INHERENT JURISDICTION AND INHERENT POWERS OF IRISH COURTS

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INTRODUCTION

The notion of a court's "inherent jurisdiction" is familiar to legal practitioners. Counsel frequently exhort the court to utilise its inherent jurisdiction in response to failures of procedural justice, whilst, in the absence of a specific statutory jurisdiction, the concept is often invoked by judges to give efficacy to judicial proceedings. "Inherent jurisdiction" is generally understood as referring to the panoply of implied powers which are exercisable by judges for the purpose of regulating curial processes. The difficulty of formulating legal principles to capture the shifting and dynamic nature of the jurisdiction has been the subject of both academic and judicial commentary. One commentator has described a court's "inherent jurisdiction" as "so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits".[1] An Australian judge, in his analysis of the jurisdiction, has commented:

> What is this species of jurisdiction? We have all heard Judges anxious to make obviously just orders, but uncertain of an express statutory authority, resorting, sometimes – I have thought, rather coyly – to the inherent jurisdiction of the court. We have also heard inadequately prepared Counsel, inviting resort to the

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[1] Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23.

> inherent jurisdiction, and being chided by a Judge who is acquainted with a specific statutory authorisation.[2]

The concept of a court possessing "inherent jurisdiction" is unsettling to a lawyer educated in a constitutional tradition founded on the separation of powers and the supremacy of parliament. The idea of an auxiliary stream of jurisdiction existing in parallel to constitutionally authorised sources of jurisdiction seems to cut across the parameter of Article 15.2 of the Irish Constitution vesting the "sole and exclusive function of making laws" in the Oireachtas. Another cause for unease is the jurisdiction's apparently limitless character, inviting the prospect of judges, unconstrained by the gravitational pull of precedent, invoking the jurisdiction to justify all manner of eccentricity in decision-making.

In this essay, it is proposed to examine the origin, juridical basis and scope of the court's inherent jurisdiction. It is intended to demonstrate that judges are, in fact, misinterpreting and misapplying the term "inherent jurisdiction" and confusing it with another quite distinct concept – that of a court's "inherent powers". By sifting through the tangled jumble of precedents in this area, it will be attempted to thematise the judicial interventions giving rise to courts' inherent jurisdiction and inherent powers and to propose formal categories for classifying the functions falling within the ambit of these concepts.

II. DIVERGENT JUDICIAL PERSPECTIVES

The doctrine of inherent jurisdiction is a creature of the English common law. Baron Alderson's decision in *Cocker v. Tempest*[3] in 1840 is often cited as the originating point for the emergence of the doctrine. He commented "the power of each court over its own processes is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice". The modern restatement of the doctrine

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[2] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (1985) 15 *Queensland Law Society Journal* 325, 326.
[3] *Cocker v. Tempest* (1841) 7 M & W 501.

finds expression in two divergent strands of case-law. In 1981, in *Bremer Vulkan Schiffbau und Maschinenfabrick v. South India Shipping Corporation Ltd*,[4] Lord Diplock described the inherent jurisdiction as a power enabling the court to do acts necessary in order to enable it to maintain its character as a court of justice. He remarked "it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability at arriving at a just decision of the dispute".[5]

A contrasting strand of case-law, however, characterises the inherent jurisdiction as a *substantive* jurisdiction, an unspecified or residual jurisdiction vesting unlimited authority in certain courts to hear any matter where the jurisdiction has not been ousted by statute or other rule. Thus, in the Canadian case of *80 Wellesley St. East Ltd v. Funday Bay Builders Ltd*,[6] the court stated that "[e]xcept where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters".[7]

An even broader view of the jurisdiction was taken in *Re Residential Warranty Co. of Canada Inc*.[8] in which it was stated that the inherent jurisdiction co-exists with statutory jurisdictions, and a judge is not precluded by codification of the law from invoking his inherent jurisdiction where the benefits of granting a particular remedy outweigh the detriment caused by its application. Commenting on these trends in Canadian jurisprudence, Farley has observed, "[f]ar from being restricted to process, inherent jurisdiction is fundamental to ensuring that justice is done substantively".[9]

It can be seen from a cursory review of the case-law on the doctrine of inherent jurisdiction that judicial perspectives on

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[4] [1981] A.C. 909.

[5] [1981] A.C. 909, at 977.

[6] *80 Wellesley St. East Ltd v. Funday Bay Builders Ltd*. [1972] O.J. No. 1713 (CA).

[7] Quoted in Farley, "Minimize codification by expanding use of inherent jurisdiction", *The Lawyers Weekly*, (2007) November, available at www.lawyersweekly.ca/index.php?section=article&articleid=576.

[8] *Re Residential Warranty Co. of Canada Inc*. [2006] A.J. No. 1304 (CA).

[9] Farley, "Minimize codification by expanding use of inherent jurisdiction" (note 7).

the nature, basis and scope of the jurisdiction sharply diverge. Apart from the pivotal question as to whether the jurisdiction enables judges to adjudicate in relation to substantive issues of law, confusion also exists on the question as to which courts may exercise this jurisdiction. Is the jurisdiction exercisable by both constitutional and statutory courts, or is it a jurisdiction which is vested only in superior courts of record? With respect to states which have adopted written constitutions – such as Ireland – it must be considered whether the concept of inherent jurisdiction has survived the imposition of a new form of constitutional design. Where it is found that the inherent jurisdiction co-exists with constitutionally authorised jurisdictions, the question of demarcating the precise interface between the constitutional and inherent jurisdiction arises.

III. CONCEPTUAL CONFUSION

A major source of the confusion that has arisen on the doctrine of inherent jurisdiction is that judges are conflating it with the concept of a court's inherent powers. The two concepts are quite distinct. Inherent jurisdiction refers to a general and original jurisdiction of certain superior courts to hear and determine any matter at first instance. By contrast, inherent powers have arisen to consummate imperfectly constituted judicial power. Thus, whilst inherent jurisdiction is substantive, inherent powers are procedural. Master Jacob's seminal article, "The Inherent Jurisdiction of the Court",[10] exhibits the confusion which arises where the distinction between inherent jurisdiction and inherent powers is not discerned. He states:

> The essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but lack substance. The jurisdiction, which is inherent in a superior court

[10] Jacob, "The Inherent Jurisdiction of the Court" (note 1).

> of law, is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.[11]

Described as "spectacularly unhelpful",[12] this widely cited article has spawned widespread confusion in common law jurisdictions on the concept of inherent jurisdiction, causing judges, in demarcating the perimeters of the jurisdiction, to confuse it with a court's inherent powers. What Jacob is, in fact, referring to in the above passage are inherent powers. The error is not merely semantic: the blurring of the distinction between inherent jurisdiction and inherent powers is symptomatic of conceptual confusion.

Whether one interprets Jacob's passage as referring to inherent jurisdiction or inherent powers, it is an incorrect statement of the law. According to Jacob, all "superior courts" have inherent jurisdiction. However, in Ireland, only the High Court has inherent jurisdiction; neither the Supreme Court nor the Court of Criminal Appeal – both "superior" courts – has inherent jurisdiction. If, on the other hand, the passage is interpreted as intending to refer to inherent powers, then it is inaccurate to say that these powers are possessed only by "superior courts"; all courts – both constitutional and statutory – have inherent powers.

IV. DISTINCTION BETWEEN "JURISDICTION" AND "POWER"

Translated from the Latin, "jurisdiction" means "the power to speak the law".[13] Jurisdiction denotes the constitutionally mandated authority of a court to take seisin of and determine causes according to law and to carry sentencing into execution. Thus, it is axiomatic that jurisdiction is granted by law.

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[11] Jacob, "The Inherent Jurisdiction of the Court" (note 1) at 27.

[12] Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn, Brooker's, 2007), p. 807.

[13] From *iuris, ius* – meaning "law" – and *dicere* – meaning "to speak".

Jurisdiction cannot be unilaterally or arbitrarily assumed by a court or created by the consent of parties to a dispute requiring adjudication.

Irish courts' jurisdictions derive from a variety of sources, including the constitution, statute, equity and the common law. Examples of constitutional jurisdiction are the authority of the High Court to hear *habeas corpus* applications or the jurisdiction of the Supreme Court to hear appeals against decisions of the High Court. The District and Circuit Courts, being creatures of statute, may not entertain constitutional actions; they exercise only limited and local jurisdictions. Inherent jurisdiction is a jurisdiction exercisable solely by the High Court.

