
INTERIM ORDERS WITHOUT REASONS: A THREAT TO PROCEDURAL FAIRNESS AND JUDICIAL ACCOUNTABILITY IN INDIAN COURTS

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ABSTRACT

The present paper is concerned with the problem of Indian courts where interim orders are made in the absence of any written reasons under Order XXXIX of the Code of Civil Procedure, 1908 (CPC) and discusses the implications of such practice on procedural justice and judicial accountability. The present paper adopts the doctrinal methodology and comparative analysis to identify the legal framework within which the interlocutory orders can be issued. The study concludes that the courts treat interim applications by taking into consideration three aspects including the case at prima facie, balance of convenience, irreparable injury, and maintainability but are often reduced to a unreasoned order. Judicial overcrowding in structure is the core of this problem as cases remain in cold storage between filing and final hearing, the interlocutory phase becomes the sole form of active judicial intervention, which compels parties to seek and courts to grant wide relief without strict justification. Based on Law Commission reports, and English and American models of comparative civil procedure, the constitutional imperative of reasoned adjudication, this paper proposes statutory amendment, procedural checklists, appellate procedures, and judicial training as stratum levels of reform to add accountability to interim adjudication.

Keywords: Interim Orders, Code of Civil Procedure, Interlocutory orders

INTRODUCTION

Indian courts are currently dealing with a problematic situation that has arisen partly because of their own practices. The institution that was meant to fix the disputed cases has been overloaded with the number of cases and it is no longer able to fix most of the disputed cases within any significant time. Within this climate the interim order that was designed by the legislature as a temporary protection has silently taken the nature of a final judgement.¹ It is handed down at the point of entry of a case, it runs over years and it decides the actual result of the dispute even before the court perceives the merits.

An interim order is any judicial direction operative during the pendency of a suit, designed to preserve the subject matter or protect a party from irreparable harm pending final adjudication.

This change is based on structural congestion. Indian courts are overwhelmed with cases which cannot be handled by them at any level and thus they are unable to dispose with each case in a timely manner. Parties can only get interim orders at the first instance of a case presented to a court meaningfully. Then the case goes into cold storage where it will be revived whenever its time comes in the long chronological queue.² The greater the congestion the greater the wait hence the more a party is desperate to have an interim order just to secure a place as the justice takes its time.

The key principle behind this problem is a fundamental tenet of justice in the law. In a case where a court awards a legal remedy, the damage suffered by the defendant will be the same as the damage that would accrue to the plaintiff in case the remedy is denied. This is the reason why either award or denial of a legal remedy is dealt with as a legal right and is determined after due hearing or trial of the merits of the case.³ Interim injunction is not a mere nuisance to the defendant but it can be as detrimental to the defendant as denying it would be to the plaintiff. The only justification that can justify such harm caused by the court without the full hearing is extreme urgency, and it would be unjust to allow that the final decision would result in serious and irreversible harm. Simultaneously, the cause should be well explained and documented by the court. Otherwise, the court will only be harming people without justice.

¹ Nick Robinson, *The Indian Supreme Court's Workload*, 10 Journal of Empirical Legal Studies 570 (2013).

² See Nick Robinson, *A Court Adrift*, Frontline (Jan. 15, 2013), <https://frontline.thehindu.com/cover-story/a-court-adrift/article4613892.ece>.

³ V.S. Deshpande, *Stay Orders—Abuse*, 28 Journal of the Indian Law Institute 141 (1986).

The doctrinal framework governing interim orders is built around Orders XXXIX, XXXVIII, and XL of the Code of Civil Procedure, 1908⁴, supported by the inherent power under Section 151.⁵ The courts have come up with a originally three factor test of judiciary interpretation: prima facie case, balance of convenience, irreparable injury, and maintainability (newly added) of the proceeding. They are not just tips but the circumstances in which the law will allow the court to modify the rights of the parties prior to the presentation of the entire case. The legislature has clearly indicated its purpose by making successive amendments by adding the proviso to Order XXXIX Rule 3⁶, inserted by the CPC Amendment Act 1976⁷, explicitly provides that courts must provide reasons before ex parte injunctions are granted, while the Amendment Acts of 1999⁸ and 2002⁹ further enhanced the obligation to expeditious disposal and the timelines of interlocutory proceedings are made mandatory. Chapter 3 of this paper discusses the specifics of this legislative framework, and how it is interpreted within a court of law in great detail.

