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RESEARCH ARTICLE

The Doctrine of Inherent Powers under the Sudanese Civil Procedure Code: Its Origin, Nature and Scope

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Abstract

This article delves into the doctrine of inherent powers within the Sudanese Civil Procedure Code, with a specific focus on its origin, nature and scope. It posits that this doctrine empowers the courts to undertake actions essential for fulfilling their duties and ensuring the pursuit of justice, even in instances where such powers are not explicitly granted to them under statutory provisions. Additionally, the article examines the potential advantages and disadvantages associated with inherent powers and contemplates whether their exercise might pose a threat to the rule of law. It also explores the arguments both in favour of and against the possibility of rule-making within the framework of these powers and the potential impact of such regulations on the administration of justice. The article asserts that while a court's inherent powers are indispensable for the efficient dispensation of justice, it is imperative that they are not wielded capriciously or arbitrarily. Instead, their exercise should be guided by the principles of equity and good conscience.

Keywords: inherent powers; Sudanese Civil Procedure Code; rule-making; administration of justice; inherent powers' origin, nature and scope

Introduction

The inherent powers of the civil courts in Sudan ascertain whether the court is authorized to invoke and employ a broad range of residual powers to fulfil its functions and duties in the administration of justice.[1] In accordance with the language structure of Sudanese civil procedure law, it is evident that none of the provisions within the law should be interpreted as limiting or otherwise impacting the inherent powers of the court to issue orders or undertake actions essential for the pursuit of justice. Essentially, these powers are intended to ensure that the far-reaching arms of justice can extend to seize or carry out whatever is considered necessary to prevent undue prejudice to any party or to prevent abuse of the legal process.[2] In other words, the reach of justice cannot be curtailed, even when the provisions of the law lack specific remedies. Therefore, at its core, the doctrine of inherent powers seeks to surmount any shortcomings in legislation, if they exist, and to bridge the gap if statutory rules prove insufficient.

In practice, the concept of inherent powers arises in the minds of judges and lawyers especially when statutory provisions are silent or lacking in specific cases. However, the terminology itself is riddled with complexity and ambiguity, as courts often use the terms "inherent powers" and

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1 Sudan Civil Procedure Code 1983 as amended by Civil Procedure Code 2018, art 285; available at: <https://www.moj.gov.sd/files/index/28> (last accessed 6 August 2024); J Jacob "The court's inherent jurisdiction" (1970) 23 *Current Legal Problems* 23 at 51.

2 Id at 24.

"inherent jurisdiction" interchangeably.[3] While these two concepts are related, they are also distinct because they pertain to different facets of the court's authority. Specifically, inherent powers encompass the set of powers that empower a court to do what is just and rectify what is unjust.[4] These inherent powers are vital for the court to uphold its role as a guardian of justice. Conversely, the term inherent jurisdiction may encompass these powers, among other things, while its broader interpretation may allude to the court's authority to hear and decide on specific types of case, even when such jurisdiction is not explicitly granted by statute.[5] A notable illustration of such confusion can be gleaned from the words of the esteemed commentator Sir Jack Jacob, who stated:

> "In many spheres of the administration of justice, the High Court of Justice in England exercises a jurisdiction which has the distinctive description of being called 'inherent'. The inherent jurisdiction of the Court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and establish its limits."[6]

A brief analysis of this quotation gives rise to significant questions regarding the distinguishing characteristics of inherent jurisdiction and inherent powers, and also prompts inquiries about the boundaries of the court's authority and the possibility of power abuse. In light of this statement, comparable questions may emerge concerning the legal rationale behind inherent powers. In a similar context, the exercise of these powers can be contentious, as it raises the question of whether the interpretive approach is liberal or conservative.

This article delves into the doctrine of inherent powers within the Sudanese Civil Procedure Code. The hypothesis explored posits that while the inherent powers of a court are essential for upholding due process of justice, they have limitations. To test this idea, the article conducts a critical analysis of the origin, nature, scope and constraints of inherent powers. One of the central questions examined is how a court can ensure that its inherent powers are exercised in accordance with legal constraints while also promoting fairness and justice for all parties involved. Furthermore, the analysis looks at the role of precedents and judicial discretion in establishing the principles governing the exercise of such power within the framework of the Sudanese Civil Procedure Code. Through an exploration of the doctrine of inherent powers within the Sudanese legislative context, this article has the potential to make several contributions to the field. Primarily, it can offer a thorough comprehension of the inherent powers doctrine and its practical applications; this comprehensive understanding may be beneficial to judges, lawyers and legal scholars operating within the Sudanese jurisdiction. Secondly, the critical analysis of the doctrine can bring attention to any potential challenges that may arise in the course of judicial practice. Consequently, this additional information can be utilized to enhance judicial practice and ensure the effective and efficient administration of justice. Lastly, the examination of the doctrine of inherent powers under the Sudanese Civil Procedure Code itself constitutes an important and valuable contribution to the field of Sudanese law, with potential implications for the broader discourse on judicial powers and the rule of law.

The methodology employed in this research involves a comprehensive legal analysis of inherent powers within the Sudanese legal context, with a focus on relevant sections of the Civil Procedure Code (CPC) and related judicial decisions to understand the scope, limitations and practical application of inherent powers. Additionally, a comparative study examines how inherent powers are understood and exercised in other legal systems, such as the United States, India and the United Kingdom, offering insights into different approaches. The research utilizes specific case studies from Sudan and other

3 Id at 25–26.

4 J Donnelly "Inherent jurisdiction and inherent powers of Irish courts" (2009) 2 *Judicial Studies Institute Journal* 122 at 125.

5 Jacob "The court's inherent jurisdiction", above at note 1 at 25.

6 Id at 23.

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jurisdictions to illustrate the practical application of inherent powers. Legal commentary and scholarship on the topic of inherent powers are reviewed to provide additional context and analysis. This methodology allows for a comprehensive exploration of inherent powers, offering a nuanced understanding of their role in addressing legal gaps and procedural challenges while considering international perspectives. The article first introduces the concept of inherent powers and its significance, followed by an examination of its historical development across various legal traditions. It explores the interplay between inherent and legislative powers, emphasizing how inherent powers complement statutory provisions. The analysis includes comparative studies across diverse legal systems, such as Ukraine, Germany, New Zealand, the UK, South Africa and India, showcasing the practical applications and contextual nuances of inherent powers within these jurisdictions. The limitations and challenges of wielding inherent powers are discussed, focusing on the need to maintain legal propriety and respect constitutional principles. The article also explores the nature and scope of inherent powers, featuring illustrative examples from Sudanese law and distinguishing inherent jurisdiction from inherent powers. It delves into the complex relationship between implicit inherent powers and statutory rules and addresses the controversy surrounding court-established procedural rules. The article concludes by summarizing key insights and advocating for a liberal interpretation of inherent powers within statutory boundaries.

Historical development and the impact of law reforms on inherent powers in Sudan

Within the sphere of judicial practice in Sudan, national courts have frequently employed the doctrine of inherent powers to signify the court's capacity to undertake whatever is required to achieve justice. In essence, this principle has been consistently applied to prevent miscarriages of justice.[7] An illustration of this authority can be found in a plethora of precedents, as will be discussed later. However, in order to grasp the nature and limitations of inherent powers, certain clarifications are necessary; it may therefore be beneficial to trace the historical background from which this doctrine originates. Understanding the doctrine of inherent powers within the legal context of Sudan involves investigating the origins of the doctrine through an exploration of the legacy of British colonial rule, which had a distinct impact on the framework of Sudanese law. Sudan was placed under Anglo-Egyptian rule by a joint agreement in 1899, which reinstated Egyptian authority once more after British rule.[8] Ironically, the partnership between the two countries was merely nominal, as the British assumed control of the condominium and the governor general assumed leadership of military and civil command in Sudan.[9] The agreement not only enabled the British to be the de jure ruler of Sudan but also the de facto one.[10]

7 Eg in *Cairo Insurance Company v Bakhita Wada Allah*, El Fatih Awouda J mentioned that Sudanese courts, being courts of equity, have always declined to allow formalities to prevail over substance. See [1965] SLJR case no AC-APP-29-1965 at 18. In the same way, in *Mohamed Omer Bazara'a v Abdel Hamid Buhafazalla*, it was decided that the court can exercise its inherent powers to extend the limitation period in the interest of justice. See [1962] SLJR 132.