The source of inherent jurisdiction in Ireland is the Constitution itself. Article 34.3.1° of the constitution invests the High Court with "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". It is by virtue of this article that the High Court hears common law actions, develops equitable doctrines and derives the authority to declare the rights and liabilities of individuals.[14]

A power, on the other hand, is "an entitlement in law to use a procedural tool … to hear and decide a cause of action in the Court within jurisdiction".[15] An inherent power is exercisable by all courts. It is a power which is incidental and ancillary to the primary jurisdiction; the power is "parasitic" on the primary jurisdiction.[16] Inherent powers are part of the common law of courts[17] or, alternatively, arise by implication from the separation of powers doctrine.[18] A court invokes its inherent power in order to fulfil its constitutionally-ordained function as a court of law

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[14] Joseph, *Constitutional and Administrative Law in New Zealand* (note 12), pp. 807 and 809.

[15] *Axiom Rolle PRP Valuation Services Ltd v. Rahul Ramesh Kapadia and others* NZAC, 43/06, para. 24 – a decision of the New Zealand Employment Court, available at www.justice.gov.nz/courts/employment-court/.

[16] Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 *Canterbury Law Review*, 220, at 221.

[17] Joseph, *Constitutional and Administrative Law in New Zealand* (note 12) at 807 and 809.

[18] Website of National Center for State Courts. See "Inherent Powers", available at www.ncsconline.org/wc/CourTopics/FAQs.asp?topic=InhPow.

and to accomplish the administration of justice in a regular, orderly and effective manner.

V. INTERFACE BETWEEN INHERENT JURISDICTION AT COMMON LAW AND INHERENT JURISDICTION UNDER THE CONSTITUTION

Inherent jurisdiction originated as a common law doctrine. In England the jurisdiction was vested in the Superior Courts of Record. The jurisdiction as it exists in Ireland may be traced back to the major judicial reorganisations which took place in Ireland in the 1870s and 1920s.[19] The Judicature (Ireland) Act, 1867, transferred to the High Court of Ireland the following jurisdictions:

- The High Court of Chancery as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him or the Lord Chancellor in relation to the Court of Chancery as a Common Law Court, and including any jurisdiction of the Masters in Chancery;
- The Court of Queen's Bench;
- The Court of Common Pleas;
- The Court of Exchequer as a Court of Revenue as well as a Common Law Court;
- The Court of Probate;
- The Court for Matrimonial Causes and Matters.

In 1921, Ireland became substantially independent and, by virtue of the Irish Free State Constitution Act, 1922, the Free State Constitution of 1922 entered into force. Two years later, the Courts of Justice Act, 1924, was enacted. It established the High Court as a superior court of record with original jurisdiction as prescribed by the Constitution, and transferred to the High Court the jurisdiction which was vested in or capable of being exercised by the existing High Court of the Supreme Court of Judicature in

[19] Forde, *Constitutional Law* (2nd ed., Firstlaw, 2004), p. 1405.

Ireland. In 1937, a new constitution, Bunreacht na hEireann, was approved in a referendum and implemented into law on 29th December 1937. It established a High Court with full original jurisdiction in all matters. The Courts (Supplemental Provisions) Act 1961, s. 8(2)(a), vests in the High Court:

> … all jurisdiction which was, immediately before the commencement of Part I of the Act of 1924, vested in or capable of being exercised by the former High Court of Justice in Southern Ireland or any division or judge thereof and was, immediately before the operative date [of this Act], vested in or capable of being exercised by the existing High Court.

Thus, the inherent jurisdiction of the High Court has two sources: Article 34.3.1° of the Constitution, and the common law. However, although the two streams of jurisdiction co-exist, Article 50 of the Constitution ensures that the inherited common law categories of inherent jurisdiction are liable to be displaced or modified to the extent that they conflict with any subsequently enacted domestic law. In developing accretions to its jurisdiction to enable it to adjudicate in relation to novel litigious fact-patterns, the High Court may trigger its inherent jurisdiction under Article 34.3.1° of the Constitution rather than invoke the common law, which, by its insistence on incremental expansion of the law by analogy with precedent, constrains the creativity of the court.

VI. INTERACTION OF INHERENT JURISDICTION WITH STATUTORY JURISDICTION

The manner in which inherent jurisdiction interacts with statutory jurisdiction was considered by the Supreme Court in *G. McG v. D.V.*[20] Murray C.J. stated as follows:

> The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that

[20] *G. McG v. D.V. (No.2)* [2000] 4 I.R. 1.

> a court possesses implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by it nature only arises in the absence of the express.[21]

Before distilling a general proposition from Murray C.J.'s statement on the nature of the interaction between inherent and statutory jurisdiction, it must be observed that what the learned judge is, in fact, referring to in the foregoing passage is inherent powers (given his identification of the powers as being part of the "judicial function" or deriving from the "constitutional role" of the court). Therefore, it is not possible to extrapolate from this aspect of the judgment a principle about the interaction of statutory jurisdiction with inherent jurisdiction under Article 34.3.1°. However, further on in his judgment, Murray C.J. makes the following observation in relation to the circumstance where a particular jurisdiction is exclusively controlled by statute law.

> Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders.[22]

Thus, according to Murray C.J., where a statutory jurisdiction operates to vest additional functions in the High Court, it triggers a corresponding attenuation of the court's inherent jurisdiction. The learned judge's views are correct

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[21] *G. McG v. D.V. (No.2)*, at 26.
[22] *G. McG v. D.V. (No.2)*, at 27.

insofar as they relate to inherent jurisdiction at common law. The requirement that a statutory jurisdiction be "expressly and completely delineated" is consistent with established canons of statutory construction which, in the absence of wording to the contrary, require that rules of statute be interpreted against the backdrop of the pre-existing common law.[23]

Reinforcing the position in Ireland is Article 50 of the Constitution, which provides that all laws in existence at the adoption of the Constitution are to remain in force until repealed or amended. However, as noted, inherent jurisdiction in Ireland is anchored in the Constitution. Article 34.3.1° invests the High Court with "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". In the author's view, the failure to add limiting words to restrict the jurisdiction to matters not codified in statute is extremely significant. Many articles in the constitution are qualified. The fundamental rights articles envisage that the exercise of the rights may be curtailed in order to secure the "exigencies of the common good".[24] Article 34.1, directing that justice be administered in public, permits of exceptions for "limited and special cases" which are "prescribed by law". Thus, it is clear that statutory jurisdiction does not subsume, but co-exists with, inherent jurisdiction.

But what is the precise dynamic between statutory and inherent jurisdiction? Can the High Court, in exercise of its inherent jurisdiction, formulate a rule of law which overrides a statutory enactment? In this regard, Article 15.2.1° must be factored into consideration. It vests "sole and exclusive power of making laws for the State … in the Oireachtas". Does this article, on its proper construction, require the High Court to ensure that judicially elaborated doctrines harmonise with existing rules of statute? It is the author's view that it does not have this effect. "Laws", as referred to in Article 15.2.1°, refers merely to acts of the Oireachtas. Statutes are only one source of law in Ireland's multi-tiered legal system. Other sources of law are: the constitution, the natural law, EU law, equity and the common

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[23] *Heydon's case* (1584) 3 Co. Rep 7a.
[24] Article 43.2.2°.

law. The constitution, as a higher law, takes precedence over statutes. Since the constitution is an entrenched document – not amenable to amendment by the ordinary legislative process – it is incontrovertible that the High Court's inherent jurisdiction cannot be attenuated by a legislative enactment.

However, it would be absurd to suggest that Article 34.3.1° bestows "carte blanche" on the High Court to engage in sweeping exercises of law-creation. In exercising its constitutional jurisdiction, the court is constrained by canons of construction. The issue of the different techniques of construction which may be employed by a court in interpreting the constitution is beyond the scope of this article. Nonetheless, case-law reveals that the notion of "deference" is firmly entrenched in the Irish constitutional tradition.[25] Canons of deference require courts to defer to the interpretation of other institutions, reflecting the reality that the functions of government are distributed to three organs of government, and for the judiciary to take it upon itself to override the will of parliament would constitute an unwarranted trespass on the legislative function of government. Reinforcing the argument based on canons of deference is the notion of the presumption of the constitutionality of statutes. In *Pigs Marketing Board v. Donnelly (Dublin) Ltd*, Hanna J. stated:

> When the court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established.[26]

Thus, a judicially formulated doctrine which conflicts with a rule of statute (or intrudes into a realm presumptively staked out for regulation by the legislature[27]) would not pass

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[25] Foley, "The Proportionality Test: Present Problems" (2008) 1 J.S.I.J. 61.

[26] *Pigs Marketing Board v. Donnelly (Dublin) Limited* [1939] I.R. 413, at 417.