Collectively these amendments point to a very steady legislative purpose: interim relief is an exception, notice is the rule, and where notice is dispensed with reasons are required. The custom of making interim orders of no reason is not only bad practice on the bench, it is antithetical to the expressive dictum of the legislature, of procedural justice and constitutional duty of reasoned adjudication. It is this gap that is intended to be addressed in the current paper.

⁴ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, Orders XXXIX, XXXVIII & XL (India).

⁵ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) s. 151.

⁶ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXIX, Rule 3.

⁷ Code of Civil Procedure (Amendment) Act, 1976, No. 104, Acts of Parliament, 1976 (India).

⁸ Code of Civil Procedure (Amendment) Act, 1999, No. 46, Acts of Parliament, 1999 (India).

⁹ Code of Civil Procedure (Amendment) Act, 2002, No. 22, Acts of Parliament, 2002 (India).

CHAPTER-1

RESEARCH AIMS & OBJECTIVES

This paper has three aims which are intimately connected to each other. It tries to first define and discuss the legal framework of giving interim orders in India and the statutory indications, judicial interpretations and suggestions made by the Law Commission which considered the normative structure of interlocutory relief. Second, it aims at examining the mismatch between such a normative structure and judicial practice, specifically the overall failure of courts to record reasons when making interim orders, and legal, constitutional and systemic implications of that failure. Third, it suggests an interim adjudication to get on its feet again by proposing a list of specific, proportionate and legally-grounded reforms to fill this gap.

The specific objectives of this research are:

- (i) to trace the legislative history of the requirement to provide reasons in interim order under the original CPC in its different revisions;
- (ii) to take into consideration the three-factor test - prima facie case, balance of convenience, irreparable injury, and the newly added maintainability, as developed by Supreme Court and to assess how far it is put into effect in practice by the courts;
- (iii) to list the negative consequences that are known to have been discovered of interim orders granted without purpose, including the abuse of process, appellate impediments and systemic procrastination;
- (iv) to make comparative studies on comparative models of English and American civil procedure; and
- (v) to work out proposals of reform on the basis of doctrinal criticism, constitutional principle and institutional viability.

STATEMENT OF PROBLEM

In this paper, a systemic issue of the Code of Civil Procedure, 1908¹⁰ is unreasoned interim orders. Courts must use a three-factor test i.e., prima facie case, balance of convenience, irreparable injury and maintainability (newly added). Yet often courts will award interim relief in a one and unreasoned sentence.¹¹ Heavy docket congestion has made the interlocutory phase the sole point of judicial intervention that matters and has become a procedural bottleneck that promotes the use of summary orders. Lacking any justifications allows abuse especially by the ex parte orders which have significant impact on the other party without any real chance to appeal them and this is criticised by the Supreme Court in *Dunlop India Ltd v Union of India*.¹² Between, on the one hand, the constitutional duty to record reasons and the statutory duty under Order XXXIX Rule 3¹³, on the other, there is still a doctrinal conflict between the constitutional and the statutory obligation. The irrational orders also produce another litigation in the nature of revisions, writ petitions and special leave petitions leading to further delay. More so, the interpretative variance among different courts in the application of the three-factor test results in impartiality to a like-minded applicant. It will lead to procedural inequities and hamper judicial accountability. It not only turns out to be an error but also a weakness of the civil procedure structure. It requires dogmatic clarity and structural redress as opposed to judicial spanking.

RESEARCH QUESTIONS

The following are the research questions that will be discussed in this paper:

1. Does the current legislative rule under the CPC place a record keeping obligation on courts to give reasons when they issue interim orders, and what is the scope and content of such obligation?
2. What are the constitutional foundations of the obligation to give reasons, and how do Articles 14 and 21 of the Constitution of India bear upon the grant of interim relief without reasons?
3. what are the recorded procedural, substantive and systemic impacts of the practice of making interim orders without recording causes?