8 R Robinson, J Gallagher and A Denny *Africa and the Victorians: The Climax of Imperialism* (1968, Anchor Books) at 346 and 352.

9 The intention of the British administration to take the lead in Sudan can be detected from the words of Lord Salisbury in a letter sent to Lord Cromer in August 1898: "You explain to the Khedive and to his ministers that the procedure I have indicated is intended to emphasise the fact that Her Majesty's Government consider that they have a predominant voice in all matters connected with the Sudan, and that they expect that any advice they may think fit to render to the Egyptian Government in respect to Sudan Affairs, will be followed"; see M Abd al-Rahim *Imperialism and Nationalism in the Sudan* (1969, Clarendon Press) at 29. Art 2 of the agreement stated that "the supreme military and civil command in the Sudan shall be vested in one officer, who shall be called the Governor-General of the Sudan. He shall be appointed by Khedive Decree on the recommendation of Her Britannic Majesty's Government, and may be removed only by Khedive Decree with the consent of Her Britannic Majesty's Government"; see L Berry (ed) *Sudan: A Country Study* (2015, Federal Research Division, Library of Congress) at 22–23. Also see A Al-Khalifa "Development and future of English law and Islamic law in the Sudan" (PhD thesis, McGill University, Montreal, 1988) at 46.

10 Id at 45.

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Shortly after the proclamation of the joint agreement, the issue of the legal system to be applied in Sudan was raised among policy-makers.[11] Based on the martial law imposed in the country, the governor general was authorized to replace or modify all laws whenever it was deemed necessary.[12] A notable illustration of this authority can be found in *Sudan Government v National Contracting Co of Egypt* (1939), where Justice Flaxman stated:

> "The learned Advocate General has shown by what means and authority the exclusive power of the Governor General of the Sudan to legislate for this country arises. I am not aware of any law promulgated by the Governor General of the Sudan which confirms any powers of an Egyptian Tribunal to serve and enforce orders directed to persons in this country for the attachment of property here. The need for some agreement between Egypt and the Sudan relating to the recognition of certain judgements obtained before Egyptian tribunals has been recognized and given effect to in the Egyptian Judgements Ordinance 1901."[13]

Interestingly, the British administration made concerted efforts to extricate Sudan from the influence of Egyptian law.[14] To this end, the condominium agreement stipulated that the legal system in Sudan would be distinct and autonomous.[15] With a commitment to establishing an independent legal system, the introduction of English common law in Sudan was part of the broader mission announced by Lord Cromer: "The cannon which swept away the Dervish hordes at Omdurman proclaimed to the world that on England – or, to be more strictly correct, on Egypt under British guidance – had devolved the solemn and responsible duty of introducing the light of western civilisation amongst the sorely tried people of the Sudan."[16] The British administration persisted in modernizing Sudan's legal system, and these endeavours culminated in the creation of the Civil Justice Ordinance in 1900.[17] It is worth noting that this was repealed in 1929 and subsequently reinstated as the Civil Justice Ordinance 1929 (CJO 1929).[18] The provisions of this Ordinance comprise a blend of the Indian Civil Procedure Code and English procedural rules. A comparison between the

11 E Guttmann "The reception of the common law in the Sudan" (1957) 6/3 *The International and Comparative Law Quarterly* 401 at 417.

12 L Fabunmi *The Sudan in Anglo-Egyptian Relations: A Case Study in Power Politics, 1800–1956* (1973, Greenwood Press) at 51–61.

13 *Sudan Government v National Contracting Co of Egypt* [1939] SLJR. See J al-Kharṭūm and K al-Qānūn *Sudan Law Reports: Civil Cases* (vol 2, 1969, Oceana Publications), available at: <https://openlibrary.org/books/OL5683781M/Sudan_law_reports_civil_cases> (last accessed 20 April 2023).

14 Art 4 of the condominium agreement states: "No Egyptian Law Decree Ministerial Arrete, or other enactment hereafter to be made or promulgated shall apply to the Sudan or any part thereof, save in so far as the same shall be applied by Proclamation of the Governor-General in manner hereinafter provided"; available at: <https://en.wikisource.org/wiki/Sudan_Convention_(1899)> (last accessed 6 August 2024).

15 M Shibeika *British Policy in the Sudan 1882–1902* (1952, Oxford University Press) at 415.

16 Quoted in PM Holt and MW Daly *The History of the Sudan: From the Coming of Islam to the Present Day* (1979, Weidenfeld & Nicolson) at 116.

17 Sudan Civil Justice Ordinance 1900 (Central Archives Ministry of the Interior); available at: <https://online.publuu.com/613464/1372038> (last accessed 7 August 2024). This Ordinance governed civil litigation in Sudan during Anglo-Egyptian rule. While its provisions have been amended over time, some of its sections are still applicable. See M Al-Shaykh Umar *Civil Procedure Code* (vol 2, 2022, Al Neelain University Press) at 245.

18 As Zaki Mustafa has noted, the CJO 1929 is considered to be the most important law in Sudan in the context of common law reception, especially as it provides for the courts to create laws under the doctrine of equity and good conscience. Thus, by taking advantage of sec 9 and its flexibility, Sudanese courts paved the way for common law enforcement in Sudan through a series of cases and ultimately ended up applying English statutes. See Z Mustafa *The Common Law in the Sudan: An Account of the "Justice, Equity, and Good Conscience" Provision* (1971, Clarendon Press) at 44; H Ismail "The need to re-examine the route of preemption law in the Sudan: A critical analysis" (2020) 36 *Arab Law Quarterly* 324 at 334.

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Indian Code and the CJO 1929 reveals that the doctrine of inherent powers was borrowed from Indian law and reintroduced in the CJO 1929.[19]

At this point, it is important to emphasize that the doctrine of inherent powers is a fundamental characteristic of the common law system, which originates from England.[20] Numerous countries have embraced the doctrine, including Sudan and India. When considering other common law jurisdictions, such as the United States, Canada, Nigeria and Uganda, it is important to observe that the inherent powers doctrine is distinctive to these legal systems.[21] In light of this context, it can be asserted that the doctrine of inherent powers is a product of the entire common law system, rather than being confined to a specific jurisdiction within the broader common law framework. Consequently, it appears indisputable that the doctrine of inherent powers, introduced to Sudan through Indian law, fundamentally originates from the common law system.[22] Interestingly, a similar conclusion can be drawn from the well-established case law. For instance, courts have turned to English and Indian precedents when interpreting or justifying their use of inherent powers, as both the English and Indian legal systems have a rich tradition of acknowledging and employing the doctrine of inherent powers. This practice is not unusual in many jurisdictions globally; courts often refer to case law and legal principles of other jurisdictions to guide their own decisions and reasoning. This trend in judicial practice is apparent in a series of cases. For instance, in *Halifax Ali Mohammed Heirs v Osman Ali Mohammed Heirs*, the Court of Appeal cited common law jurisprudence in the context of inherent powers; it was ruled that "the court can assume jurisdiction under its inherent powers to issue declaratory judgments not accompanied by consequential relief. The court must be satisfied that a genuine dispute exists regarding the right being asserted."[23] This is also clearly articulated by Allen in *Law and Orders*.[24] Similarly, in *Dariat El Mahdi v Abd El Agadir Abu Regaaila*, the Court of Appeal made it evident that section 226 of the CJO 1929 closely mirrors its Indian counterpart; in this context, Abdel Mageed Imam PJ remarked:

> "With all due respect to the Indian views, I believe this court is not obligated to favor one over the other. Our Section 226 of the Civil Justice Ordinance is quite extensive (similar to Section 151, its Indian equivalent). Under this section, the court can exercise its power to administer justice, and the only constraint one can contemplate is that this exercise must not conflict with the explicit provisions of the law."[25]

19 Guttmann "The reception", above at note 11 at 405; CJO 1929, sec 226.

20 J Cameron "The inherent power of a state's highest court to discipline the judiciary" (1977) 54/1 *Chicago-Kent Law Review* 45 at 47–48.

21 In the US, it was held in *Chambers v Nasco, Inc* that federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them, invoking the inherent power to punish conduct which abuses the judicial process; see [1991] 501 US 32. The Supreme Court of Canada in *RV Clarkson* stated that "every court possesses the inherent jurisdiction and power to control its procedure and to prevent its process from being frivolous or abusive in a harmful manner"; see [1986] 66 NR 114 (SCC). The Nigerian Supreme Court in *Alhaji Umar Abba-Tukur v Government of Gongola State* made it clear that courts have the inherent power to regulate their own process and bar any attempt to abuse the court procedure; see [1989] 4 NWLR (Pt 117) 517. Under sec 98 of Ugandan Civil Procedure Act, the inherent power of a court is stated in the following terms: "Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"; available at: <https://ulii.org/akn/ug/act/ord/1928/1/eng%402000-12-31> (last accessed 22 April 2023).