[27] *T.D. v. Minister for Education and others* [2001] 4 I.R. 259. In this case, the Supreme Court held that an order made by Kelly J. in the High Court directing the Minister for Education and the Eastern Health Board to provide high support and special care units for special needs children in order fill a

constitutional muster. It is clear then that, although inherent jurisdiction coexists with statutory jurisdiction, it is necessarily subordinate to it. A judge must exercise his inherent jurisdiction with the utmost restraint, ensuring that no judicially created construct operates to supersede a rule of statute. To confer on the High Court a jurisdiction to displace rules of statute would, as Murray C.J. observes, "undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders".[28]

VII. CATEGORIES OF INHERENT JURISDICTION

It is proposed to examine eight categories of the High Court's inherent jurisdiction: (a) *Parens Patriae*; (b) Judicial Review; (c) Granting of Bail; (d) Setting Aside of Unsound Judgments; (e) Disciplining of Officers of Court; (f) Punishing for Contempt; (g) Variation of Trusts; and (h) Winding up of Companies.

A. Parens Patriae

Parens Patriae means "parent of the nation". In law, it refers to the jurisdiction of the state to intervene to protect children and incapacitated individuals from abusive or negligent natural parents or legal guardians. The state, acting as *parens patriae*, is vested with authority to make decisions affecting the welfare of the persons brought under the state's protection.

1. Common Law

Parens patriae originated in England as a common law concept. The jurisdiction was exercised by the Crown in the 13th century, then transferred to the Lord Chancellor in the 17th century and, ultimately, vested in the Court of Chancery.[29]

"legislative vacuum" arising out of the failure of the legislature and executive to vindicate the constitutionally guaranteed rights of children was inconsistent with the distribution of powers between the legislative, executive and judicial arms of Government mandated by the Constitution.

[28] *G. McG. v. D.V. (No.2)* (note 20), at 27.

[29] Donnelly, "Assessing Legal Capacity: Process and the Operation of the Functional Test" (2007) 2 J.S.I.J 141, at 144.

In 1853, a part of the *parens patriae* jurisdiction was put on a statutory footing. Section 47 of the Regulation of Commission in Lunacy Act, 1853 established a Court of Protection entrusted with functions to manage the affairs of legally incapacitated adults. In Ireland, the state's wardship jurisdiction with respect to persons of unsound mind was granted a separate statutory basis by virtue of the Lunacy Regulation (Ireland) Act, 1871. The jurisdiction, although technically vested in the Crown, was, in practice, delegated to the Lord Chancellor. With respect to Ireland, the jurisdiction was formally transferred to the Lord Chancellor by virtue of the Government of Ireland Act, 1920. After adoption of the Free State constitution, the Courts of Justice Act, 1924, was enacted which vested in the Chief Justice the wardship jurisdiction which was exercisable by the Lord Chancellor under the Government of Ireland Act, 1920.

In 1937, a new constitution, Bunreacht na hEireann, was adopted. Section 9 of the Courts (Supplemental) Act, 1961 transferred the jurisdiction in lunacy and minor matters formerly exercised by the Lord Chancellor of England to the President of the High Court. The Supreme Court affirmed in *In re a Ward of Court*[30] that the *parens patriae* jurisdiction survived enactment of the Free State constitution and continues to exist alongside the statutory jurisdiction.

With respect to the *parens patriae* jurisdiction as it relates to minors, the court's jurisdiction again has its origins in English law. The wardship of children originated as a property right arising out of the feudal system of tenures. Up until 1660, the Court of Wards and Liveries was entrusted with the administration of the jurisdiction. When tenures and the court were abolished, the concept of wardship survived and the jurisdiction with respect to the wardship of children was taken over by the Court of Chancery.[31] The survival of this aspect of the *parens patriae* jurisdiction has been recognised by the English courts in such cases as *Re E. (a minor),*[32] *Re W. (a minor)*[33] and

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[30] *In re a Ward of Court* [1996] 2 I.R. 79, at 103-107.

[31] Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand" (note 16), at 226.

[32] *Re E. (a minor)* [1990] 9 B.M.L.R. 1.

[33] *Re W. (a minor)* [1992] 4 All E.R. 648.

Re C. (a child) H.I.V. test.[34] In Ireland, the wardship jurisdiction was exercised by the Lord Chancellor up until 1922. After the Treaty, the jurisdiction was vested in the Lord Chief Justice of Ireland. Under the Courts of Justice Act 1924, the jurisdiction was transferred to the Chief Justice of Saorstát Eireann and, ultimately, following enactment of the Courts of Justice Act 1936, it devolved onto the President of the High Court. The President currently retains the jurisdiction by virtue of section 9 of the Courts (Supplemental) Provisions Act, 1961.

2. The Constitution

Whether the High Court may invoke its inherent jurisdiction, under Article 34.3.1° of the Irish Constitution to assume functions analogous to the *parens patriae* prerogatives at common law requires a consideration of the manner in which Article 34.3.1° interacts with related constitutional Articles 40.3 and 40.2.5°.

> Article 40.3 provides that:
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> 1° - The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° - The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.
>
> Article 40.2.5° provides that:
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> In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

[34] *Re C. (a child) H.I.V. test* [1999] 3 F.C.R. 289.

It is evident that these articles, requiring the State, in exceptional cases, to assume protective obligations towards its citizens and children, pre-empt part of the ancient *parens patriae* jurisdiction. The extent to which the jurisdiction has been eroded depends on the scope of Articles 40.3 and 40.2.5°. A review of the case-law which has grown out of judicial exegesis of these articles (a task which is beyond the scope of this paper) would assist in shedding light on this question. It is clear, however, that the jurisdiction conferred by Articles 40.3 and 40.2.5° is wider than the *parens patriae* jurisdiction, in that it is not confined to scenarios where a citizen or child has been admitted to wardship. On the other hand, it must be noted that, in one respect, Article 40.2.5° is more limiting than the *parens patriae* jurisdiction: it authorises the State to supply only the role of "parents" thereby excluding from its ambit individuals who stand in *locus parentis* to children.

B. Judicial Review

Judicial review in Ireland has a dual function. It empowers the Supreme Court to review statutes enacted by the Oireachtas to test their compatibility with the provisions of the constitution.[35] Judicial review also plays a pivotal role in administrative law. It defines a mechanism by which the High Court supervises the exercise of public power, ensuring that bodies entrusted with such power act within the limits imposed by law. It is this aspect of the jurisdiction that falls within the High Court's general or inherent jurisdiction.

Judicial review is a common law concept which traces its origin to *Dr. Bonham's Case* of 1610. Sir Edward Coke, sitting as Chief Justice of England's Court of Common Pleas, inaugurated the notion of judicial review when he declared "when an act of parliament is against common right and reason or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void".[36] With respect to administrative

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[35] Article 26 of the Irish Constitution.

[36] Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003). Vol. 1. Chapter: *Dr. Bonham's Case*; see also the entry on "Judicial Review" in *West's Encyclopedia of American Law* (Gale Group, Inc., 1998).

law, the Superior Courts in England developed a review jurisdiction which, at its inception, was exercised by the King's Council. A number of writs were developed by the courts, such as the writ of error (which created a procedure for correcting errors of courts of record) and the writ of review (the vehicle used to review the decisions of lowers courts and administrative bodies). From 1600 onwards, the King's Bench began to encroach on the functions of the King's Council, gradually assuming its judicial review prerogatives. Judicial review, in England today, is exercised as part of the superior courts' inherent jurisdiction, and is commonly delegated to administrative panels, operating within the High Court.

In Ireland, the High Court invigilates the exercise of judicial and quasi-judicial power by courts and administrative bodies by virtue of its inherent jurisdiction under the Constitution. Replicating the remedies developed by the English courts, the High Court has developed a range of reliefs including certiorari, mandamus, prohibition and *quo warranto* which it will consider granting of foot of an application for judicial review. Order 84 of the Rules of the Superior Court codifies a procedural framework which regulates the manner in which applications for judicial review may be brought before the High Court.

C. Granting of Bail

In England, the High Court hears bail applications under its inherent jurisdiction, though the application must be sought by way of ancillary relief to another proceeding such as an appeal or a judicial review application.[37] In other common law jurisdictions, the principle that bail can be granted only as a part of some other type of High Court proceeding has been discarded.[38] In Ireland, the High Court grants bail by virtue of its inherent jurisdiction under the Constitution. Again, in contrast to the position in England, the court will hear an application for bail *in vacuo*, and not just as an aspect of another type of proceeding.

The importance of discerning the juridical foundations of inherent jurisdiction is brought into sharp focus by the

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[37] *R. v. Secretary of State for the Home Department, ex p. Turkoglu* [1988] Q.B. 398, at 400.

[38] *Zaoui v. A.G.* [2005] 1 N.Z.L.R. 666 (S.C.).