¹⁰ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908 (India).

¹¹ *Dalpat Kumar v. Prahlad Singh* AIR 276B (SC 1993).

¹² *Dunlop India Ltd. v. Union of India*, AIR 597 (SC 1977).

¹³ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXIX, Rule 3.

4. How are comparative jurisdictions - i.e. England and the United States - regulating the grant of interim relief, and what are the lessons that India may learn on the same?
5. Which legislative, procedural, and institutional changes are adequate and warranted to guarantee that Indian courts do capture reasons when declining or approving interim orders?

PROPOSITION

This paper asserts the following thesis: the practice of granting interim orders without recording reasons is not only contrary to good judicial practice, but is a breach of the constitutional obligation of reasoned adjudication, a violation of the legislative duty expressly imposed by the proviso to Order XXXIX Rule 3 of the CPC, and a structural source of injustice that permits abuse, impedes appellate review and distorts the adversarial balance between litigants. The remedy lies not in further judicial rulings which six decades of Supreme Court condemnation have shown to be insufficient, but in targeted statutory reform: specifically, the introduction of a general Rule 3B in Order XXXIX requiring brief reasons for all interim orders, accompanied by mandatory procedural checklists for ex parte orders, appellate remand protocols and structured judicial education. This assertion is doctrinal in nature: it does not assert a hypothesis but rather makes the normative argument that the rule of law, procedural justice and constitutional fidelity each demand that the exercise of judicial power in the interim context be preceded by intelligible justification.

CHAPTER-2

RESEARCH METHODOLOGY

Research Design: -

The research approach is a doctrinal legal approach which entails largely researching case laws, legal commentaries, as well as scholarly articles.

Data Collection Sources: -

In this case, the researchers have used two sources of data both primary and Secondary. Primary sources have been considered as landmark case laws. These are the sources of the legal background and judicial viewpoints of the question. The secondary sources are mostly books, scholarly articles, research papers etc, which have been written by jurists, sociologists and the scholar, giving a critical perspective through which the question of the research can be analyzed. Since they are secondary sources, they serve to supplement the law provisions by offering theoretical and practical discourses that enable one to have a comprehensive vision of the matter.

Analysis: -

This study will be based on textual study of legal texts, legal cases and legal commentaries to analyze.

CHAPTER-3

LEGISLATIVE FRAMEWORK & JUDICIAL PRECEDENTS

1. Order XXXIX¹⁴

Order XXXIX of CPC regulates the grant of temporary injunctions is the main statutory device of interim relief in civil proceedings, as it gives the courts the power to prohibit a party against performing or persisting a certain act in anticipation of the final judgment.

2. Order XXXVIII¹⁵

It governs attachment before judgment, enabling courts to secure the defendant's property before a decree is passed so as to prevent its dissipation.

3. Order XL¹⁶

It governs the appointment of a receiver, placing disputed property under the protection of a court-appointed officer during the pendency of proceedings.

4. Section 151¹⁷

Section 151 of the Code of Civil Procedure states that nothing in the Code takes away or limits the Court's inherent power to pass such orders as may be necessary to ensure justice or to prevent misuse of the Court's process. So, where no specific provision under Orders XXXIX, XXXVIII, or XL covers the nature of relief sought, a court may grant interim protection under Section 151 to prevent injustice or abuse of process. For example, status quo orders which have no express statutory backup in the CPC are routinely passed by courts invoking Section 151 as their source of authority.

5. Stay of Proceedings Orders

Stay of proceedings draws its authority from multiple statutory sources depending on the context. Section 10 of the CPC¹⁸ mandates a stay where two suits between the same parties on the same matter are pending simultaneously. Order XLIII Rule 1¹⁹ empowers the appellate court to stay the operation of an order appealed against, while Section 24²⁰ contemplates a stay when proceedings are transferred to another court. Where no express

¹⁴ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXIX.