22 From the eve of the colonial era up to the present, the legal landscape of Sudan was shaped by a combination of the common law system, Islamic law and customary law. See S Parmar "An overview of the Sudanese legal system and legal research" (January 2007), available at: <https://www.nyulawglobal.org/globalex/South_Sudan.html> (last accessed 24 April 2023).

23 *Halifax Ali Mohammed Heirs v Osman Ali Mohammed Heirs* [1970] SLJR case no AC-REV-531-1970 at 75.

24 CK Allen *Law and Orders* (2nd ed, 1945, Stevens) at 266

25 *Dariat El Mahdi v Abd El Agadir Abu Regaaila* [1960] SLJR case no AC-Revision-70-159 at 49.

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In *Sayed Abdullahi El Fadil El Mahdi v Arab Bank, Khartoum*, Justice Babiker Awadalla similarly cited section 151 of the Indian CPC and drew a comparison with section 226 of the Sudanese CJO 1929.[26]

Some scholars contend that the impact of common law in Sudan was not substantial, nor was it firmly ingrained in the beliefs of the indigenous population, except for a few legal professionals and elites.[27] Nonetheless, it is generally believed that the influence of common law persisted even after Sudan gained independence in 1956, as a significant portion of the legal workforce (including judges and lawyers) had been trained by British authorities and may have leaned towards relying on English case law.[28] Furthermore, it is noteworthy that English remained the language used in litigation until 1970. Undoubtedly, shortly after gaining independence, there were pressing demands for reforming the legal system, particularly when Colonel Gaafar al-Nimeiry seized power in a coup on 25 May 1969.[29] At the start of his rule, a committee was tasked with crafting recommendations for a new system, but he disbanded it and established another committee primarily composed of twelve Egyptian jurists and three Sudanese lawyers.[30] Following recommendations from this committee, Sudan transitioned from the common law system to the civil law system and replaced the CJO 1929 with the Civil Procedure Code (1972).[31]

However, the common law system was reinstated in Sudan shortly thereafter, leading to the repeal of the CPC (1972) and its subsequent re-enactment as the CPC (1974).[32] President al-Nimeiry forged an alliance with the Muslim Brotherhood movement and declared Sharīʿah as the foundation of the Sudanese legal system in September 1983. Consequently, the legal landscape underwent reforms to align with Islamic laws, leading to the repeal of the CPC (1974) in 1983 and its subsequent re-enactment as the Civil Procedure Code (1983).[33] Despite the surge of Islamic influence, the entire legal landscape continued to closely resemble the common law system.

The doctrine of inherent powers within the Sudanese Civil Procedure Code must be understood within the context of the broader constitutional framework that governs the administration of justice in Sudan. Articles 4, 6 and 8 of the Sudanese Constitution of 2019 provide a foundational legal ethos that informs the judiciary's interpretive and procedural discretion.[34] Article 4 enshrines the state's commitment to a democratic, pluralistic and decentralized system, underpinned by the principles of justice, equality and the guarantee of human rights and fundamental freedoms. This commitment establishes a constitutional mandate for the judiciary to interpret laws in a manner that furthers these foundational values, thereby providing a constitutional basis for the purposive interpretation of statutes and procedural rules. Article 6 reinforces the supremacy of the rule of law and the transitional authority's dedication to upholding legal accountability. It implies a constitutional endorsement for the judiciary to rectify grievances and restore rights, which may necessitate the invocation of inherent powers to ensure that justice is not encumbered by procedural irregularities.

26 *Sayed Abdullahi El Fadil El Mahdi v Arab Bank, Khartoum* [1962] SLJR case no AC-REV-29-1962.

27 Al-Khalifa "Development and future", above at note 9 at 263; D Crecelius "The course of secularization in modern Egypt" in JL Esposito (ed) *Islam and Development: Religion and Socio-Political Change* (1980, Syracuse University Press) at 59.

28 Guttmann "The reception", above at note 11 at 409–12.

29 Berry *Sudan*, above at note 9 at 36. Gaafar al-Nimeiry took over Sudan in the 1969 coup and held on to the presidency by taking a constantly swerving political course, until a bloodless coup ousted him in 1985; he died in Sudan on 30 May 2009. See D Hevesi "Gaafar al-Nimeiry, a Sudan leader with shifting politics, dies at 79" (11 June 2009) *The New York Times*, available at: <https://www.nytimes.com/2009/06/12/world/africa/12nimeiry.html> (last accessed 22 April 2023).

30 O Köndgen "Codifying a jurist's law: Islamic criminal legislation and Supreme Court case law in the Sudan under Numairi and Bashīr" (PhD dissertation, University of Amsterdam, 2013) at 76.

31 Ibid.

32 Ibid.

33 Berry *Sudan*, above at note 9 at 41.

34 Constitution of the Republic of Sudan 2019, available at: <https://www.constituteproject.org/constitution/Sudan_2019> (last accessed 7 August 2024).

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Article 8 explicitly directs state agencies, including the judiciary, to engage in legal reform aimed at developing a rights and justice system characterized by independence and adherence to the rule of law. This directive is indicative of a constitutional recognition of the judiciary's role in shaping the legal system to align with the evolving needs of justice.

In light of these constitutional provisions, it is evident that the Sudanese Constitution contemplates a flexible and dynamic application of justice, one that prioritizes substantive outcomes over procedural formalities. This is in harmony with the constitutional practices of many countries in the developing world, where the purposive interpretation of the constitution and the principle of administering substantive justice without undue regard to technicalities are widely recognized. The constitutional context of Sudan therefore not only permits but arguably necessitates that courts exercise their inherent powers when such actions are required to uphold the constitutional mandates of justice, equality and human rights. This interpretive stance is crucial for determining whether a court can justifiably set aside a provision of law in the Civil Procedure Code and underscores the judiciary's constitutional duty to ensure that the administration of justice is not strictly confined to the letter of procedural codes but is also guided by the spirit of the Constitution, which seeks to deliver justice in its most equitable form.

Understanding the ambiguity of inherent powers and inherent jurisdiction

Generally speaking, the endeavour to formulate a precise definition for the doctrine of inherent powers, like the majority of legal terms, is fraught with difficulty, as exemplified in *Jawahar Singh Sobha Singh v Union of India (UOI) and Others*. Although the question of the exact meaning of the term "inherent powers" was raised by the Punjab-Haryana High Court, the Court acknowledged that it is an ambiguous concept; it was observed that

> "The expression 'inherent powers of the Court' is not susceptible of a clear and precise definition and, so far, no Court has endeavoured to give an all-embracing statement of the essential nature of this extraordinary jurisdiction. The boundaries of inherent powers can best be determined by a process of inclusion and exclusion."[35]

Nevertheless, a clear understanding of the term and its functioning can be gleaned from the legal heritage of common law, and it is therefore beneficial to draw upon some examples from English and Indian law as points of reference. In this regard, the words of Justice Baron Alderson can be cited, as he once described the doctrine of inherent powers with the following: "The power of each court over its processes is unlimited; it is a power inherent to all courts, both inferior and superior; without it, the court would be compelled to remain passive and witness the abuse of its processes leading to injustice."[36] The Supreme Court of Sudan adopted a similar approach; for example, in *El Nur Abdullah v Nasra Ahmed Salem*, it was determined that the Supreme Court, like any other lower court, possesses a broad spectrum of inherent powers to extend the legal timeframes provided in accordance with the rules of law.[37]

Scholarly and judicial literature has embraced the analytical perspective of Sir Jack Jacob, who defines inherent jurisdiction, rather than inherent powers, as follows: "[a] residual source of powers, upon which a Court may rely in case of necessity, whenever it is just or equitable to do so, in

35 *Jawahar Singh Sobha Singh v Union of India (UOI) and Others* [1958] AIR P H 38, para 5.

36 *Cocker v Tempest* [1841] 7 M & W 502, 503–504. Sir Edward Hall Alderson was an English lawyer and judge whose many judgments on commercial law helped to shape the emerging British capitalism of the Victorian era. He was a baron of the Exchequer and so held the honorary title Baron Alderson. See "Edward Alderson (judge)" (25 December 2022) *Wikipedia*, available at: <https://en.wikipedia.org/wiki/Edward_Alderson_(judge)> (last accessed 24 April 2023).

