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An Empirical Study on the Accessibility and Validity of Criminal Gag Orders in India

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ABSTRACT

With a recent increase in instances of ad interim gag orders being granted under Section 144 of the Code of Criminal Procedure, individuals facing allegations of criminal behaviour are turning to the courts more often for relief from damaging publications. Traditionally, gag orders have been viewed as a conflict between the 'a priori' enforcement of a defendant's right to fair trial by prohibiting news outlets from reporting on the case and the public's right to know. However, since the pandemic's inception, the two types of gag orders that have been frequently passed are either to curb dissent or impose prior restraints against defamation in criminal cases.

The validity of the former has been in question, as they are often passed in tandem with Section 188 of the Indian Penal Code that deals with disobedience to order promulgated by a public servant, rendering all persons contravening it punishable by law. Various prominent Supreme Court and High Court lawyers have expressed contrary opinions regarding this subject, with some arguing that the response has been disproportionate and that public tranquillity has been used as a veil for intolerance, while others are arguing that the authorities were within their rights to do so.

The latter has faced a huge outcry from social activists who have pointed to a string of sexual harassers that have managed to evade the public eye by quashing stories on media sites. They have also condemned it as an erasure of victim justice, especially when power wielded by the alleged offenders is considered. Lawyers have referred to these orders as reflective of the large-scale gender inequality and apathy in the country.

As a result, this paper will use empirical evidence to test the above-mentioned problems in a two-pronged way. Firstly, it uses cases to whether gag orders overstep the boundaries of state responsibility. Secondly, to assess broader trends, it collates data on the gag orders passed between 2016 and 2021 to consider the likelihood of a court granting a gag order to a high-profile, privileged defendant compared to an average defendant with no connections to assess their accessibility of the orders. It finds that in 72.7% of the cases, privileged defendants are the ones most likely to get a gag order. It also analyses how many orders curb dissent against ruling governments and finds that this occurs in 54.5% of cases.

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I. INTRODUCTION

Gag orders refer to orders passed by either the government or the judiciary when attempting to prevent individuals from disseminating or publishing information. They can be imposed on parties to litigation to stop them from talking to the press or on the press itself to stop it from publishing certain information. In India, they often comprise two types, the first when aiming to curb any objectionable content or dissent and the second as an imposition on the press to assert control over the publication of content on alleged offenders or on parties in cases from communicating with the press. Passed under Section 144 of the Code of Criminal Procedure² which is for the protection of human health, safety and public tranquillity, gag orders often have undetermined time limits. They may be lifted at the caprices of the government or judiciary, which is why the general debate on infringing press' rights arises. It is often founded on the dichotomy between the protection of the public's right to information³ and the preservation of the fair trial rights of litigants.⁴ Typically, a gag order functions on the premise of prior restraint, in that the State or judiciary prohibits speech or another expression before it can take place to preclude the harm it could cause.

² The Code of Criminal Procedure, 1973 Act No. 2 of 1974.

³ Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants* 30 U.S.F.L. REV. 95-97 (1996).

⁴ Don Apfel, *Gag Orders, Exclusionary Orders and Protective Orders: Expanding the Use of Preventive Remedies to Safeguard a Defendant's Right to Fair Trial*, 29 AM U.L. REV. 439-440 (1979-1980).

(A) Literature Review:

The aforementioned debate has been explored in various papers before. D. Apfel⁵, in a paper defending the right to a fair trial, observes that defence attorneys must take a bigger role in protecting their clients from adverse publicity. The author notes that traditional methods like a change of venue, postponing the trial and voir dire, while valuable, can only be used in cases where media coverage has been infrequent or objective. Often, in high-profile cases, the only preventive measure to avoid prejudice is a gag order. The author believes that the stringent requirements set in the Nebraska case may sometimes not be met, and even in those cases, the attorney must attempt to get an exclusionary order by preparing to argue that the right to a fair trial is paramount to any other rights of free speech. Sharma and Shukla⁶ echo this by arguing that gag orders infringe on the judicial principle of presuming innocence until proven guilty. The concept is further substantiated by a study by Greene, Edith and Wade⁷ which found that there was a 75% conviction rate when a mock trial was exposed to publicity, a huge contrast from the 60% conviction rate when there was no publicity at all. This serves as an imperative background to the current paper on the absolute importance of a trial that can prevent wrongful imprisonment⁸.

⁵ Supra Note 2.

⁶ Rama Sharma & Sushim Shukla, *A Legal Discourse Between Fair Trial and Media Trial: Indian Perspective*, 9 Dehradun Law Rev. 65, 65-74 (2017).