¹⁵ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXVIII.

¹⁶ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XL.

¹⁷ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) s. 151.

¹⁸ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) s. 10.

¹⁹ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XLIII, Rule 1.

²⁰ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) s. 24.

provision governs the situation, courts invoke the residuary inherent power under Section 151²¹ to stay proceedings in the interests of justice or to prevent abuse of process. Stay of proceedings therefore differs from status quo orders which have no express statutory provision.

6. Amendments in CPC, 1908

The proviso to Order XXXIX Rule 3²², inserted by the CPC Amendment Act 1976²³, expressly requires courts to *record reasons* before granting ex parte injunctions. The CPC Amendment Acts of 1999 and 2002 reinforced the duty of expeditious disposal. Rule 3A²⁴, inserted by the 1999 amendment²⁵, requires that where an ex parte injunction has been granted, the application must be heard and finally disposed of within thirty days of the date on which the injunction was granted which ensures that the party against whom an ex parte order operates is not left in that position indefinitely without a hearing on the merits. The Code of Civil Procedure (Amendment) Act 2002²⁶ also introduced several significant changes. It replaced the Order XVII²⁷, on adjournments, limited the grant of adjournments and stated that no more than three adjournments should be allowed to a party when a suit was being heard.

7. Judicial Precedents

Apart from being a procedural expectation, the requirement to subsequently note reasons when passing interim orders is a constitutional requirement that is firmly established by the judiciary. The High Court of Orissa in *Krishna Bapi Raju G v Union of India*²⁸ authoritatively stated that once an appeal is brought to an appellate court against a discretionary order, it is the requirement of the court at the first instance, to note down brief reasons in respect of passing of an interim order pending final adjudication, the only effect of which is to enable the appellate court to determine whether the discretion exercised is something to interfere. The Court further held that recording of reasons is a statutory responsibility cast upon the court, and that the power to grant interim relief does not absolve the court of its solemn duty to record reasons in support thereof.

²¹ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) s. 151.

²² Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXIX, Rule 3.

²³ Code of Civil Procedure (Amendment) Act, 1976, No. 104, Acts of Parliament, 1976 (India).

²⁴ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXIX, Rule 3A.

²⁵ Code of Civil Procedure (Amendment) Act, 1999, No. 46, Acts of Parliament, 1999 (India).

²⁶ Code of Civil Procedure (Amendment) Act, 2002, No. 22, Acts of Parliament, 2002 (India).

²⁷ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XVII.

²⁸ *Krishna Bapi Raju G. v. Union of India*, W.A. No. 1927 of 2025 (Orissa HC).

The importance of reasons in judicial decision-making was underscored by the Supreme Court in *Shiv Kumar Chadha v Municipal Corporation of Delhi*²⁹ where it was held that an interim order passed without reasons fails to meet the basic standard of adjudication. This position was reiterated in *Morgan Stanley Mutual Fund v Kartick Das*³⁰ reinforcing that reasons are the heartbeat of every decision-making process. The constitutional obligation to record reasons was confirmed by a Constitutional Bench in *S N Mukherjee v Union of India*³¹ and reaffirmed in *Krishna Kumar v Union of India*³² as a mandate rooted in Articles 14 and 21 of the Constitution. In *Kranti Associates (P) Ltd v Masood Ahmed Khan*,³³ the Supreme Court comprehensively summarised the judicial trend, holding that in India courts have always been required to record reasons even in administrative decisions if such decisions affect anyone prejudicially; that reasons operate as a valid restraint on arbitrary exercise of power; that they facilitate judicial review by superior courts; and that transparency in decision-making is the sine qua non of restraint on abuse of judicial power. The Court further held that a pretence of reasons or "rubber-stamp reasons" cannot be equated with a valid decision-making process.⁶ This was affirmed in *Nareishbhai Bhagubhai v Union of India*,³⁴ where the Supreme Court held that the requirement to record reasons has virtually become a component of human rights and is part of due process in all common law jurisdictions.