37 *El Nur Abdullah v Nasra Ahmed Salem* [1976] SLJR at 65–66.

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particular to ensure respect for the due process of law, to prevent improper annoyance or oppression, to serve justice between the parties and to secure a fair trial between them".[38] According to Jacob, a parallel conclusion can be drawn from the language structure of section 151 of the Indian Civil Procedure Code, which reads as follows: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."[39] An identical section was imported from the Indian Code into the Sudanese Civil Justice Ordinance, remaining unchanged through successive amendments until the implementation of the current Civil Procedure Code (1983), which re-enacted the inherent powers of the court using the same wording as its Indian counterpart. Consequently, the doctrine retained its original characteristics and was re-enacted as follows:

1) "The court may, at any time and on such terms as it deems appropriate, amend any defect or error in any proceeding in a suit; and all essential amendments shall be carried out to determine the actual question or issue raised by or dependent on such proceeding."[40]
2) "Nothing in this Code shall be construed to restrict or otherwise impede the inherent power of the court to issue orders as may be required to achieve the ends of justice or to prevent the abuse of the court's process."[41]

The language structure of these articles clearly indicates that the doctrine of inherent powers was originally conceived and established as a legitimate creation of the common law. From its inception to the present day, it has remained unaffected by the successive changes in the Sudanese legal landscape.

Considering the perspectives of Jacob and Alderson, it becomes evident that their efforts aimed to clarify the essence of inherent "powers" or the so-called inherent "jurisdiction". In this context, they acknowledge that the essence of the doctrine is to empower the court to prevent malicious litigation; therefore it may seem that they have effectively addressed the ambiguity of the concept. However, an examination of both viewpoints reveals that neither provides a definitive meaning or a conclusive end to the use of the term. To put it more accurately, the concept of inherent powers may appear straightforward on the surface, but this simplicity is deceptive.[42]

In Sudan, inherent powers and inherent jurisdiction were often used interchangeably within the legal context. For example, in *Mohammed Hassanein Abullea v Joseph Tabet*, the Court of Appeal ruled that, given the circumstances of the case, the Court should exercise its inherent jurisdiction and order the partnership to be dissolved, as the parties appeared to have reached an impasse.[43] Conversely, in *Building Authority of Khartoum v Evangelos Evanguides*, the High Court of Appeal used the term "inherent power" rather than "inherent jurisdiction", stating: "The second contention is that this court is bound by two of its own precedents, in which the ratio decidendi is that once there is no right of appeal under an Ordinance, then it is not possible for the High

38 Jacob "The court's inherent jurisdiction", above at note 1 at 51. On Jacob, see C Glasser "Lawyer who ushered England's civil courts into the present day" (1 January 2001) *The Guardian*, available at: <https://www.theguardian.com/news/2001/jan/01/guardianobituaries1> (last accessed 24 April 2023): "Sir Jack Jacob, who has died aged 92, was the outstanding British exponent of civil court procedure during the 20th century. He was the first to fully grasp the relationship between court rules and the social dynamics which lay behind their operation."

39 Jacob "The court's inherent jurisdiction", above at note 1 at 51. Indian Civil Procedure Code, available at: <https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00051_190805_1523340333624&sectionId=33494&sectionno=151&orderno=162> (last accessed 7 August 2024).

40 Sudan CPC, above at note 1, sec 328(1).

41 Id, sec 328(4).

42 Y Goh "The inherent jurisdiction and inherent powers of the Singapore courts: Rethinking the limits of their exercise" (2011) *Singapore Journal of Legal Studies* 178 at 188. See also *Cocker*, above at note 36.

43 *Mohammed Hassanein Abullea v Joseph Tabet* [1956] SLJR case no AC-APP-12-1956 at 12.

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Court, invoking its inherent power, to intervene through a review."[44] The terms "inherent powers" and "inherent jurisdiction" are thus being employed interchangeably by Sudanese courts due to the confusion surrounding the precise meaning of the term. This confusion can be assumed to arise more from the interpretations of these concepts in judicial rulings than from provisions of the law. This view is reinforced by the language structure of article 285 of the CPC (1983), which does not include any specific reference to the term "inherent jurisdiction"; instead, it empowers the courts to create and design solutions within the scope of their inherent powers. For these reasons, and to mitigate such confusion, it may be appropriate for Sudanese courts to utilize "inherent powers" to denote the authority they possess to fulfil their duties and functions. In this context, the term would primarily refer to a court's capacity to exercise discretion in managing and controlling its own proceedings, as well as to take any necessary actions to serve the interests of justice, including the power to regulate the conduct of parties, admit or exclude evidence, grant interim injunctions and impose penalties for contempt of court. On the other hand, it should be noted that the term "inherent jurisdiction" is widely used in legal practice to describe a court's inherent authority to hear and adjudicate certain types of cases. However, it is evident that Sudanese courts may still use the term "inherent jurisdiction" to describe the court's broader authority, which encompasses inherent powers.

The debate regarding the terminological conundrum emerged long ago, when Jacob wisely proposed that the terms "inherent jurisdiction" and "general jurisdiction" of the court are not identical and should not be conflated; he contended that inherent jurisdiction is merely an expression of the court's extensive general jurisdiction.[45] According to this explanation, the inherent jurisdiction of the court can be invoked when it is deemed "equitable and just" to do so.[46] Jacob describes the doctrine in a comprehensive manner as a reserve of powers that the court may employ whenever it is fair and equitable; these powers are utilized to prevent undue prejudice to the opposing party, to thwart abuse of the legal process and to preserve the smooth and intact progression of legal proceedings. In summary, these powers serve the purpose of delivering justice and ensuring impartial litigation between parties.[47]

In Jacob's view, inherent jurisdiction is a privilege granted exclusively to superior courts to uphold their status as courts of law. He similarly contends that the inherent jurisdiction of superior courts did not originate from statutory provisions but was inherited from the concept of royal supremacy.[48] Furthermore, he emphasizes that the inherent jurisdiction of superior courts remained unaffected by the codification movement. In summary, he believes that the term "inherent jurisdiction" is broader in scope than the term "inherent powers". In supporting his viewpoint, Jacob proposes that inherent jurisdiction encompasses all the powers necessary for the court to "fulfil itself as a court of law" and "to uphold, protect, and fulfil the judicial function of administering justice according to law in a regular, orderly, and effective manner".[49] Therefore the concept of inherent powers falls within the purview of what he contends to be inherent jurisdiction: according to the earlier argument, the inherent powers of the court stem from the inherent jurisdiction.[50] While Jacob acknowledges that inherent powers are a component of inherent jurisdiction, he emphasizes that they complement the powers conferred upon the court by statutory rules. Furthermore, he concludes that each of these sets of powers substitutes for and reinforces the other.

No further illumination can be provided regarding inherent powers or so-called inherent jurisdiction due to a lack of consensus on the foundation of such authority. In this context, some

44 *Building Authority of Khartoum v Evangelos Evanguides* [1958] SLJR case no AC-APP-23-58 at 44.
45 Jacob "The court's inherent jurisdiction", above at note 1 at 23–24.
46 Id at 51.
47 Ibid.
48 Id at 27.
49 Id at 27–28.
50 Id at 50.