New Zealand decision of *Zaoui v. A.G.*[39] concerning an appeal to the Supreme Court against a refusal of the High Court to grant bail. Taking the view that the High Court had erred in refusing bail, the Supreme Court proceeded to declare that it was "prepared to exercise the original jurisdiction of the High Court before remitting the matter to that Court for any continuing supervision".[40] As the Supreme Court in New Zealand possesses only inherent powers and not inherent jurisdiction, it is evident that, with respect to this aspect of its judgment, the Supreme Court exceeded jurisdiction. In Ireland, the Supreme Court's appellate jurisdiction with respect to decisions from the High Court is constitutionally defined and extends to "all decisions of the High Court".[41] Therefore, whilst the Supreme Court has jurisdiction to grant relief against a refusal of the High Court to grant bail, it must do so in reliance on its constitutional jurisdiction; it does not have inherent jurisdiction and is not authorised to exercise the inherent jurisdiction of the High Court.

D. Setting Aside of Unsound Judgments

The juridical source of the authority of courts to set aside flawed judgments is obscured by judges' interchangeable use of the terms inherent jurisdiction and inherent powers. The English Court of Appeal case of *Taylor v. Lawrence*[42] concerned an application to reopen an appeal on the grounds that the judge who had determined the matter at first instance had allowed bias to colour his decision. Declaring that the Court of Appeal "was not established to exercise an originating as opposed to an appellate jurisdiction", the court went on to say "it is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court, it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court."[43] In enunciating a distinction between "originating jurisdiction" and "implicit jurisdiction", the Court lapsed into semantic imprecision. A jurisdiction cannot,

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[39] *Zaoui v. A.G.* (previous note).
[40] *Zaoui v. A.G.* (previous note) at para. 100.
[41] Article 34.4 of the Irish Constitution.
[42] *Taylor v. Lawrence* [2003] Q.B. 528.
[43] *Taylor v. Lawrence* (previous note), at 245-246.

by definition, arise by implication. In the second sentence in the above passage, the Court correctly identifies the authority to revisit final decisions as a power. Thus, the authority to set aside judgments derives from an inherent power. However, in *Champion Investments Ltd. v. Eaitisham Ahmed,*[44] the English High Court affirmed it had "inherent jurisdiction" to set aside a court error without recourse to fresh proceedings. Similarly, in New Zealand, the High Court has declared that it has inherent jurisdiction to set aside orders of courts of co-ordinate jurisdiction where it can be shown that the order is a "nullity".[45] The question, thus, necessarily arises as to whether the authority to set aside judgments exists both by virtue of an inherent power and an inherent jurisdiction. It is suggested that this is the case.

Whilst, in Ireland, the High Court may set aside its own orders by virtue of its inherent jurisdiction under the Constitution, in the absence of an inherent power to grant such a remedy, the Supreme Court would not be able to set aside final judgments it has made which are subsequently shown to be infirm. The issue was addressed by the Supreme Court in *DPP v. McKevitt*[46] which concerned an application to reopen a decision of the Supreme Court on foot of an appeal against a decision of the Court of Criminal Appeal. Noting that Article 34.4.6° of the Constitution provides "[t]he decision of the Supreme Court shall in all cases be final and conclusive", Murray C.J. stated that "[v]ery exceptionally the Court has jurisdiction to review a decision in … special circumstances".[47] In specifying the circumstances in which that power could be exercised, the learned judge cited the judgment of Denham J. in the *Greendale Developments Ltd (No. 3)* case:[48]

> The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final

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[44] *Champion Investments Ltd. v. Eaitisham Ahmed* (High Court, Queen's Bench Division, unreported, William Blair QC, 5th August, 2004).
[45] *R. v. Nakhla (No. 2)* [1974] 1 N.Z.L.R. 453 (CA).
[46] *D.P.P. v. McKevitt* [2009] IESC 29. Available at www.supremecourt.ie.
[47] *D.P.P. v. McKevitt* (previous note).
[48] *Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514.

> Order. However, it would only arise in exceptional circumstances. The burden on the Applicants to establish that exceptional circumstances exist is heavy.
>
> … It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or Order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.

Murray C.J., having surveyed the relevant case-law on the issue, identified two criteria of legality that guide and constrain courts in exercising the powers to set aside final orders:

> Firstly, the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant.[49]

According to Murray C.J., the power to set aside a final order is possessed only by the Supreme and High Courts and, with respect to the High Court, is exercisable only where a final and unappealable order of the High Court is at issue.[50] Whilst this view may be correct insofar as it relates to inherent powers, it is suggested that, under its inherent jurisdiction, the High Court would also have authority to set aside an order which is capable of being directly appealed to the Supreme Court. Furthermore, the Court of Criminal Appeal has taken the position that it also has an inherent power to set aside a final order.[51] Thus, drawing on the case-law, it is suggested that the superior[52] courts may set

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[49] *D.P.P. v. McKevitt* (note 46). Available at www.supremecourt.ie

[50] See earlier decision in *P. v. P.* [2001] I.E.S.C. 76.

[51] *The People (D.P.P.) v. Laide and Ryan* [2005] 1 I.R. 209.

[52] The "superior courts" in Ireland are the Supreme Court, the High Court and the Court of Criminal Appeal. (Practice and Procedure before these courts is governed by the Rules of the Superior Court.)

aside orders pursuant to their inherent powers (or, in the case of the High Court, under its inherent jurisdiction) in the following circumstances:

1. Where an Order is obtained fraudulently or by deceit.[53]
2. Where the Court has been misled, either innocently or deliberately, as to the factual background of the case.[54]
3. Where there is perceived or objective bias on the part of the judge pronouncing judgment.[55]
4. Where the judicial proceedings on foot of which an Order is made are gravely flawed by reason of a fundamental breach of fair procedures and justice guaranteed by the Constitution.[56]
5. Where there has been an accidental slip in the judgment as drawn up.[57]
6. Where the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.[58]
7. Where special or unusual circumstances prevail.[59]

Thus, the rule that a court is *functus officio* once its judgment is entered in the record is subject to the overarching constitutional principle that a court will not permit an unsound judgment to be used as an instrument of injustice thereby subverting curial due process and defeating the requirements of constitutional justice.

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[53] *Tassan Din v. Banco Ambrosiano S.P.*A [1991] I.R. 569. However, according to Murphy J., in such a case, fraud "does not truly represent an exception to the constitutional provision, an order obtained by fraud is a mere nullity".

[54] *The People (D.P.P.) v. Laide and Ryan* [2005] 1 I.R. 209.

[55] *Kenny v. Trinity College* [2008] 2 I.R. 40.

[56] *P. v. P.* [2001] I.E.S.C. 76.

[57] *Belville Holdings Ltd v. Revenue Commissioners* [1994] 1 I.L.R.M. 29, at 36.

[58] *Belville Holdings Ltd. v. Revenue Commissioners* (previous note) at 36.

[59] *Belville Holdings Ltd. v. Revenue Commissioners* (previous note) at 36.

E. Disciplining of Officers of the Court

The inherent summary jurisdiction of the High Court over officers of the court now finds statutory articulation in the Solicitors Acts 1954-2002. Under the statutory jurisdiction, the President of the High Court has power to strike a solicitor off the Roll of Solicitors,[60] suspend a solicitor from practice for a specified period,[61] prohibit a solicitor from practising on his own,[62] censure the solicitor, or censure the solicitor *and* require him pay a monetary penalty.[63]

An important aspect of the High Court's jurisdiction over officers of the court is the authority to make what are referred to as wasted costs orders. This element of the jurisdiction is also codified, finding expression in Order 99 Rule 7 of the Rules of the Superior Court.

A recent development in some common law jurisdictions has been the willingness of courts to make costs orders against barristers who have improperly or negligently conducted litigation.[64] Significantly, in England, section 51 of the Supreme Court Act, 1981 empowers a court to make wasted costs orders against a litigant's legal representatives (which includes barristers). In light of the fact that, with respect to litigation, clients' decisions with respect to the preparation and conduct of litigation are strongly influenced by the advice of barristers, it is suggested that the High Court should be prepared to deploy its inherent jurisdiction to bring errant barristers within its scope.

Other individuals with a designated role to play in the administration of justice, such as receivers, liquidators, sequestrators, sheriffs, bailiffs, jurors and witnesses, may be disciplined by the court under its inherent jurisdiction.[65]

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[60] S. 8(1)(i) (as substituted by section 18 of the Act of 1994 and as amended by section 10 of the Act of 2002) of the Act of 1960.
[61] S. 8(1)(ii).
[62] S. 8(1)(iii).
[63] S. 8(1)(iv).
[64] Webb, "Hopeless Cases: In Defence of Compensation Litigants at the Advocate's Expense" (1999) 30 *Victoria University of Wellington Law Review* 295. Available via www.austlii.edu.au/nz/journals.
[65] Jacob, "The Inherent Jurisdiction of the Court" (note 1), at p. 47.