The Orissa High Court in *Santosh Kumar Paikray v State of Odisha*³⁵ added that reasons are the links between the materials on which conclusions are based and the actual conclusions reached, and that fair play requires recording of germane and precise reasons whenever an order affects the right of a citizen. Any order bereft of reasons, the Court held, cannot be regarded as a proper order in the eye of law. The reason is the heartbeat and soul of an order without which it cannot survive.

²⁹ *Shiv Kumar Chadha v. Municipal Corp. of Delhi*, AIR ONLINE 417 (SC 1993)

³⁰ *Morgan Stanley Mut. Fund v. Kartick Das*, SCC (4) 225 (SC 1994)

³¹ *S.N. Mukherjee v. Union of India*, AIR 1984 (SC 1990)

³² *Krishna Kumar v. Union of India*, AIR 1390 (SC 1959)

³³ *Kranti Assocs. (P) Ltd. v. Masood Ahmed Khan*, MANU 0682 (SC 2010)

³⁴ *Nareishbhai Bhagubhai v. Union of India*, MANU 1084 (SC 2019)

³⁵ *Santosh Kumar Paikray v. State of Odisha*, 2016 (II) OLR 1131 (Ori.).

8. The Three-Factor Test

Courts have, through judicial interpretation, developed a three-factor framework for evaluating applications for interim relief. The first factor is the prima facie case. The court must be satisfied that a strong prima facie case exists in favour of the petitioner, extending beyond bare merits to encompass locus standi and justiciability of the subject matter. The liberalisation of locus standi through public interest litigation commencing with *SP Gupta v Union of India*³⁶ has expanded this element, though simultaneously increasing the risk of instrumentally motivated applications. The second factor is the balance of convenience which is measured by the harm to the petitioner by not granting temporary injunction and by the harm that may be caused to public interest or to others by granting such injunction. The third factor is irreparable injury i.e., the refusal to grant relief must cause injury incapable of subsequent compensation by damages. This is a high threshold that practice has seen routinely bypassed. These are the three pillars of Injunction Order.³⁷ The new factor which the authors have found out is maintainability, encompassing locus standi and justiciability. In *State of Rajasthan v Union of India*,³⁸ the Supreme Court declined to adjudicate on political grounds, treating the matter as non-justiciable. Even where a prima facie case on the merits exists, a court will not grant interim relief if the underlying proceeding is not maintainable.

9. Law Commission Reports

The Law Commission of India has repeatedly flagged the problem of unreasoned interim orders across six decades. The 14th Report (1958)³⁹ and the 27th Report (1964)⁴⁰ identified the tendency of courts to grant ex parte orders without adequate scrutiny, while the 77th Report (1978)⁴¹ and the 124th Report (1988)⁴² both recommended that courts record brief reasons when passing any interim order. All this was reinforced in the 253rd Report (2015)⁴³ on Commercial Courts on unreasoned interlocutory orders as a major source of delay and uncertainty in commercial disputes. These recommendations have

³⁶ *S.P. Gupta v. Union of India*, AIR 149 (SC 1982).

³⁷ See Priyanka Shankar, *Prima Facie Case, Balance of Convenience & Irreparable Injury Are Three Pillars for Granting Injunction: Gujarat High Court*, LiveLaw (Feb. 22, 2022), <https://www.livelaw.in/news-updates/gharar-high-court-prima-facie-case-balance-of-convenience-irreparable-injury-three-pillars-injunction-order-195471>.

³⁸ *State of Rajasthan v. Union of India*, AIR 1361 (SC 1977).

³⁹ Law Comm'n of India, *Reform of Judicial Administration*, Report No. 14 (1958).

⁴⁰ Law Comm'n of India, *Code of Civil Procedure, 1908*, Report No. 27 (1964).

⁴¹ Law Comm'n of India, *Delay and Arrears in Trial Courts*, Report No. 77 (1978).

⁴² Law Comm'n of India, *The High Court Arrears—A Fresh Look*, Report No. 124 (1988).

⁴³ Law Comm'n of India, *Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015*, Report No. 253 (2015).

been consistent over 60 years, and the fact that they have not been put into practice indicates the existence of a structural issue that cannot be addressed through legislative tinkering.