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commentators contend that a court's inherent powers stem exclusively from its status as a judicial institution and are not bestowed upon the court by any regulatory rules.[51] This approach aligns with the "innate theory" of inherent jurisdiction, which posits that the court's inherent jurisdiction is derived from the very nature and existence of the court itself. In other words, the court possesses inherent jurisdiction simply because it is deemed necessary to oversee its proceedings and prevent the abuse of the process. An example illustrating the innate theory can be found in *Ogwuegbu v Agomuo and Others* in the Nigerian Court of Appeal,[52] where it was held that

> "[T]he inherent power of the Court is that power which adheres to the Court just because it is a Court. And if I may diverge to Latin, the word 'inherent' (adjective used to qualify the noun – 'power') derives from Latin 'inhaereo' (verb) 'inharere–inhaesum' meaning, 'to stick in', 'cling to', or, 'cleaves to', a Court by the very reason only of its being such a Court. 'Inherent power' of the Court needs not be legislated upon. No. Where, however, there be a legislation dealing with such 'inherent power', it is no longer, in my view, an 'inherent power'. Why? Because it thenceforth, becomes a 'statutory power' or, 'constitutional power' as the case may be. But in that case too, in my view, the 'statutory power' does not detract, or derogate from or, abridge the 'inherent power' of that Court. Why? Again, because it is inherent."[53]

Likewise, in *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*, the Supreme Court of India observed that inherent power was not bestowed upon the Court but that it is an intrinsic power inherent in the Court by virtue of its duty to dispense justice.[54] The Andhra Pradesh High Court of India revisited the same concept in *P Srinivasa Rao v P Indira and Another*, where it was established that the power under section 151 of the Indian CPC is not a power bestowed upon the Court; rather, it is an inherent power intrinsic to the Court itself, stemming from its duty to administer justice between the parties.[55]

Conversely, certain commentators have arrived at a contrary conclusion, contending that inherent powers were indeed granted to courts by the English Judicature Act of 1873.[56] In essence, the inherent powers are not exclusively generated by a court itself but are granted to it by the legislature. This perspective aligns with the vesting theory of inherent jurisdiction; therefore it could be argued that in practice, the doctrine of inherent powers is often perceived as a combination of both the innate theory and the vesting theory. While a court may possess certain inherent powers derived from its status as a judicial institution, it may also hold powers conferred by law.[57]

Limitations and challenges of inherent powers

In the diverse landscape of global legal systems, courts frequently confront situations where specific legislation or committee-enacted rules are absent, especially in civil and criminal proceedings. Some jurisdictions address this challenge by focusing on the court's inherent powers and the practice of judicial law-making. The jurisdictions under consideration here include continental European

51 M Hetherington "Inherent powers and the Mareva jurisdiction" (paper presented at the International Conference on Economic and Organised Crime: Risks and Remedies, Sydney, 1987) at 77; available at: <https://classic.austlii.edu.au/au/journals/SydLawRw/1983/6.pdf> (last accessed 8 August 2024); R Assy and A Higgins (eds) *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (2020, Oxford University Press) at 271.

52 See id at 274.

53 *Ogwuegbu v Agomuo and Others* [1999] LPELR-6686 (CA).

54 *Manohar Lal Chopra vs Rai Bahadur Rao Raja Seth Hiralal* [1962] AIR 527, [1962] SCR Supl. (1) 450, AIR 1962 Supreme Court 527, [1963] ALL L J 169.

55 *P Srinivasa Rao v P Indira and Another* [2002] (1) ALD 296, [2002] (1) ALT 677, 93.

56 Assy and Higgins *Principles, Procedure*, above at note 51.

57 See *Metropolitan Bank v Pooley* [1885], 10 App Cas 210 [1881–5] All ER Rep 949.

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countries (with a focus on Ukraine and Germany), as well as common law jurisdictions like New Zealand, the United Kingdom, South Africa and India. In continental and common law jurisdictions, courts have evolved a sophisticated approach to judicial law-making, particularly in civil justice. Timchenko and Kotvyakovsky offer an insightful overview of this practice, emphasizing how European nations such as Ukraine and Germany authorize their courts to engage in legislative activities to fill legal voids. This form of judicial activism, while proactive, is carefully regulated to prevent overstepping into legislative domains, thereby ensuring that justice prevails despite the lack of explicit legal rules.[58]

The role of courts in managing procedural gaps is highlighted in the context of administrative offences. Zhukova examines how courts of general jurisdiction and arbitration courts in unspecified jurisdictions tackle cases lacking specific procedural legislation, particularly focusing on the submission and management of electronic documents. This scenario underscores the flexibility and adaptability of judicial systems in upholding procedural integrity in the absence of clear guidelines.[59] The interplay between domestic mandatory rules and international contracts offers another perspective on judicial discretion: Merwe explores how courts in New Zealand, the United Kingdom and South Africa address the complexities inherent in international employment contracts when legislative directives are unclear. This involves balancing respect for party autonomy in contract law against the enforcement of mandatory domestic legal principles.[60] In the domain of cyberspace, the absence of specific legislation or court rules introduces unique challenges; Singh discusses the Indian judiciary's approach to establishing jurisdiction in the digital realm. This reflects a broader global issue where courts are tasked with developing jurisprudential principles in areas not explicitly covered by existing legislation.[61]

As we go deeper into the dynamics of inherent powers within various judicial systems, it becomes imperative to acknowledge their intrinsic limitations. These constraints are crucial in ensuring that the exercise of such powers remains within the ambit of legal propriety and does not overstep the boundaries set by statutory rules and constitutional principles. Mendelson's analysis offers a foundational perspective on this aspect; his work delves into the interplay between liberty and authority in federal systems, highlighting how inherent powers, while broad, are circumscribed by due-process limitations. This is particularly relevant in scenarios where courts are required to navigate the absence of specific legislation, ensuring that their interventions do not infringe upon individual rights or constitutional mandates.[62] Further insight into these limitations is provided by Mullenix's exploration of US federal courts' powers in sanctioning parties through attorney fees. This discussion brings to light the nuanced boundaries of inherent powers, especially in the context of federal courts and their ability to impose sanctions in the absence of explicit statutory guidance. The case study presented by Mullenix serves as a critical example of how inherent powers, though significant in filling legislative gaps, are not unfettered and must align with established legal norms.[63]

58 HP Timchenko and YO Kotvyakovsky "On the issue of judicial law-making in civil proceedings" (2022) 2 *Analytical and Comparative Jurisprudence* 101, available at: <https://doi.org/10.24144/2788-6018.2022.02.18> (last accessed 25 July 2024).

59 OV Zhukova "On the issue of appealing to the court decisions in cases of administrative offenses" (2021) *Bulletin of TvGU. Series: Law (1)* 53.

60 M Merwe "A comparative analysis of the proposed mandatory nature of employment legislation and its interaction with the choice of law of an international contract" (2020) 14/2 *Pretoria Student Law Review* 147.

61 A Singh "Ascertaining cyber jurisdiction in cyber space: Jurisprudential understanding and a comparative analysis" (2009) *SSRN*, available at: <https://ssrn.com/abstract=1366018> (last accessed 25 July 2024).

62 W Mendelson "Justices Black and Frankfurter: Supreme Court majority and minority trends" (1950) 12/1 *The Journal of Politics* 66, available at: <https://doi.org/10.2307/2126088> (last accessed 25 July 2024).

63 L Mullenix "The $1.5 million sanction: Testing the inherent power of federal courts to sanction parties by awarding attorney fees" (1991) 8 *Preview of Supreme Court Cases* 244 (University of Texas Law public law research paper no 369), available at: <https://ssrn.com/abstract=2222068> (last accessed 25 July 2024).

Campagnolo's examination of cabinet immunity in Canada further underscores the limitations imposed on judicial powers by statutory provisions. By revisiting key rulings of the Supreme Court of Canada, Campagnolo argues that certain legislative sections can significantly limit the inherent jurisdiction and powers of provincial superior courts. This analysis is particularly illuminating in understanding how statutory rules can act as a check on a court's authority, especially in matters of evidence admissibility and the legality of executive action.[64] Lastly, Piotrowski's discussion of the Polish legal system provides a broader perspective on the constraints of inherent powers within a democratic framework. The Polish Constitution's emphasis on protecting individual rights serves as a boundary for the exercise of judicial discretion, highlighting the importance of maintaining a balance between judicial authority and the principles of inherent and inalienable human dignity.[65]

A critical perspective on the inherent problems associated with the use of equity in judicial decisions is provided by Schroeder. The Supreme Court's approach, discussed in the context of the Wheaton injunction, illustrates the tension between positivism and equitable considerations. This tension underscores the ambiguity inherent in equity, where the application of laws and treaties without equitable limitation can lead to a bifurcation of precedent and a reworking of fundamental principles such as stare decisis and the rule of law. This case exemplifies how the application of equity can vary significantly, leading to different judicial outcomes based on the same set of facts.[66] The case of *eBay v MercExchange*, as discussed by Robert I. Reis, highlights the inherent requirements of discretionary equitable relief in the context of injunctive remedies. The court's focus on the discretionary elements and requirements of judicial relief, particularly in the absence of categorical presumptions based on property rights, illustrates the challenges in applying equity in a consistent manner. This case raises important questions about the adequacy of compensation, the measurement of value and the determination of relative harms, all of which are central to the equitable process but subject to varying interpretations.[67]

Rees's examination of "court substitute" tribunals sheds light on the procedural implications of equity and good conscience clauses. These tribunals, which are directed to act according to equity, good conscience and the substantial merits of the case, demonstrate the procedural flexibility and evidentiary freedom granted to judicial bodies. However, this also highlights the difficulty in complying with the rules of natural justice in the absence of detailed rules of procedure and evidence, thereby adding to the ambiguity and the potential for inconsistent application of these principles.[68] Emilian Ciongaru's conference paper "Equity: Connotations in the current Romanian legal system" provides an insight into how equity is integrated into the judicial development of law, serving a hermeneutic function in making interpretations. The special powers granted to judges in the Romanian legal system to offer resolutions they consider fair, grounded on facts rather than positive law, underscore the subjective nature of equity. This subjectivity, while allowing for flexibility and adaptability, also poses challenges in ensuring consistent and fair application across different cases.[69]

64 Y Campagnolo "Cabinet immunity in Canada: The legal black hole" (2017) 63/2 *McGill Law Journal* (Ottawa Faculty of Law working paper no 2019-31), available at: <https://ssrn.com/abstract=3456932> (last accessed 25 July 2024).