F. Contempt of Court

The law of contempt has a dual aspect: criminal contempt and civil contempt. Criminal contempt encompasses a range of conduct including contempt in the face of the court, publication of material likely to prejudice a fair trial, acts which are likely to affront the dignity of the court or challenge its authority, and conduct which interferes with the orderly administration of justice. Civil contempt arises where a person fails to obey a court order or to comply with an undertaking given to the court. From time immemorial, the English courts have exercised an inherent jurisdiction to punish for contempt. The Rolls and Year Books, dating back to 1250, cite instances of litigants being held in contempt of court. Originally developed by the King's Council, the contempt jurisdiction was taken over by the Star Chambers in the 16th century, and, ultimately, in the 18th century, transferred in the King's Bench.[66] As a creature of the common law, the inherent jurisdiction to punish for contempt was inherited by the High Court by virtue of Article 50 of the Constitution. However, authority exists to suggest that the jurisdiction now has a constitutional basis[67]. In *D.P.P. v. Walsh and Conneally*,[68] the court declared that its authority to punish for contempt derived from its constitutionally mandated function to achieve the proper and effective administration of justice. Further judicial *dicta* will be required to clarify the manner in which the tentacles of the constitution are reaching out to erode the traditional common law doctrine of contempt. A further factor clouding clarity in this area is the fact that the right to punish for contempt could potentially collide with other constitutionally protected rights such as the right of the individual to freedom of expression, the right to personal liberty and the right to due process of law.[69] A court must carefully calibrate the implied constitutional right to punish for contempt in the context of its

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[66] Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand" (note 16), at p. 228.

[67] Law Reform Commission, *Report on Contempt of Court* (L.R.C. 46–1994) 6.

[68] *(D.P.P.) v. Walsh and Conneally* [1981] I.R. 412, 426.

[69] Law Reform Commission, *Report on Contempt of Court* (L.R.C. 46–1994) at para. 6.

interplay with these other competing constitutional rights. The Supreme Court has recently affirmed that, in relation to a contempt application, the alleged contemnor is entitled, by virtue of constitutional provisions, to a jury trial.[70] However, a contempt in the face of the court may be punished summarily.[71]

G. Variation of Trusts[72]

Trust instruments may be varied by the High Court under its inherent jurisdiction. The House of Lords in *Chapman v. Chapman*[73] characterised the authority of the court to vary trusts as falling under two rubrics: emergency and compromise. Judicial amplification of the *Chapman* criteria, however, has resulted in a redefinition of the mechanisms capable of triggering the court's inherent jurisdiction. The inherent jurisdiction of the court to vary the terms of a trust may now be analysed under three separate headings: salvage, maintenance and compromise.

1. Salvage

Where dictated by necessity, the court may order the sale or mortgage of a minor's equitable interest in property. Considered a measure of last resort, the salvage jurisdiction could be invoked where, say, a minor's property is dilapidated and funds are required to carry out essential repairs. The principle was applied in the Irish case of *Re Johnson's Settlement,*[74] in which Gavan Duffy J. declared that "the Court can as a last resort … apply the principle of salvage in order to sanction the expenditure out of capital of the money necessary for doing such repairs, constituting permanent improvements, as are essential to the preservation of the settled property".[75]

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[70] *D.P.P. v. Independent Newspapers*, *per* Geoghegan J. [2009] I.E.S.C. 20.
[71] *In re O'Kelly* [1944] I.R. 529. See generally, Law Reform Commission, *Report on Contempt of Court* (L.R.C. 46–1994).
[72] McDonald and Street, *Equity and Trusts: Concentrate* (Oxford University Press, 2009); Butler, *Equity and Trusts in New Zealand* (Brooker's, 2003); Delaney, *Equity and the Law of Trusts in Ireland* (3rd ed., Thomson Roundhall, 2003).
[73] *Chapman v. Chapman* [1954] A.C. 428.
[74] *Re Johnson's Settlement* [1944] I.R. 529, at 533.
[75] *Re Johnson's Settlement* (note 74), at 533.

2. Maintenance.

A court may order the liquidation of part of the capital assets of a trust for the maintenance and education of a beneficiary. The rationale for this principle was set forth in the case of *Havelock v. Havelock.*[76] It was held that a settlor would not create a trust directing trustees to accumulate funds to generate a future income for an intended beneficiary but fail to make provision for the release of funds to meet a beneficiary's immediate needs.

3. Compromise.

Where conflict arises as to the competing rights of the beneficiaries under a trust, the court has authority to impose a compromise solution. Lord Morton, in *Chapman v. Chapman*,[77] interpreted the parameters of the jurisdiction narrowly, as arising only in an emergency or where genuine disputes over the interpretation of the trust exist. In these cases, the court is not so much varying the interests of the beneficiaries as clarifying the terms of the trust instrument. However, in a dissenting judgment, Lord Cohen, characterised the compromise jurisdiction more widely as empowering the court to impose a genuine compromise solution, thereby altering the relative positions of the tenant for life and the remaindermen.

The issue as to the correct interpretation of "compromise" as it applies to the variation of trusts has not yet been addressed by an Irish court. As Delaney notes, "it remains to be seen whether, in the absence of ... legislation in this jurisdiction, our courts would adopt the more flexible approach of the minority in *Chapman*".[78]

Ireland has, in fact, recently made statutory provision for the variation of trusts. The Land Law and Conveyancing Act, 2009, empowers the court to sanction "arrangements" involving "varying, revoking or resettling the trust" or "varying, enlarging, adding to or restricting the powers of the trustees". Although these provisions entrust the courts with broad discretionary

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[76] *Havelock v. Havelock* (1880) 17 Ch.D. 807.
[77] [1954] 2 W.L.R. 723.
[78] Delaney (note 72 above), at 442.

powers, it is traditional for courts, in interpreting statutes, not to depart from established common law principles. Judicial exegesis of the statutory provisions will determine the manner in which Irish courts, in sanctioning arrangements for the variation of trusts, affirm, extend, contract, transform or reformulate the existing principles of law in this area.

H. Winding-up of Companies

There is some authority to suggest that a court may wind up a company under its inherent jurisdiction.[79] The rationale informing this view is that in a winding-up it is desirable to have regard to the multiple interests of a company's members and officers, and the strict application of technical statutory winding-up procedures can fail to deliver a just outcome. Inherent jurisdiction enables a court to bypass unduly restrictive statutory codes and apply a more nuanced approach with a view to promoting equity between the competing interests.[80] In light of their traditional attitude of deference to the legislature, it is doubtful whether Irish Courts would demonstrate such a bold, innovatory approach and disregard prevailing statutory jurisdictions affecting the winding-up and liquidations of companies.

VIII. INHERENT POWERS OF COURTS – TWO THEORIES

Inherent powers have arisen to supplement original jurisdictions. Essentially procedural in nature, inherent powers enable courts give full effect to the primary jurisdiction thereby permitting them to fulfil their function as courts of judicature. All courts in the judicial hierarchy – statutory and constitutional – possess inherent powers. Two theories have been developed to identify the juridical basis of courts' inherent powers.

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[79] See Young J. in *Re Kalblue Pty Ltd*. (1994) 12 A.C.L.C. 1057, a decision from New South Wales. Also Mason, "Local Proceedings in a Multi-State Liquidation: Issues of Jurisdiction" (2006) 5 *Melbourne University Law Review* 145, and *Overview of Insolvency Law in Hong Kong* at www.tannerdewitt.com/media/publications/insolvency-law.php.

[80] See Mason, "Local Proceedings in a Multi-state Liquidation: Issues of Jurisdiction" (previous note).

A. Part of Common Law of Courts

In *Connelly v. D.P.P.*, the English Court of Appeal stated: "There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are ... inherent to its jurisdiction". [81] In *R. v. Norwich Crown Court ex parte Belsham*, the court declared that "a Crown Court has an inherent power arising at common law and independent of [its statutory jurisdiction] to control its process". [82]

The above *dicta* show that there is division of opinion as to the precise *locus* of the inherent power. In *Connelly*, the inherent power is described as being ancillary to a court's substantive jurisdiction, whilst in *Norwich*, the power is characterised as being intrinsic to the court itself. Joseph suggests, however, that these views are complementary rather than contradictory. He states: "Inherent powers attach where a court is fixed with jurisdiction … [the] powers devolve from a court's jurisdiction".[83] Whichever view one cleaves to, it is clear that inherent powers have been developed by courts and are, thus, a feature of the common law. Encapsulating their essence, Joseph refers to inherent powers as forming part of the "common law of courts".[84]

B. Consequence of Separation of Powers Doctrine

An alternative view is that inherent powers are implied by the doctrine of the separation of powers.[85] Being entrusted with the judicial function of government, courts have a constitutionally-ordained duty to exercise their functions effectively and efficiently to achieve the due administration of justice. This view resonates in the Irish context having regard to Article 34 of the Constitution, which directs that "justice shall be

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[81] *Connelly v. D.P.P.* [1964] A.C. 1254, at 1301 (CA and HL).