CHAPTER-4

FINDINGS/ISSUES AND CHALLENGES

1. The Congestion-Driven Interim Order Trap

The docket congestion crisis in Indian courts is decades old and has no indication of being resolved in the future. No other way to ensure that the position is not lost is by getting an interim order immediately at the steps of the case as parties cannot reasonably wait years before a final decision on the case is arrived at. Courts themselves, swamped and pressed to clear their daily boards, grant interim applications on the spot, without it being addressed with the rigor which might be required of their ultimate practical ramifications. The interim order becomes the de facto final judgment which is adjudged upon with a fraction of the deliberation that a final judgment would have.

2. Violation of Natural Justice and the Symmetry Principle

In the event of a legal remedy being granted, the injury caused on the defendant is the one that would have been caused on the plaintiff by the refusal. It is this symmetry that is the reason why legal remedies are usually afforded after a complete hearing of the merits. The grant of relief, without reasons, without notice, and without reference to the three factors test, not only fails to protect the plaintiff but also causes an unwarranted injury to the defendant. This harm is augmented when the orders are granted ex parte pursuant to Rule 3, which breaches the principle of audi alteram partem that the Supreme Court has identified as one of the pillars of natural justice. So if a court does not explain its decision, no one can check whether it was fair, legal, or correct. And if no one can check it, the court cannot truly be held responsible for what it does. That is why giving reasons is very important for transparency and accountability in the judicial system.⁴⁴

3. The Abuse of Interim Orders: A Documented Crisis

The abuse of the interim order process is a documented crisis that the Supreme Court itself has catalogued with unusual candour. In *Dunlop India Ltd case*, Justice Chinnappa Reddy

⁴⁴ Anya Bernstein, *Judicial Accountability*, 113 Georgetown Law Journal 651 (2025).

spoke with evident frustration about courts that had developed an unwarranted tendency to grant interim orders with great potential for public mischief for the mere asking — orders that were often ex parte and non-speaking, passed even by High Courts under Article 226.⁴⁵ The Court catalogued specific abuses: public revenue jeopardised, welfare legislation stayed, seized commodities released, and entire government services left in suspended animation. In *Siliguri Municipality v Amalendu Das*,⁴⁶ the Court warned that stays of tax recovery should be an exception and not a rule. In *Samarias Trading Co Pvt Ltd v S Samuel*,⁴⁷ the Court laid down under Article 141⁴⁸ that entertaining oral applications and issuing interim orders thereon must immediately cease, holding that a court without a contemporaneous record ceases to be a court of record. In *Lakshmi Charan Sen v AKM Hassan Uzzaman*,⁴⁹ a Constitution Bench set aside the stay of an entire state assembly election, recognising that the democratic process itself is imperilled by interim orders granted without adequate justification.

4. Impediment to Appellate Review

Unreasoned interim orders create a structural impediment to effective appellate supervision. Under Section 104⁵⁰ read with Order XLIII Rule 1,⁵¹ an appeal lies from an order granting or refusing an injunction but when no reasons have been recorded, the appellate court is left without any foundation for review. It cannot assess whether the lower court correctly engaged with the three-factor test or the irreparable injury threshold was reached or not. By expressly noting that the trial courts have not yet documented their consideration of the factors in question, the Supreme Court in *Dorab Cawasji Warden v Coomi Sorab Warden*⁵² noted that the appellate courts should take care not to vacate the review by unreasoned orders, thus admitting the absence of review created by unreasoned orders.

⁴⁵ India Const. art. 226.

⁴⁶ *Siliguri Municipality v. Amalendu Das*, MANU 0017 (SC 1984).

⁴⁷ *Samarias Trading Co. Pvt. Ltd. v. S. Samuel*, MANU 0014 (SC 1984).

⁴⁸ India Const. art. 141.

⁴⁹ *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman*, MANU 0567 (SC 1983).

⁵⁰ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) s.104.

⁵¹ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XLIII, Rule 1.