⁷ Greene, Edith, & Wade, Russell, *General pre-trial publicity and juror decision-making*, 2 Appl. Cogn. Psychol. 123, 123-135 (1988).

⁸ *Challenges to Gag Orders End in Mixed Results*, 24 News Media & the Law (Spring), 3-5 (2000).

However, some scholars believe that the effect of media coverage on trials is exaggerated. Strauss⁹, in a paper, argues that regardless of the public perception of a defendant, they trust the judges' orders enough even if it is the opposite of their opinions, so there is no value in curbing their right to information. This is further strengthened by a study by Brusckhe¹⁰ that states that the training given to judges is enough to filter out public opinions in judgements. These demonstrate the contrary premise of information freedom discussed in this paper. TK Raj¹¹ argues that gag orders infringe on the right to have an uninhibited marketplace of ideas by preventing free speech that could have widespread chilling impacts on the expression of ideas. She further notes that the orders are hard to challenge or get lifted due to the high discretion awarded to lower courts in determining whether there is sufficient cause to grant the order. This context is crucial to this paper since it illustrates the irreversibility of invalid gag orders due to a heavy case backlog.

Thus, it is clear that the constitutionality of gag orders is highly contested since it is well recognised that it threatens the broad swathes of free speech awarded to citizens. This concept was affirmed by the Supreme Court in the Romesh Thapar¹² case, where it noted that the circulation of information is vital to the

protection of freedom of speech and expression. This is subsequently confirmed in Brij Bhushan v. State of Delhi¹³, where freedom of the press was recognised. Thus, to offer some clarity, in Sahara vs SEBI¹⁴, the Supreme Court observed a specific exception that allowed prior restraints. To shield the countervailing constitutional right to a fair trial, the apex court extended Article 129, detailing recourse in the case of contempt of courts, to apply to preventive measures. Recognising that media reporting can influence the outcome of a trial, it noted that a court can pass a postponement or gag order when there is an ongoing trial and when the information published poses a "real and substantial risk of prejudice to the fairness of the trial." The application of this test is murky because the determination of what may constitute an interference in the trial is presumptive until the information is actually disseminated. However, for the purpose of this paper, it is assumed that the test laid down in the SEBI case is reflective of the accepted boundaries to free speech. Still, there exist two problems - the first of which is the disregard for the test since there have often been cases when the gag orders were imposed after the trial was over and the offender convicted¹⁵. The second is that most gag orders passed over the last few years have been protective of privilege¹⁶.

⁹ Marcy Strauss, *Sequestration*, 24 American Journal of Criminal Law, 63, 66-67, 1996.

¹⁰ Brusckhe, Jon, & Loges, *Relationship between pretrial publicity and trial outcomes*, 49 Journal of Communication, 96, 104-120, 1999.

¹¹ Thulsi K Raj, *Restricting Free Speech Through Bail Orders*, NLSIR REVIEW, (Nov 1, 2021, 9:29 PM), <https://nlsir.com/restricting-free-speech-through-bail-orders/>.

¹² Romesh Thappar v. State of Madras[18] AIR 1950 SC 124

¹³ Brij Bhushan v. State of Delhi 1950 AIR 129.

¹⁴ Sahara India Real Estate Corporation Limited & Ors v. Securities and Exchange Board of India, Civil Appeal No. 9833 of 2011.

¹⁵ Justice C.S. Karnan v The Honourable Supreme Court Of India, W.P.(C) 6278/2017.

¹⁶ Isabel Farhi, *When Silence Isn't Golden: How Gag Orders Can Evade First Amendment Protections*, MEDIA FREEDOM AND INTERNET ACCESS CLINIC (Aug. 15, 2021, 6:30 PM), <https://law.yale.edu/mfia/case-disclosed/when->

They are often sought to quash media attention¹⁷ to high-profile criminal defendants that wield massive amounts of social and political capital.

II. VALIDITY OF GAG ORDERS

The basis for prior restraint began with the *Naresh Shridhar Mirajkar v. the State of Maharashtra*¹⁸ wherein it was held the courts had inherent powers that included the banning of media reports and comments on trials that had been commenced, with the view of ensuring justice and it was not a curb on their freedom of speech. This was relied upon in *Sahara India Real Estate Corp. Ltd v. SEBI*¹⁹, wherein the court elaborated on the validity of gag orders. However, the conditions set down were vague and have since not been narrowed down. The apex court has refrained from clarifying its judgement, stating that it would be decided on a case-to-case basis and that there can never be an objective criterion set to determine whether a publication is hindering justice. The obvious issue that arises is that there is too much ambiguity that is weaponised by courts and governments in India, which results in impinging the transparency of the current open-court system and methods of expressing disapproval. The two biggest manifestations of this have been the *Swatanter Kumar*²⁰ case and the *Karnan*²¹ case.