[82] *R. v. Norwich Crown Court; Ex p Belsham*, [1992] 1 W.L.R. 54, at 66 (QBD).

[83] Joseph, *Constitutional and Administrative Law* (note 12), at p. 810.

[84] Joseph, *Constitutional and Administrative Law* (note 12), at p. 807.

[85] Website of National Center for State Courts. See "Inherent Powers", available at www.ncsconline.org/wc/CourTopics/FAQs.asp?topic=InhPow.

administered in courts established by law by judges". Reinforcing the correctness of the view from the Irish perspective are the *dicta* of Murray C.J. (cited above), in which he characterises inherent powers as necessarily accruing to a court by virtue of "the very nature of its judicial function or its constitutional role in the administration of justice".[86]

Another argument postulating inherent powers as an element of the separation of powers doctrine is the idea that courts must have powers to protect the independence of the judicial function from encroachment by the executive and legislative branches of government.[87] Thus, inherent powers are part of a court's resources; they are a necessary adjunct to the judicial function, facilitating the courts in functioning within a gapless framework of regulation thereby preserving the principles of constitutional order.

IX. RELATIONSHIP BETWEEN INHERENT POWERS AND RULES OF COURT

Many inherent powers developed by the courts are now codified in court rules. However, it seems that not only do inherent powers coexist with rules of court, but where a rule is narrower in scope than the common law power, it does not extinguish the element of the power which remains unregulated by the court rule. Thus, in *Barry v. Buckley*, Costello J. declared that, in relation to the right to strike out a claim on the grounds that it disclosed no reasonable cause of action, the court's jurisdiction by virtue of its inherent power was wider than under Order 19 rule 28 of the Rules of the Superior Court in that it entitled the court to hear evidence on affidavit and did not confine it (as under the statutory rule) to a consideration of the pleadings.[88] It is clear then that inherent powers supplement and amplify court rules. Jacob defines inherent powers as performing three essential functions: (i) filling in gaps left by the court rules,

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[86] *G. McG v. D.V. (No.2)* (note 20).

[87] Website of National Center for State Courts. See "Inherent Powers" available at www.ncsconline.org/wc/CourTopics/FAQs.asp?topic=InhPow.

[88] *Barry v. Buckley* [1981] I.R. 306; See also *Sugg v. Legal Aid Board* [2009] I.E.S.C. 348.

thereby ensuring that judges are equipped with the necessary powers to properly discharge the adjudicative function; (ii) enabling judges invoke powers against persons other than the parties to litigation; and (iii) granting to judges the power to punish offenders by fine or imprisonment.[89]

IX. CATEGORIES OF INHERENT POWERS

A number of commentators including Mason,[90] de Jersey[91] and Jacob,[92] have proposed various categories for classifying inherent powers. Drawing on these categories, it is proposed to analyse inherent powers as they have arisen in the Irish context under the following four headings: (a) Power of court to regulate its own procedure and protect fair trial process; (b) Power to prevent steps being taken that would render judicial proceedings inefficacious; (c) Power to prevent abuse of process; and (d) Power to act in aid of Superior Courts and in aid or control of inferior courts.

A. Power of Court to Regulate its own Procedure and Protect Fair Trial Process

The case law is studded with examples of courts utilising their inherent powers to ensure curial due process and fairness in judicial proceedings. The purposes for which the powers have been exercised, in this regard, correspond to a wide range of functions, which include:

1. Power to Issue Practice Directions

Practice Directions supplement court rules. They are issued "to inform parties what the court expects of them in respect of the practice and procedure of the courts".[93] In *Connelly v. D.P.P.*, Lord Devlin considered the circumstances in which a

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[89] Jacob, "The Inherent Jurisdiction of the Court" (note 1 above).
[90] Mason, "The Inherent Jurisdiction of the Court" (1983) 57 *Australian Law Journal* 449.
[91] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2 above).
[92] Jacob, "The Inherent Jurisdiction of the Court" (note 1 above).
[93] See courts service website at www.courts.ie.

court might find itself called upon to utilise its inherent powers to issue Practice Directions:

> the judges of the High Court have in their inherent jurisdiction, both in civil and criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the Court's process is used fairly and conveniently by both sides … If jurisdiction is conferred upon a court, it may and should exercise that jurisdiction; and if no procedural machinery has been provided, it is for the Court to provide such machinery as best it can.[94]

In Ireland, a panoply of Practice Directions has been issued to augment the rules of the courts governing procedure in civil, criminal and family law matters. All of the courts – the Supreme Court, the High Court, the Circuit Court and the District Court – have issued Practice Directions to regulate various aspects of practice and procedure before their respective courts. The question as to whether a Practice Direction is strictly binding in law, and whether a litigant can be called to account and penalised for failure to comply with its provisions, is uncertain although in at least one common law jurisdiction this has been answered in the affirmative.[95]

2. Power to Dismiss Claim for Want of Prosecution or Delay.

A court may dismiss a claim for want of prosecution,[96] or where there has been an inordinate and inexcusable delay on the part of the plaintiff in prosecuting his proceedings,[97] or where the interests of justice require it to do so.[98] The primary

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[94] *Connelly v. D.P.P.* [1964] A.C. 1245, at 1347.
[95] *Gittins v. W.H.C. Stacy and Son Pty Ltd* [1964] 82 W.N. (Pt. 1) N.S.W. 157.
[96] *Primor v. Stoke Kennedy Crowley* [1996] 2 I.R. 475, at 476.
[97] *Primor v. Stoke Kennedy Crowley* (previous note), at 476; *Stephens v. Paul Flynn Ltd*., (High Court, unreported, Clarke J., 28 April 2005); *Faherty v. Minister for Defence, Ireland and Attorney-General* [2007] I.E.H.C. 371.
[98] *Faherty v. Minister for Defence, Ireland and Attorney General* (previous note).

consideration for Courts in such cases is "to deal with the essential justice of the case before them".[99]

In making a decision as to whether to dismiss a claim in these circumstances, courts are required to have regard to a number of considerations, including: the implied constitutional principles of basic fairness of procedures; whether the delay and consequent prejudice are such to make it unfair to allow the action to proceed; the effect of any delay on the part of the defendant; whether any delay on the part of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay; whether the delay gives rise to a substantial risk that it is not possible to have a fair trial; and, the fact that the prejudice to the defendant may arise in many ways other than mere delay and cause damage to the defendant's reputation and business.[100] Whilst the European Convention on Human Rights Act, 2003, does not displace the tests to be applied by the court in adjudicating an application to have a claim struck out,[101] it may, however, impact on the relative weighting of the applicable variables.[102] As Clarke J. ventures, "the balance of justice may be tilted in favour of imposing greater obligation of expedition".[103] The shift in emphasis has been triggered not only by the impact of Article 6 of the Convention but also by an amendment to Order 27 of the Rules of the Superior Court which mandates a more critical approach to an unexplained or unjustified delay.

3. Power to Grant a Stay of Proceedings

A court may stay proceedings which, although technically within its jurisdiction, could be more conveniently heard in a different forum.[104] Alternatively, a court may stay proceedings in respect of any action brought in breach of an agreed method of resolving disputes by a method other than litigation.[105] A stay

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[99] *Primor v. Stoke Kennedy Crowley* (note 96 above), at 476.
[100] *Primor v. Stoke Kennedy Crowley* (note 96 above).
[101] *Stephens v. Paul Flynn Ltd* (note 97 above).
[102] *Faherty v. Minister for Defence and others*. (note 97 above).
[103] *Stephens v. Paul Flynn Ltd*, (note 97 above).
[104] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2 above).
[105] *Campus and Stadium Ireland Development Ltd. v. Dublin Waterworld Ltd.* [2006] 2 IR 181.

may be granted where proceedings are advanced with undue speed.[106] A court has power to stay proceedings where the plaintiff has already brought substantially similar proceedings which were unsuccessful and where the costs have not been discharged.[107] Where a court imposes some condition or term which must be complied with by a litigant, it has the power to impose a stay until the condition or term is fulfilled. This would arise where, say, a plaintiff, being resident out of the jurisdiction, is required to provide security for costs[108] or where a plaintiff prosecuting a personal injuries claim is required to submit to a medical examination.[109] A court may refuse to entertain proceedings which are not properly constituted, such as where one of the parties is non-existent[110] or where they relate to a hypothetical issue.[111]

4. Power to Recast the Form of Proceedings

A court may convert a *habeas corpus* application to a judicial review proceeding if it takes the view that this is indicated by the circumstances of the case.[112]

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[106] *Wilson v. Rickerby* [2005] N.Z.A.R. 508 (HC).