⁵² *Dorab Cawasji Warden v. Coomi Sorab Warden*, MANU 0161 (SC 1990).

5. Strategic Litigation and Doctrinal Inconsistency

Marc Galanter's main idea is that parties who go to court frequently (repeat players) have special procedural advantages that ordinary one-time litigants do not have. This difference becomes very clear in the Indian system of interim orders, where repeat players are often better able to use the legal process to their benefit.⁵³ A litigant with substantial resources who successfully secures an ex parte injunction without explanation benefits both immediately and permanently: the business operations of the defendant are crippled but there are no grounds in the order that can be used on appeal. This twists the litigation scene in support of an entity (litigant) that initiates first as opposed to a party that has a better legal case. To make matters worse, there exists an acute disparity in the recording of reasons between courts, the Supreme Court and commercial High Courts regularly issue reasoned orders, whilst the lowest docket pressure district courts are the ones that issue unreasoned relief in the highest numbers. Andhyarujina notes that this tendency has only been reinforced in the High Court level since the 1990s despite the frequent criticism of the Supreme Court even confirms the ineffectiveness of judicial censure without structural reform.⁵⁴

⁵³ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Society Review 95, 114 (1974).

⁵⁴ See NNLRJ INDIA, *Disturbing Trends in Judicial Activism*, India Lawyers' Blog (Aug. 6, 2012), <https://indialawyers.wordpress.com/2012/08/06/disturbing-trends-in-judicial-activism/>.

CHAPTER-5

SUGGESTIONS AND REFORM PROPOSALS

1. Codify the Duty to Record Reasons

The most radical is the reform of Order XXXIX⁵⁵ to make it clear that any order granting or refusing interim relief should document, albeit concisely, how the court has evaluated each factor in the three-factor test. The legislature has already done this for ex parte injunctions in the proviso to Rule 3.⁵⁶ What is needed is a general Rule 3B extending the same obligation to all interim orders. Two or three sentences per factor would suffice but it would create a minimum floor of accountability consistent with the constitutional imperative.

2. Mandatory Checklist for Ex Parte Orders

For ex parte orders specifically, a standardised procedural checklist should be prescribed, requiring the court to record why notice was dispensed with, the specific harm that would result from delay, the precise scope of the order, and the return hearing date. The 253rd Law Commission Report⁵⁷ recommended its adoption for commercial courts,³ and the Commercial Courts Act 2015⁵⁸ should be amended to mandate this. As Desai and Muralidhar argue, institutionalised procedural checklists are more effective than aspirational statutory language in changing entrenched judicial behaviour.⁵⁹

3. Appellate Protocols

The lack of reasons should be viewed as a procedure irregularity by appellate courts that should be remanded because of reasons and not vacated automatically. This maintains the efficiency of the trial courts and implements responsibility. Reasonless ex parte injunctions ought to be automatically vacated in case no reasons are entered during the Rule 3A thirty-day period.

⁵⁵ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXIX.

⁵⁶ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, (India) Order XXXIX, Rule 3.

⁵⁷ Law Comm'n of India, *Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015*, Report No. 253 (2015).

⁵⁸ Commercial Courts Act, 2015 (India).

⁵⁹ Ashok Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* 159, 170 (B.N. Kirpal et al. eds., 2000).

4. Judicial Education

The National Judicial Academy needs to come up with systematic training programs of drafting of reasoned interim orders. High Courts should exercise supervisory jurisdiction under Article 227⁶⁰ to issue practice directions requiring subordinate courts to record minimum reasons, building an institutional culture of accountability from within.

5. Comparative Lessons

Under the English Civil Procedure Rules 1998, Part 25⁶¹ requires reasons for interim injunctions. Under the American Federal Rules, Rule 65⁶² requires specific findings of fact and conclusions of law for every preliminary injunction.⁹ Neither system requires lengthy judgments. Both require that judges articulate the basis of their decision in reviewable terms. India's reforms should draw on these models while remaining sensitive to the institutional capacity constraints of its vast court system.

⁶⁰ India Const. art. 227.

⁶¹ Civil Procedure Rules 1998, (Eng.) pt. 25.