In the former, the Delhi High Court issued a gag order preventing the discussion of sexual

harassment claims made by an intern on the retired judge Justice Swatanter Kumar. The order is clearly an overstepping of boundaries because it is in flagrant disregard of conditions set out by the court, which clearly prescribes a gag order as the last alternative. Prior to the order, allowing the victim to communicate with media outlets allowed her to feel protected and led to other interns in similar situations feeling that they would be able to find support. It also provides wide access to lawyers and activists that could reduce the cost of the trial. Yet, contrary to protecting the victim's right to speak out, the judge giving the gag order attempted to protect a former colleague and the judicial structures with no basis of why the public opinion was likely to affect the case. The concerns would have been better addressed by the postponement of the trial, that the SEBI case lays down as a consideration the court must do before the gag order is passed or, even addressing them at a later stage by evaluating whether there was defamation once the facts were determined. The transparency concerns were also counterproductive as it was unclear why the ruling judge on the case would not be unbiased and swayed by a mere reporting of the facts by the media. Since powerful figures within the judiciary itself were not subjected to an open court proceeding, the transparency of the system as a whole was left questioning. The media suppression creates an air of isolation,

silence-isnt-golden-how-gag-orders-can-evade-first-amendment-protections.

¹⁷ Devika Agarwal, #MeToo: Decoding the rights of the accused, First Post, Oct. 15, 2018.

¹⁸ *Naresh Shridhar Mirajkar v. State of Maharashtra* 1967 AIR, 1 1966 SCR (3) 744.

¹⁹ *Sahara India Real Estate Corporation Limited & Ors v. Securities and Exchange Board of India*, Civil Appeal No. 9833 of 2011.

²⁰ *Swatanter Kumar v. Indian Express Criminal Appeal No.102/2014*.

²¹ *Justice C.S. Karnan v The Honourable Supreme Court Of India*, W.P.(C) 6278/2017.

where future victims are afraid to lodge complaints in fear that the harasser would be the one that could get judicial sympathy.

Similarly, in the Karnan case, after a seven-judge bench convicted former Justice Karnan as a contemtor, they issued a future gag order for any comments that he may make about the judiciary, citing the fact that previous contemptuous statements were disseminated through electronic media. This is in clear violation of the SEBI case guidelines, as the trial was not ongoing and contravenes the ratio that states that the gag order must be for a limited duration, which the blanket gag order does not fall under. It disregards any test of reasonableness set under Section 144(2)²² of the CrPC that states that order may only be passed in a situation of emergency or where there is a lack of time. Thus, it is clear that gag orders often constitute judicial overreach.

III. ACCESSIBILITY OF GAG ORDERS

Bruschke and Loges, in a 2004 study,²³ observed that the biggest indicator of a trial outcome is the economic wealth of the party. Their research notes that the wealthier a person is, the more the court is inclined to care about the case. This manifests in many ways for a gag order because it is easier for the privileged, alleged offender to quash any media stories prior to the case actually

taking place. The best example of this is the backlash from women's collectives²⁴ and social activists to raise awareness about the impacts of gag orders during trials of crimes against women. It is important to note that the public perception of a crime swaying a judgement is not always unjust, as sometimes it is balancing a scale that is tipped in favour of the privileged. The strength of public outcry coupled with detailed and accurate media coverage can serve as a huge catalyst in exerting pressure on the government and the police to take cognisance of a woman's plight in the trial. Evidently, this cannot occur when the media is suppressed from disseminating information and educating the public on how horrific the crime is. This is the sole motivating factor for accused parties to push for a halt on media stories and social media publications. This is not to be confused with the provision in Section 228A of the Indian Penal Code²⁵, which withholds the identity of the complainant and in Section 327(3)²⁶ of the Criminal Procedure Code that can allow limited media coverage of an in-camera sexual harassment trial, that protects the dignity of women. This also needs the consent of the court, which is why public information on the rest of the case, which could comprise witnesses retracting statements, the accused's hostile behaviour and intimidation tactics used in court, is necessary to hold the accused and State accountable. Blanket gag orders are severely

²² Section 144(2), The Code of Criminal Procedure, 1973 Act No. 2 of 1974.