65 R Piotrowski "Judges and the limits of democratic power in the light of the Constitution of the Republic of Poland" (2018) 80/1 *Ruch Prawniczy Ekonomiczny i Socjologiczny* 215, available at: <https://doi.org/10.14746/rpeis.2018.80.1.17> (last accessed 25 July 2024).

66 J Schroeder "America's written constitution: Remembering the judicial duty to say what the law is" (2015) 43 *Capital University Law Review* 833, available at: <https://ssrn.com/abstract=2556683> (last accessed 25 July 2024).

67 RI Reis "Rights and remedies post eBay v. MercExchange: Deep waters stirred" (2008) 2 *Akron Law Review* 101 (Buffalo Legal Studies research paper no 2011-014), available at: <https://ssrn.com/abstract=1789873> (last accessed 25 July 2024).

68 N Rees "Procedure and evidence in 'court substitute' tribunals" (2006) 28/41 *Australian Bar Review* 41.

69 E Ciongaru "Equity: Connotations in the current Romanian legal system" (paper presented at the Ninth International Conference on European Integration – Realities and Perspectives, Galati, 16–17 May 2014); available at: <https://proceedings.univ-danubius.ro/index.php/eirp/article/view/1497/1661> (last accessed 8 August 2024).

The reliance on the principles of equity and good conscience in the invocation of inherent powers by judges presents a complex landscape. While these principles allow for judicial flexibility and adaptability, they also introduce a level of subjectivity that can lead to varying interpretations and applications. This variability poses significant challenges in ensuring consistency and fairness in the application of inherent powers, highlighting the need for a careful and nuanced approach in their use.

Understanding the nature and scope of inherent powers

In light of Jacob's perspective, inherent powers stemming from the expansive concept of inherent jurisdiction pose significant challenges; however, the character of this power persists as an element of procedural rather than substantive law.[70] This viewpoint aligns with judicial practice, where courts depend on their inherent powers to dispense justice and deter vexatious litigation processes.[71] To explore the nature of the doctrine within the domain of Sudanese law, it is useful in this context to refer to an illustrative case that demonstrates the practical application of inherent powers in the pursuit of justice, *Hameeda Abdullah Kanoan v Fathi Hamid*. In this case, the Supreme Court and appellate courts in the country emphasized the principle that procedural rules should not restrict the achievement of justice. The Supreme Court clearly stated that procedure should not be used as a tool of injustice or to cause harm to any party; instead, there should be a liberal and open-minded approach to achieving justice, adapting procedures to this end. This stance is particularly evident in the Court's interpretation of the Civil Procedure Code 1974, specifically section 303, which empowers a court to extend time limits if it deems this necessary for the achievement of justice. The Court's decision in this case reflects a commitment to ensuring that procedural rules serve justice rather than hinder it, demonstrating the vital role of inherent powers in bridging gaps where procedural rules fall short.[72] Similarly, in *Yusuf Salih F v Saadia Mustafa*, the Supreme Court held that the court's inherent powers under article 303(2) of the CPC 1983 should only be invoked for clear and compelling reasons, namely to prevent the abuse of court procedures and to ensure the attainment of justice between the parties.[73] *Omar Ali Osman v Hamad Ahmed Dar Qil* further exemplifies the practical application of inherent powers by courts in ensuring justice. In this case, the Supreme Court also focused on article 303(2) of the CPC 1983, which outlines the court's jurisdiction in monitoring the application of procedural rules. The court's decision highlighted its role in guarding against any potential wrongdoing that could skew the scales of justice. This case underscores the court's proactive stance in using its inherent powers to oversee procedural fairness and prevent any form of judicial misstep that could lead to an unjust outcome. The Supreme Court's intervention in this matter illustrates the critical function of inherent powers in maintaining the integrity of the judicial process and ensuring that procedural rules are applied in a manner that upholds justice and fairness.[74]

In illustrating the practical application of inherent powers by courts, a noteworthy example is found in *Hassan Mudawee Abdel-Jalil v Morgos Trading Co*.[75] In this case, the appeal court faced a situation where a default decree was issued improperly, not aligning with the stipulated requirements of the CJO 1929, section 64(1)(a). The court's decision to set aside the default decree was not based on the grounds mentioned in section 69 of the Ordinance but rather on the recognition of a "just and sufficient cause" for its annulment. This decision underscores the court's ability to exercise its inherent powers to correct procedural errors and ensure justice. The court's

70 M Dockray "The inherent jurisdiction to regulate civil proceedings" (1997) 113 *Law Quarterly Review* 120 at 131.
71 Jacob "The court's inherent jurisdiction", above at note 1 at 24.
72 *Hameeda Abdullah Kanoan v Fathi Hamid* [1977] SLJR at 294 and 295.
73 *Yusuf Salih F v Saadia Mustafa* [1979] SLJR at 241.
74 *Omar Ali Osman v Hamad Ahmed Dar Qil* [1975] SLJR at 181.
75 *Hassan Mudawee Abdel-Jalil v Morgos Trading Co* [1967] SLJR at 195.

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intervention in this case highlights the dynamic role of inherent powers in addressing legal gaps and rectifying judicial processes, thereby upholding the principles of fairness and justice in the legal system.

An examination of Jacob's views reveals that he distinguishes between two types of inherent powers: the first pertains to those granted to higher as opposed to lower courts. According to Jacob, these powers stem from the inherent jurisdiction of the court and are not conferred by the rule of law. Consequently, defining such powers can be challenging. On the contrary, both superior and inferior courts may exercise a range of powers vested in them by legal provisions. It is therefore worth noting that the primary distinction between these two categories is that the first set of powers is circumscribed and bound by regulations, while the other is not specifically enumerated and operates without regulatory constraints.

Turning to Sudanese legislation, it can be asserted with confidence that the scope and limits of the doctrine have been clearly defined. An analytical examination of article 285 of the Sudanese Civil Procedure Code suggests that the court is granted authority, within the bounds of its inherent powers, not only to prevent the abuse of its proceedings but also to issue any orders that are necessary to achieve the objectives of justice. Consequently, the court is not bound by procedural rules if such rules conflict with the pursuit of justice; in other words, procedures must not and should not serve as a means to subvert the essence of justice. As previously mentioned, the Court of Appeal in *Cairo Insurance Co v Bakhita Wada Allah and Others* emphasized that inherent powers should be invoked to protect the interests of justice and should not allow procedural technicalities to supersede the demands of justice.[76] Likewise, in *Sudan Government v Pio Madibo*, Babiker Awadalla J stated, "We have been able to circumvent the strict time limits established in the code through the utilization of the inherent powers conferred upon the court by the Civil Justice Ordinance, Section 214. When the circumstances of the case indicate that significant injustice has transpired, and the sole impediment to rectifying that injustice is the issue of time, these powers come into play."[77]

These decisions demonstrate that judicial practice in Sudan has adopted the perspective that the court's extraordinary authority, under its inherent powers, should be employed solely to prevent injustice and to uphold the principles of justice. In other words, the principle of inherent powers empowers the court to take necessary actions in the pursuit of its duty in administering justice, even when the legislature falls short in this regard. However, courts do not possess the authority to set aside statutory rules through their inherent powers. To put it simply, the inherent powers of the court supplement and complement the powers expressly granted to it. However, the exercise of such power will not be upheld if it contradicts any of the powers expressly conferred upon the courts by the law.

