²"Invalid from the start".

²³The Hindu net desk, *Justice Karnan vs supreme court: saga of a defiant judge*, The Hindu (July 3, 2017, 12:30 PM), <http://www.thehindu.com/news/national/justice-karnan-vs-supreme-court-the-saga-of-a-defiant-judge/article18414667.ece#spl-article-18426047.html>.

²⁴INDIA CONST. art. 72.

²⁵ *Shri Baradakanta Mishra vs. The Registrar of Orissa HC*, (1974) AIR 710.

But later on, the SC substituted the sentence with imprisonment stating the reason that “a heavy hand is wasted severity where a lighter sentence may serve as well”. Therefore, if the SC would have adopted this kind of attitude in J. Karnan’s case then maybe it could have saved itself from this constitutional confusion.

CONCLUSION

Our forefathers have created the Constitution with due care and diligence and separated the powers of three fundamental organs of our constitution. i.e. Parliament, executive, and judiciary in a pragmatic way so that they do not encroach upon each other and one can create a check over the other. But in this case, the SC has crossed the constitutional boundaries which it does not suppose to and has encroached over the subject of parliament by removing J. Karnan. And as already stated, through this case by taking a *suo motu* cognizance against a HC judge the SC has shown that it has some kind of leash over HC where it does not have any, except art.141. i.e. the doctrine of “*stare decisis*” and the appellate jurisdiction from HC. Supreme Court not being the appointing authority (alone) and the removal authority of the judges do not have the power to discharge a judge from his powers as it was done in J. Karanan’s case. And the SC’s irrational order of gagging media was another thing that should be severely criticized because freedom of speech and expression is a fundamental right in our constitution and restraining it on unreasonable grounds is something that should be looked down upon and should be frowned upon. There is no questioning that J. Karnan has committed some serious acts of misconduct but this problem might have never occurred if the collegium system would have done its research properly before appointing him as a HC judge. It could have also been avoided if the parliamentarians would have taken a tiny bit of interest in the matter.

Since the event has uncovered a yawning gap in the constitution for dealing with a judge who is short of impeachment. Therefore, it is humbly suggested that a proper law should be enacted for the same. So that if a situation like this would appear again then it can be handled constitutionally.