²³ 6 Bruschke, J., & Loges, W.E. *Free Press v. Fair Trials*, 29 Lawrence Erlbaum Associates, NJ., 2004.

²⁴ The Network of Women in India, *Media Responsibility in the #MeToo Era*, NWMINDIA.ORG, (Nov 6, 2021, 3:12 PM), [https://www.nwmindia.org/statements/against-](https://www.nwmindia.org/statements/against-sexual-harassment/from-r-k-pachauri-to-subodh-gupta-and-soumya-d-asgupta-media-responsibility-in-the-metoo-era/)

[sexual-harassment/from-r-k-pachauri-to-subodh-gupta-and-soumya-d-asgupta-media-responsibility-in-the-metoo-era/](https://www.nwmindia.org/statements/against-sexual-harassment/from-r-k-pachauri-to-subodh-gupta-and-soumya-d-asgupta-media-responsibility-in-the-metoo-era/).

²⁵ Section 228A, Indian Penal Code, 1860 ACT NO. 45 of 1860.

²⁶ Section 327(3), The Code of Criminal Procedure, 1973 Act No. 2 of 1974.

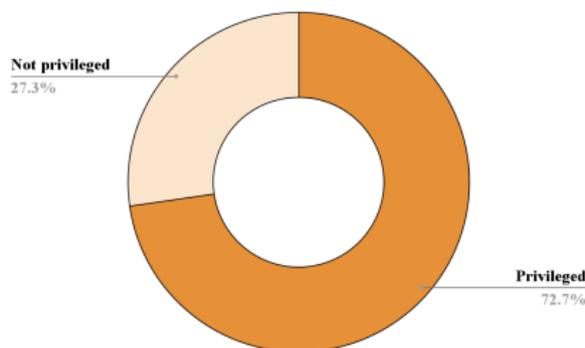
harmful to the victims and serve as a benefit to the accused in our current patriarchal system.

Annexure 1

Date	Name	Privileged	Organisation
May 9, 2017	In re: Sri Justice C. S Karnan	Yes	Supreme Court of India
October 20, 2017	Gag order against KT Rajendra Balaji		Madras High Court
March 8, 2019	Gag Order for Gopalakrishnan	Yes	Padmanabn Bengaluru Sessions Court
March 30, 2019	Gag Order for Tejaswi Surya	Yes	Local civil court in Bangalore
April 12, 2019	Association For		Karnataka High Court

	Democratic ... vs Election Commission		
February 18, 2020	Gag Order for Soumya Dasgupta	Yes	Patiala House Court
September 15, 2020	Dammalapati Srinivas vs The State of Andhra Pradesh	Yes	Andhra Pradesh High Court
September 17, 2020	Rakulpreet Singh v/s Union of India	Yes	Delhi High Court
November 2, 2020	Akhilanand Rao vs State of UP	Yes	Allahabad High Court
March 4, 2021	Gag order for Karnataka BJP Ministers	Yes	Bangalore 26th Civil Sessions Court

July 5, 2021	Gag order for Sadananda Gowda	Yes	Bengaluru City Civil Court
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As is clear from Annexure 1 and the graphical representation in Figure 1, in 72.7% of cases, the privileged defendants are the ones who are most likely to be granted a gag order. In the case of Sowmya Dasgupta, for example, complaints of alleged molestation were made against him. The Network of Women in Media India, an activist group²⁷, noted that a few weeks after the press covered the story, any mention of the incident had been erased across all platforms. The problem was observed to be that it already requires great courage to speak out against a man with substantial social capital. Having the story removed after that signals to the victim that justice may never be served to them and that the accused, despite the crime, will always be more important. It is imperative to point out the counter-argument here that states that in certain cases, the allegations may be false and a person

wrongfully defamed. It is valuable to consider the NWMI's policy suggestion of news outlets posting reasons for the removal of news so that the public is at least aware of the incident. In the case of Priya Ramani v. MJ Akbar²⁸, the court upheld that the right to reputation of the accused cannot be protected at the cost of the victim's right to dignity, proving that it is important to listen to a victim. Furthermore, this paper would submit that false allegation are much less likely to occur than true ones. Even allegations that have been termed untrue in the past, on further investigation, had an overwhelming majority of cases that did not make it to trial due to independent reasons like witnesses turning hostile or intimidation of victims into withdrawing the case. In addition, the court procedure is often tedious and requires huge economic and time investments from the victims that dissuade them from pursuing the case. Therefore, the term 'untrue' is more reflective of a case being dropped than the allegation itself. Lastly, this paper would argue that regardless of the crime, there is an alternative way to prevent false damage to reputation. Section 182 of the Indian Penal Code²⁹ gives the penalty for giving false information to a public servant with the intention of using their power to cause injury to another. The complainant can be subject to criminal prosecution for perjury, which would serve as enough deterrence in filing the FIR. Thus, it is clear that there exist adequate measures to protect the privileged already. This