⁶² Fed. R. Civ. P. 65.

CONCLUSION

The problem of unreasoned interim orders is, at its deepest level. Courts exist to adjudicate disputes according to law. The essence of adjudication is the reasoned application of legal standards to facts. When a court issues an injunction which paralyzes a defendant's business, which interrupts a tax recovery to the public services, or which freezes assets for years without any justification, then it has stopped judging and started ordering.

The three-factor test prima facie case, balance of convenience, irreparable injury, and the maintainability (newly added) is not a form of bureaucracy. It captures the knowledge of centuries of equity jurisprudence of when it is proper to interfere prior to the hearing itself and when not. The principle of symmetry, upon which it is based, is easy but far-reaching in that since interim relief is harmful to the defendant no more than a refusal is harmful to the plaintiff, the court must explain the decision which they make. It is at least justification that reasons give. They are essential to the three-factor test and its absence renders the test a prayer they repeat to one another during judgments, but disregard in their actual practice. Without reason, as the High Court of Orissa recently and rightly determined, in *Krishna Bapi Raju G v Union of India*, the heartbeat and the soul of an order which cannot exist without reason, and it is the fervent responsibility of every court to make a cursory finding prior to making an interim order.

The current system of legislation does have an obligation to document a rationale of reasons - but not fully. This duty specifically applies to ex parte injunction, as stipulated in the proviso to Order XXX IX Rule 3, which was added in 1976. The missing general provision of such an obligation to all the interim orders is the main legislative gap identified in this paper. Such silence has been taken by the courts to mean nothing, when it ought to be interpreted as a void in need of immediate redress.

The constitutional basis of this duty is also very apparent. Article 14 and Article 21 of the Constitution upheld by the Supreme Court in *Krishna Kumar v Union of India* confirm the implication that the obligation to provide reasons is a constitutional defense against arbitrary exercise of judicial power and not a procedural formality. The duty is also based upon the audi alteram partem principle and upon the principle of the rule of law itself, the duty of all exercises of public power to be intelligibly explained to their victims.

The results of overlooking this duty have been drastic and systematic. The Supreme Court in *Dunlop India Ltd* case enumerated the recorded misuse of the revenues of the population,

welfare laws and necessities. *Samarias Trading Co* case showed that oral petitions had the ability to result in some never ending continuously stays that were not recorded at the time. In addition to abuse, unreasoned orders interfere with the appellate process, permit litigation to be strategic where resources are available, spawn secondary challenge proceedings, which increase the delay process multiplied by itself, and add to the same docket congestion that created them in the first place.

The relative experience proves that the reform is needed and possible. Under the English law with the Civil Procedure Rules of 1998 Part 25 and Practice Direction 25A, without-notice orders need reasons and mandatory dates of their return. The Federal Rules Rule 65 guarantees that every preliminary injunction must have certain findings of fact and conclusions of law as per the American law. These two systems show that the minimum reasons requirement does not have to raise the hearing times- all it needs is a change of judicial culture towards accountability.

The Law Commission has proposed reasons to be mandatory in three individual reports over a sixty-year period. However the history of the Supreme Court in 1980s given by Chandrachud indicates that internal judicial culture was hard to formalise the requirement despite the Court being most outspoken in its attack on unreasoned orders, again showing that legislative change is needed exactly because the informality of compliance has not worked.⁶⁴ The missing thing is not the diagnosis but the prescription, the prescription is not the will to administer it but the missing thing is the prescription.

The reforms suggested in this paper: an overall statutory obligation to make reasons when a new Rule 3B, a set of procedural checklists requiring ex parte orders, a system of appellate remand precautions, and a system of judicial education are modest, in proportion, and long overdue. The constitutional theory of Khaitan is a reminder that the rule of law dictates not just that the decisions made by the law be according to law but that they should be able to clearly explained to the people to whom they have an impact. An open-minded judiciary is a judiciary which can be held to account. The revival of the role of reasoned interim adjudication does not therefore involve only a procedural change, but a question of constitutional loyalty and civil justice integrity in India.