The controversy over rule-making and the limits of inherent powers

Under article 285(2) of the Sudanese Civil Procedure Code, a court is endowed with a range of implied inherent powers, which are nevertheless meant to supplement and complement the powers expressly granted to it. In this context, the court is granted the authority to ensure equitable litigation and preserve the flow of justice. However, it would not be permissible for the court to invoke its implied inherent powers to override or disregard the explicit provisions of the law: the court may only invoke its inherent powers when the statutory rules fail to offer a solution, as Sudanese judicial practice has consistently clarified on numerous occasions. For instance, in *Elser Adam Sable v Haowa Adam*, the Supreme Court of Sudan noted that it is firmly established that the Court does not possess the authority to annul or disregard the explicit provisions stipulated by the law, even if the Court's objective is the administration of justice.[78] Consequently, the exercise of inherent

76 *Cairo Insurance Company*, above at note 7.
77 *Sudan Government v Pio Madibo* [1963] SLJR case no AC-REV-60-1962 at 89.
78 *Elser Adam Sable v Haowa Adam* [1986] SLJR at 35.

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powers should be restricted to situations where there are no express provisions addressing the matter. In such cases, the court is entitled to act in a manner that serves justice and prevents the abuse of procedural rules.

An emphasis highlighted by the Supreme Court of Sudan is evident in *Mustafa Mahmoud Jibreel v Heirs of Rashid Mahmoud Qabil*. In this case, it was ruled that the Court could not rely on its inherent powers to refer the dispute to arbitration without the consent of the litigants or in contradiction to what is stipulated in article 149 of the Civil Procedure Code. In a similar vein, the Court declared that the inherent powers were not meant to supplant or supersede the explicit provisions of the law, but rather were intended to supplement and enhance those provisions. Consequently, if the legislature fails to establish the requisite provisions for a given situation, that situation may be addressed through the inherent powers of the Court.[79] Consistently upholding its stance on inherent powers, in *Ali El Bedawi El Mubarak v Abdel Rahman El Khazein*, the Supreme Court affirmed that its inherent powers were employed solely to complement explicit legislation and not to substitute for it.[80] In *Gamal Mustafa Abu Samra v Abul Ela Engineering Co*, the Court of Appeal held that the inherent power of the Court under CJO 1929, section 226, cannot be utilized to extend the period of limitation on grounds of equity and justice.[81] Likewise, in *Hakeem Andrews and Others v Thuraya Muhammad Ahmed Ateeq*, the Supreme Court of Appeal ruled that the Court is not authorized, under its inherent powers, to entertain an action to evict a tenant before the expiration of the notice period specified in article 11(e) of the Rent Restriction Law of 1953.[82] In a similar vein, in *Sayed Abdullahi El Fadil El Mahdi v Arab Bank, Khartoum*, the Supreme Court of Appeal held that no court has the authority to employ its inherent powers to grant itself jurisdiction that the law did not confer upon it.[83]

As evidenced by these cases, it is clear that the explicit provisions of the law place constraints on the exercise of inherent power. A court cannot invoke its inherent authority to override specific legal rules if these rules are adequate to serve the objectives of justice. On the contrary, it can be argued that the legislature itself states that nothing in the CPC shall be construed as limiting or otherwise affecting the inherent power of the court to issue orders necessary for the ends of justice. Consequently, the court may rely on such delegation to set aside statutory rules in the interest of justice. However, it needs to be clarified from the outset that the inherent powers of the court are intended to bridge gaps and address the shortcomings and rigidity of the legislation; therefore the court may utilize its inherent powers solely to complement and enhance the provisions of the law but not to contravene them. For example, in *Abu al-Qasim Hassan al-Qash v Fregerri Lamborelli*, the Supreme Court of Sudan held that even though the Civil Procedure Code of 1974 lacks any provision that explicitly permits or prohibits the Court from restoring the status quo ante, the Court may issue an order to do so in accordance with its inherent powers under article 303 of the Civil Procedure Code 1974.[84] Similarly, in *Saleh Mohammed Saleh v Heirs of Aisha Ali Abdullah*, the Court of Appeal concluded that there was nothing to prevent the trial court from invoking its inherent powers to issue a restraining order if it was necessary to achieve justice, even if the granting of such an order is not prescribed by law.[85]

The controversy surrounding rule-making within the inherent powers of the court raises the question of whether the court possesses the authority to establish procedural rules independently,

79 *Mustafa Mahmoud Jibreel v Heirs of Rashid Mahmoud Qabil* [1966] SLJR at 34.
80 *Ali El Bedawi El Mubarak v Abdel Rahman El Khazein* [1969] SLJR case no AC-REV-525-1968 at 121.
81 *Gamal Mustafa Abu Samra v Abul Ela Engineering Co* [1968] SLJR case no AC-REV-584-1968 at 33.
82 *Hakeem Andrews and Others v Thuraya Muhammad Ahmed Ateeq* [1970] SLJR at 75.
83 *Sayed Abdullahi El Fadil El Mahdi*, above at note 26 at 136.
84 *Abu al-Qasim Hassan al-Qash v Fregerri Lamborelli* [1979] SLJR at 2.
85 *Saleh Mohammed Saleh v Heirs of Aisha Ali Abdullah* [1976] SLJR at 134.

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without the need for legislative or executive approval. To address this question, proponents of inherent powers in England point to the fact that the inherent jurisdiction of the High Court empowers it to formulate such rules, as it is essential and necessary for the proper functioning of the judicial system. They argue that courts are inherently authorized to develop rules because they are well equipped to grasp the requirements of the legal system and adapt to changing circumstances.[86] In simple terms, allowing courts to establish procedural rules will help ensure the flow of justice.[87] It is noteworthy that such an argument is no longer valid in light of Sudan's constitutional amendments of 2005; in accordance with these amendments, the authority to enact rules of civil procedure is vested in a legislative committee.[88]

On the other hand, opponents of inherent powers argue that the authority to formulate procedural rules should be granted to the court by a legislative or executive body, contending that this approach is essential to preserve a separation between the legislative and judicial branches.[89] Additionally, opponents argue that rule-making through inherent powers could potentially result in courts establishing rules that overly favour their own interests. In practice, it has been rightly observed that courts in many legal systems often depend on their inherent powers to formulate procedural guidelines. For instance, courts in the United States utilize inherent powers to innovate procedural rules outside the conventional rule-making process.[90] Likewise, in Australia, the High Court possesses the authority to establish rules that oversee and govern the proceedings of the federal courts.[91] It is worth noting that superior courts consider the procedural guidelines devised through their inherent powers to be binding on lower courts.[92] However, inferior courts may have the ability to contest the validity of such rules if they believe that they are at odds with the provisions of the law or established principles.

It should be noted that the Indian Civil Procedure Code, under section 122, confers specific high courts (excluding the court of a judicial commissioner) with the authority to formulate rules governing their own procedures and the procedures of the civil courts under their supervision.[93] They may, through these rules, nullify, modify or supplement any or all of the rules in the first schedule.[94] Conversely, under section 125, high courts, excluding the courts specified in section 122, may wield the powers granted by that section in a manner and under conditions determined by the state government. Rules established under these sections must not conflict with the provisions of the Indian CPC. Consequently, it is evident that such rules may not supersede or invalidate the explicit statutory rules. From a different perspective, these rules are subject to prior approval from the government of the state in which the court whose procedures the rules govern is located. In cases where the court is not situated within a specific state, prior approval is granted by the central government.[95] Crucially, the rules established and approved under sections 122 and 125 shall not take effect unless they are published in the official gazette.[96] Concerning the publication of these rules, it has been proposed that such requirements guarantee that the rules are promulgated appropriately.

Furthermore, section 129 of the Indian CPC bestows upon the high courts, excluding the court of the judicial commissioner, the authority to formulate rules pertaining to their original civil

86 Assy and Higgins *Principles, Procedure*, above at note 51 at 279.
87 Id at 286.
88 Ibid.
89 L Hyde "From common law rules to rules of court" (1937) 22/2 *Washington University Law Quarterly* 187 at 188.
90 A Barrett "The supervisory power of the Supreme Court" (2006) 106 *Columbia Law Review* 324 at 369, 370 and 386.
91 W Lacey "Inherent jurisdiction, judicial power and implied guarantees under chapter iii of the constitution" (2003) 31/1 *Federal Law Review* 57, available at: <http://classic.austlii.edu.au/au/journals/FedLawRw/2003/2.html> (last accessed 28 April 2023).
92 Assy and Higgins *Principles, Procedure*, above at note 51 at 286.
93 Indian CPC 1908, sec 122.
94 Ibid.
95 Id, sec 126.
96 Id, sec 127.