²⁷ Scroll Staff, *Women's collective, 25 others criticise 'powerful men' seeking gag orders in sexual assault cases*, SCROLL.IN, (Nov 8, 2021, 7:34 PM), <https://scroll.in/latest/975996/womens-collective-25-others-criticise-powerful-men-seeking-gag->

orders-in-sexual-assault-cases.

²⁸ Priya Ramani v. MJ Akbar Complaint Case No. 05/2019.

²⁹ Section 182, Indian Penal Code, 1860 ACT NO. 45 of 1860.

means that the basis of gag orders favouring the privileged have serious grounds to be questioned.

The second problem with current gag orders passed is that they are often stifling dissent

against governments. The most recent example of this is the new amendment to the Central Services (Pensions) Rules, 1972³⁰ that prevents any retired officials from intelligence or security-related organisations from writing a memoir about their time in service. The penalty for doing so is a partial or complete withdrawal of pension. Officers from the Intelligence Agencies have expressed their concerns about the amendment because it seems that any differing opinions or experiences that do not paint the government in the best light are likely to be cracked down upon. This is relegating Intelligence Officers to a life of being unable to talk about their past trauma, which is a fundamental assault on human dignity. Curbing dissent also hinges dangerously on the realm of an overarching interference in people's personal lives, a trend that has been increasing over the past few years, as demonstrated by Annexure 2.

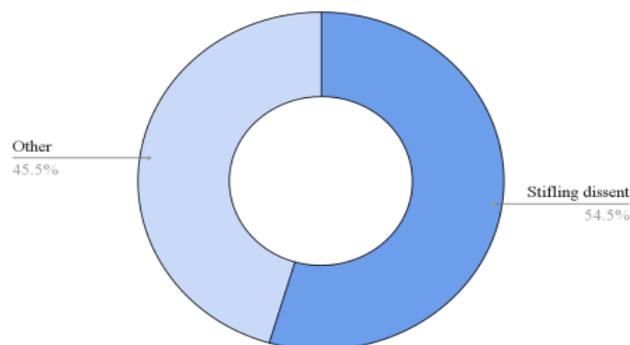
Annexure 2

Date	Name	Stifling Dissent	Organisatio n
Nov. 7, 2016	Gag order for NDTV		Broadcastin g Ministry

Nov. 7, 2017	Gag Order for UP CM	Yes	Allahabad High Court
Nov. 29, 2017	C.B.I vs M.L. Parmar & Ors.	Yes	Special CBI Court &Ors
Februar y 6, 2018	Sanjay Leela Bhansali & Ors vs State & Ors	Yes	State Govt. of Rajasthan and Gujarat
March 11, 2020	Service Lee Technolo gies Private ... vs Floron Bpo And Consulta ncy		Bombay High Court
May 12, 2020	Gag Order by district administr		District Collector of Dholpur and Kota

³⁰ Central Civil Services (Pension) Rules, 1972.

	ations of Kota and Dholpur		
May 23, 2020	Mumbai COVID- 19 Gag Order		Deputy Commissio ner of Police (Operations) and Executive Magistrate
July 17, 2020	Haryana Gag Order during COVID- 19		District Administrat ion of Haryana
January 22, 2021	Gag order by Bihar govt	Yes	Bihar state government
April 18, 2021	Gag order on Himachal teachers	Yes	Himachal Pradesh Higher Education Department



IV. CONCLUSION

The gag orders passed in India today are violative of the very guidelines that the Apex Court itself has passed. For them to be more comprehensive and to ensure their strict application, it is imperative that the Supreme Court clarifies what constitutes a substantial risk to justice. Blanket ban orders that specify no duration, orders passed pre-trial or in the aftermath of a judgement should be heard faster in an appeal court. In addition, it is clear from the empirical study implemented above that gag orders often are inaccessible, and the judiciary must take it upon themselves to consider victim rights before passing an order. The amount of leeway given to governments to decide what may constitute dissent must also be put under judicial scrutiny in India as the study is reflective of the government being a judge in its own cause.

Figure 2 pegs the figure of curbing dissent at an overwhelming 54.5%.