[107] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2), p. 328.

[108] *Gray v. Edie* [1786] T.R. 267.

[109] *Edmeades v. Thames Board Mills* [1969] 2 Q.B. 67.

[110] *Lazard Brothers and Co v. Midland Bank Ltd* [1993] A.C. 296.

[111] *Sumner v. William Henderson and Sons Ltd* [1963] 1 W.L.R. 823.

[112] *Koranteng v. Judge Sheridan and others* [2009] I.E.H.C. 31. The case concerned an application pursuant to Article 40.2 of the Constitution, challenging a detention on the grounds of the failure of the District Court judge to properly conduct a bail hearing. The High Court judge converted the proceeding to a judicial review hearing. The case was wrongly decided, however, as, in the earlier decision of *McDonagh v. Governor of Cloverhill Prison*, the Supreme Court ruled that, in challenging an allegedly unlawful detention on the grounds of the failure of the District Court Judge to properly conduct a bail hearing, the applicant must proceed by way of an Article 40.2 application. The case, nonetheless, illustrates the inherent power of the court to alter the form of proceedings. It is suggested, thus, that if a detainee, seeking to challenge an allegedly unlawful detention, were to bring an application for judicial review, the court – as an alternative to striking out the application – would have power to convert the proceeding to an Article 40.2 application.

5. Power to Control Admission to and Participation in Proceedings

In rare circumstances, where justice dictates, a court may permit an unqualified advocate to assist an unrepresented litigant.[113] Where an individual has a particular interest in proceedings to which he is not a party, he may seek leave of the court to assist the court as *amicus curiae.*[114] A common law power exists enabling an individual to seek injunctive relief in the name of the Attorney General where his interests are being threatened by an anticipated breach of a statute by another person. Thus, in *Attorney-General (Society for the Protection of Unborn Children Ireland Ltd) v. Open Door Counselling Ltd*,[115] the Supreme Court affirmed that, as the plaintiffs were seeking to injunct abortion-related activities – which were contrary to Article 40.3.3° of the Constitution – they were entitled to bring their action in the name of the Attorney-General.

6. Power to Regulate Procedure and Evidence in Criminal and Civil Proceedings.

Much of the law governing procedure and evidence in criminal cases has been prescribed by judges in exercise of their inherent powers for the purpose of ensuring fairness and justice between prosecutor and accused. Thus, where justice requires, a court may vacate a plea of guilty entered by an accused.[116] A judge has a power to refuse to permit the adduction of additional evidence, if to do so would be unfair or would tend to frustrate the accused's entitlements.[117] A court, where satisfied that the evidence against an accused is fabricated, may, in lieu of permitting entry of a *nolle prosequi,* direct a jury to return a verdict of "not guilty".[118] The court may stay a prosecution where it takes the view that committal proceedings ought first to

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[113] *Coffey v. Tara Mines Ltd*. [2008] 1 I.R. 436.
[114] *HI v. The Minister for Justice, Equality and Law Reform, on the Application of the United Nations High Commission for Refugees* [2003] 3 I.R. 197.
[115] *Attorney-General (Society for the Protection of Unborn Children Ireland Ltd) v. Open Door Counselling Ltd* [1988] I.R. 593. See also Forde, *Constitutional Law* (note 19 above), p. 1725.
[116] *DPP v. Redmond* [2006] 3 I.R. 188.
[117] *Phipps v. Judge Hogan* [2008] 3 I.R. 221.
[118] *R. v. Saunders* [1983] 2 Qd. R. 270

take place.[119] A trial judge has power to compel the production of evidence (including the production of documents)[120] or to order the preservation of evidence.[121] A court may inspect documents denied to one of the parties to the litigation.[122] A judge has power to deny a litigant a full hearing,[123] or to decline to hear an advocate[124] or to order a party before the court to speak[125] or to be silent.[126] A court has power to prohibit the publication of details of proceedings.[127]

7. Power to Amend or Set Aside Orders

Courts may correct mistakes or errors in court orders[128] and may also set aside default orders.[129]

B. Preventing Steps From Being Taken That Would Render Judicial Proceedings Inefficacious.

1. Power To Grant Interlocutory/Interim Orders To Protect The Rights Of Litigants

A court may grant an interlocutory or interim order pending the hearing of an appeal where it is necessary to protect the rights of the parties. This would arise, say, where an order is required to preserve property which is the subject matter of the proceedings[130] or where an interim injunction is required to

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[119] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2 above), at p. 327.
[120] *Ambiorix Limited v. Minister for the Environment* [1992] 1 I.R. 277.
[121] *The Angel Bell* [1980] 1 All E.R. 480.
[122] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2), p. 327.
[123] *Hunter v. Chief Constable of the West Midlands* [1982] A.C. 529.
[124] *Abse v. Smith* [1986] 1 Q.B. 536, C.A.
[125] *Re B* [1994] 2 F.L.R. 479, C.A.
[126] *Kinnard v. Field* [1905] 2 Ch. 306.
[127] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2 above), at p. 327.
[128] *McMullen v. Clancy* [2002] 3 I.R. 493.
[129] Lacey, "Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution" (2003) 2 *Federal Law Review* 31.
[130] *Cosma v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133.

restrain the deportation of an individual pending the outcome of an application for an interlocutory injunction.[131]

2. Power to Grant Mareva Orders[132]

Where a plaintiff has a justified claim against a defendant, and a risk exists that the defendant will remove his assets from the jurisdiction with the intent of thwarting the satisfaction of any judgment that may be recorded against him, a Mareva Order may be granted. Two essential conditions for the granting of a Mareva Order were identified in *O'Mahony v. Horgan.*[133] The plaintiff must be in a position to show that (a) he has an arguable case that the action will succeed, and (b) that the intended removal of the assets is for the purpose of frustrating the plaintiff in recovering damages and not merely for enabling the defendant carry on his business or discharge lawful debts.

In the absence of the availability of Mareva Orders, it is evident that judgments obtained by litigants could not be enforced and judicial proceedings would be thereby rendered inefficacious. Thus, Mareva Orders are an indispensable element of a court's armoury of powers enabling it to ensure that the integrity of the court process is safeguarded and that judicially-imposed solutions to disputes are implemented.

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[131] *Cosma v. Minister for Justice* (previous note).

[132] In the UK and Ireland, the Mareva Order is commonly viewed as an *equitable* remedy rather than a common law relief. However, in the UK, in the early 1980s, Robert Goff J, in *The Angel Bell* [1980] 1 All E.R. 480, proposed a new jurisdictional basis for granting Mareva orders. He suggested that the purpose of the Mareva order was to frustrate anticipated procedural abuse of court process on the part of the defendant. Thus, he suggested that the power to grant Mareva injunctions derives from the courts' inherent powers to prevent abuse of process. This revised approach has been followed in a number of jurisdictions including New Zealand and Australia, including the High Court of Australia. See, Hetherington, "Mareva after Thirty Years" (2004) 8 *University of West Sydney Law Review* 21.

[133] *O'Mahony v. Horgan* [1995] 2 I.R. 411. See also Delaney, *Equity and the Law of Trusts in Ireland* (note 72 above), at 525.

3. Power to Grant Anton Piller Orders[134]

An Anton Piller Order requires a defendant to permit the plaintiff to enter his premises to inspect documents and seize evidence.[135] The purpose of such orders is to prevent the destruction of stolen or pirated material which is of relevance to matters at issue in the pending action. Such orders are commonly sought in cases involving trademarks, copyright or patent infringements.

A three-pronged test is applied by the court in considering applications for Anton Piller orders: (i) there must exist an extremely strong *prima facie* case against the respondent, (ii) the damage, actual or potential, must be very serious for the applicant, (iii) clear evidence must exist that the respondents have in their possession incriminating documents or articles and that there is a real possibility that such items may be destroyed before an *inter partes* hearing can take place. Anton Piller orders have been granted by the Irish courts but the Supreme Court has yet to consider the issue.

4. Power to Order Security for Costs.

A court may order a party to provide security for costs in a civil action. Generally such orders are made only against plaintiffs but, exceptionally, may also be made against a defendant. Thus, in relation to a case proceeding on affidavit, where the defendant wishes to cross-examine a plaintiff's deponent who is located overseas, the court would have power to order the defendant to provide security for the costs in respect of the deponent's attendance at court.[136] In a case where a defendant advances a very tenuous defence to a claim brought against him,

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[134] Anton Piller Orders – often viewed by courts as a form of equitable remedy – may be granted by the court under its inherent powers. In New Zealand, the court, in *Axion Rolle PRP Valuation Services Ltd v. Rahul Ramesh Kapadia and others* NZAC, 43/06, having expounded a distinction between jurisdiction and power, held "it is incontrovertible that Anton Piller orders are the exercise of an inherent power". See also *Busby v. Thorn EMI Video Programmes Ltd* [1984] 1 N.Z.L.R. 461, at 477 (the case in which the Court of Appeal in New Zealand first sanctioned the use of Anton Piller Orders).

[135] *Anton Piller KG v. Manufacturing Processes Ltd* [1976] Ch. 55.

[136] *Stanley-Hill v. Kool* [1982] 1 N.S.W.L.R. 460.

the court would have power to require such a defendant to provide security for costs.[137]

C. Preventing Abuse Of Process

1. Where Proceedings are Frivolous, Vexatious, Oppressive or Groundless

A court has power to stay proceedings which are frivolous or vexatious.[138] Although Irish judges use the words "frivolous" and "vexatious" interchangeably, Jacob enunciates a distinction between the terms, citing illustrative case-law.[139] Thus, frivolous proceedings arise where a litigant trifles with the court,[140] or where the entertainment of proceedings would constitute a waste of time,[141] or when a claim is not backed by a rational argument.[142] On the other hand, proceedings are considered vexatious where they are without foundation, or cannot possibly succeed, or have as their purpose some ulterior or improper purpose[143]. It is in this latter sense that Irish courts have invoked their power to strike out frivolous and vexatious claims. Thus, it has been held that a court may dismiss a claim where the proceedings disclose no reasonable cause of action or, where, on the uncontested facts, the plaintiff is bound to fail.[144] In such instances, the court is empowered to go behind the pleadings and hear evidence on affidavit in order to determine the true facts of the case.[145] The power to strike out a claim must be exercised sparingly and only in clear cases[146] though, it has been held that where there is no evidence whatsoever to support the claim, the court should not shirk from exercising the power.[147] However, in

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[137] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2 above), at p. 328.
[138] *Barry v. Buckley* [1981] I.R. 306.
[139] Jacob, "The Inherent Jurisdiction of the Court" (note 1 above).
[140] *Chaffers v. Goldsmid* [1894] 1 Q.B. 186.
[141] *Dawkins v. Prince Edward of Saxe Weimar* (1876) L.R. 1 Q.B.D. 503.
[142] *Addis v. Crocker* [1961] 1 Q.B. 11.
[143] *Willis v. Earl Beauchamp* [1886] 11 P.D. 59.
[144] *Sugg v. Legal Aid Board* [2009] I.E.H.C. 348.
[145] *Goodson v. Grierson* [1908] 1 K.B. 764.
[146] *Sun Fan Chan v. Osseous Ltd.* [1992] I.R. 425, at 428.
[147] *Supermacs Ireland Ltd. v. Katesan (Naas) Limited* [2004] 4 I.R. 273.

relation to an action to dismiss proceedings at the statement of claim stage, where an amendment to a Statement of Claim is capable of saving the claim, then the action should not be dismissed.[148]

It is an abuse of process for an applicant to seek a relief from a court adducing material evidence that was strategically omitted from an earlier application for the same relief which was refused by the court.[149] A court may restrain the institution of proceedings in order to ensure that the process of the court is not abused by repeated attempts by an individual to reopen litigation or to pursue litigation oppressively against a defendant.[150] Where a litigant brings two successive actions where a single set of proceedings would have sufficed, the second action will be deemed *prima facie* vexatious.[151] Other remedies which may be granted by the court where proceedings are frivolous or vexatious include the striking out of parts of writ indorsements, the setting aside of service of writs, and the ordering of the removal from court files of material improperly put there.[152]

2. Power to Stay Proceedings Where Criminal Charge Pending

A court may stay civil proceedings arising out of a set of facts which also gives rise to criminal liability in circumstances where a criminal prosecution has already been instituted.[153] Additionally, a court may stay civil proceedings where a criminal prosecution arising out of the same litigious facts has resulted in a conviction against the plaintiff, and it is clear that the dominant purpose of the civil proceedings is to mount a collateral attack on the decision of the criminal court which recorded the conviction.[154]

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[148] *Sun Fan Chan v. Osseous Ltd* [1992] I.R. 425, at 428.
[149] *In the matter of Vantive Holdings and in the matter of the Companies Acts 1963-2006* [2009] I.E.S.C. 69.
[150] *Riordan v. An Taoiseach* [2001] 3 I.R. 365.
[151] *Slough Estates Ltd. v. Slough Borough Council* [1968] Ch. 299.
[152] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2 above), at p. 328.
[153] De Jersey, "The Inherent Jurisdiction of the Supreme Court" (note 2 above), at p. 328.
[154] *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529.

D. To Act In Aid Of Superior Courts and In Aid Or Control Of Inferior Courts

1. Granting a stay against an order pending appeal

A court may stay execution of a judgment pending an appeal to a higher court. The question as to whether a court may grant a stay of execution against a *refusal* of a relief has arisen in a number of cases involving examinerships. *In Re Gallium Limited*[155] concerned a petition to have an examiner appointed to an insolvent company and which, pending the determination of the petition, had been placed under the temporary protection of the court. On rejection of the petition in the High Court, McGovern J. granted an application for a stay on the court's order pending the hearing of the Supreme Court appeal. In the Supreme Court, Fennelly J., giving judgment on behalf of the Supreme Court, did not address the question as to whether the High Court judge had acted within his powers in granting the stay.

The issue was recently revisited by the High Court in the case of *Vantive Holdings and others and the Companies Acts 1963-2006,* which also involved an application for an examinership. Having rejected a petition in the High Court to have an examiner appointed to a group of insolvent companies (also enjoying the temporary protection of the courts), Kelly J. granted a stay on his order pending the Supreme Court appeal. The correctness of Kelly J.'s decision in granting the stay was affirmed by Murray C.J. in the Supreme Court, which extended the stay pending the actual hearing of the appeal. Observing that, in the absence of a stay, the constitutional right of appeal would be "moot", the learned judge ruled that a stay against a refusal of a relief could be granted as long as the appeal was brought promptly and there existed statable grounds for an appeal.[156]

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[155] *In the Matter of Gallium Limited Trading as First Equity Group and in the matter of the Companies (Amendment) Act* 1990 [2009] I.E.S.C. 8.
[156] *Irish Times*, 4 August 2009.

X. DEVELOPMENT OF INHERENT POWERS

It would be incorrect to view inherent powers as an unplumbed reservoir which a court can tap into whenever it lacks jurisdiction to grant a relief which it considers desirable. Clarity, certainty and predictability are important values in law. The common law evolves incrementally in order to facilitate necessary changes to the law whilst preserving stability and conceptual continuity. Casuistic development of legal principles injects incoherency into the evolving case-law clouding the ability of litigants to discern the true perimeters of the law and to forecast outcomes to litigation. Judges, in developing the common law, must do so by extrapolating from the existing body of precedent. As Farley J. ventures: "Any decision based on [an inherent power] should be in the tradition of the common law – incremental extensions of existing law, judicially and judiciously arrived at on a reasoned basis using analogy from established principles where possible".[157]

XI. CONCLUSION

It is vital that judges distinguish between inherent jurisdiction and inherent powers, and be aware of the respective juridical foundations of the two concepts. The conflation of the two terms has impacted on the exercise of curial function warping judges' perception of the true contours of their substantive and procedural powers. As *Attorney-General v. Zaoui*[158] shows, the confusion surrounding the juridical basis of "inherent jurisdiction" has led courts to exercise the inherent jurisdiction where it does not exist. With respect to inherent powers, the notion that such powers are exercisable only by "superior courts" will cause lower court judges to fail to harness the full gamut of their implied powers, frustrating their capacity to function effectively as courts of judicature.

Inherent jurisdiction and inherent powers are concepts which are vital to the administration of justice functioning as a vital lifeline to judges enabling them to adjudicate effectively in

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[157] Farley, "Minimize codification by expanding use of inherent jurisdiction" (note 7 above).
[158] Note 39 above.

relation to new and evolving litigious fact-patterns. The reduction of inherent jurisdiction and inherent powers to defined categories provides clarity to courts and, as far as inherent powers are concerned, operates as a brake on judicial expansionism, requiring judges, in the tradition of the common law, to develop the powers incrementally, justifying their innovations by argument based on analogy with precedent.