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jurisdiction, irrespective of anything stated in the Code. According to this delegation, high courts are empowered to create rules, in accordance with the letters patent or any order or law that established them, to regulate their own procedures.[97] Lastly, section 130 of the Indian CPC grants authority to the high court to establish rules concerning matters other than procedure, except for high courts specifically excluded by this section. However, such rule-making requires prior approval from the state government and must also be in accordance with article 227 of the Indian Constitution. It should be noted that rules created under sections 129 and 130 shall possess the force of law only when they are officially published in the gazette.[98] A similar example of rule-making can be found in the United States, where the law grants the Supreme Court the authority to establish procedural rules.[99] It is worth noting that the authority for rule-making is not solely conferred upon the Supreme Court but is also granted to federal courts.[100] Hence, federal courts and district courts, guided by the Rule of Civil Procedure, may rely on their inherent powers to establish procedural rules that align with that Rule and the overall legislative intent.[101]

The question that requires consideration here is whether rule-making falls within the purview of inherent powers under the Sudanese CPC. To address this question, it is necessary to examine the language and structure of the section that provides for the exercise of inherent powers; this examination may unequivocally establish that the law does not provide any basis for overturning or altering any clearly stated rules prescribed by the statute. This perspective is further supported by judicial practice in some instances, where it has been emphatically asserted that no court possesses the authority to challenge the explicit provisions of the legislation. For instance, in *Sudan Government v Bazzou Gamra El Habashi*, it was ruled that the inherent power of the court should not contradict or supersede specific provisions of statutory law.[102] Similarly, in *Ali El Bedawi El Mubarak v Abdel Rahman El Khazein*, the Court of Appeal held that the inherent powers of this court can only be utilized to complement, but not to replace, clear enactments.[103]

On the contrary, it can be argued that under section 285 of the current Sudanese CPC and its equivalent in the repealed CJO 1929, it is stipulated that inherent power can be invoked to serve the ends of justice. Furthermore, legal scholars assert that inherent power has been vested in a court due to its duty to administer justice between the parties, and there is nothing in the Code that diminishes the inherent powers of a court. For all these reasons, the court may exercise,

97 Id, sec 129.

98 Id, sec 131.

99 See "Judiciary and judicial procedure, Part V: Procedure", cap 131, Rules of courts, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2071&num=0&edition=prelim> (last accessed 22 April 2023): "§2071. Rule-making power generally. (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title. (b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order. (c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit." Also see J Janatka "The inherent power: An obscure doctrine confronts due process" (1987) 65/2 *Washington University Law Quarterly* 429 at 433.

100 "§2071 (c)(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference. (d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public. (e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment. (f) No rule may be prescribed by a district court other than under this section"; "Judiciary and judicial procedure", ibid.

101 B Barton "Theory of the inherent powers of the federal courts" (2012) 61/1 *The Catholic University Law Review* 1 at 10.

102 *Sudan Government v Bazzou Gamra El Habashi* [1968] SLJR case no AC-CR.REV-155-1968.

103 Above at note 80.

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among other things, the power conferred upon it to develop remedies, such as temporary injunctions, as long as it is necessary to achieve the ends of justice. This argument is bolstered by judicial practice on various occasions. As previously mentioned, in *Abu al-Qasim Hassan al-Qash v Fregerri Lamborelli* and *Saleh Mohammed Saleh v Heirs of Aisha Ali Abdullah*, it was determined that the court, under its inherent powers, may issue various orders such as interim injunctions and take whatever actions are necessary if they are just and equitable, particularly when the provisions of the law lack such remedies.[104] Thus it can be observed that the court is not authorized to go beyond the legislation but is authorized to address grey areas when the law is silent.

Taking into account all of these cases, there is an argument for adopting a middle ground. In essence, inherent powers are a double-edged sword, which means they can be employed for the furtherance of justice or its miscarriage. The tone and wording of inherent powers under the Sudanese CPC provide leeway for a court to grant interim injunctions beyond those explicitly provided for by law. It is also my position that the inherent powers of the court are supplementary and complementary to the powers explicitly granted under the CPC. Therefore, when it is fair and just, a court may invoke its reserve power to address any gaps or deficiencies that exist. However, it is obliged to first consider whether such an exercise of power is prohibited by any other provisions of the CPC or conflicts with the overall legislative intent. On the other hand, the inherent powers enshrined under the CPC cannot be used to override or replace the explicitly stated statutory rules, especially if the consequence of such an exercise impacts the substantive rights of the parties. Overall, inherent powers are granted to a court in order to serve the ends of justice, and for all the reasons mentioned above, the court should not permit procedural rules to take precedence over substance; in other words, inherent powers should be invoked to prioritize a substantive outcome over the rigidity of procedural rules.

Conclusion

In the view of this critical analysis of the inherent powers doctrine under the Sudanese Civil Procedure Code, it is apparent that the doctrine is received and accepted as part of the common law tradition, because it owes its origin to its counterpart in the Indian Civil Procedure law. It is important to mention that despite the significance of the doctrine in the field of justice administration, it is complex and fraught with difficulties; as Jacob noted, it is "amorphous and ubiquitous".[105] In fact, there may be some overlap between the concepts of inherent jurisdiction and inherent powers in Sudanese law, and judges may not always make a clear distinction between the two. Consequently, they are often used interchangeably, as if they are identical. However, it is essential to understand that these concepts are somewhat distinct. Inherent jurisdiction may pertain to hearing and deciding a certain category of case and may also encompass a wide range of inherent powers that are vested in specific types of court, such as the High Court in England. On the other hand, inherent powers refer to the authority of all courts, regardless of their rank, to manage their own procedures and ensure that justice is effectively and efficiently administered. The confusion between and interchangeability of these two terms have a significant impact on the true understanding and exercise of "inherent".

To sum up, it appears that judicial practice, whether in Sudan or in equivalent jurisdictions, regards the doctrine of inherent powers as part of procedural rules. For this reason, it should be interpreted liberally to serve the ends of justice. In essence, the doctrine enables the courts to navigate around the rigidity of legislation and ensure that procedure is allowed to prioritize substantive rights. The analysis leads to the conclusion that the exercise of inherent powers under the Sudanese CPC is not constrained by the provisions of the Code, as clearly stated in section 285: "Nothing in

104 Above at notes 84 and 85.

105 Jacob "The court's inherent jurisdiction", above at note 1

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this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." However, these powers should not be exercised when that conflicts with the provisions explicitly provided in the law or creates paradoxical outcomes inconsistent with the legislative intent. In this regard, the court may use its inherent power to address gaps and fill legislative voids, but it cannot exceed the explicit provisions without proper justification.

In exploring the intricate landscape of inherent powers and inherent jurisdiction within the legal context, it becomes evident that this doctrine is a multifaceted and often contentious concept. The diverse interpretations and applications of inherent powers, both in Sudanese law and international legal systems, have led to a complex tapestry of principles and practices. As we conclude this discussion, it is essential to summarize key viewpoints and the rationale behind them. One of the central themes in this exploration has been the elusive nature of the inherent powers doctrine: the term "inherent powers" resists a clear and precise definition, and scholars like Jacob and Alderson grappled with its ambiguous boundaries. Inherent powers are a legitimate creation of common law, primarily designed to empower courts to prevent malicious litigation. However, it is acknowledged that neither my perspective nor the opposing viewpoint provide a definitive meaning, and the simplicity of the concept can be deceptive. A key distinction in this discourse has been the differentiation between inherent powers and inherent jurisdiction. Jacob posits that inherent jurisdiction is broader in scope than inherent powers, encompassing all the powers necessary for a court to fulfil its role as a dispenser of justice. On the other hand, inherent powers, as I have discussed, are a component of inherent jurisdiction, serving to complement the powers expressly granted to the court. The straddling of these two horses has been a recurrent theme in legal practice, as Sudanese courts at times use the terms interchangeably due to the ambiguity surrounding their precise meanings.

The nature of inherent powers, as we have examined, is primarily procedural rather than substantive. Courts often rely on these powers to dispense justice, prevent vexatious litigation and adapt procedures to the overarching goal of achieving justice. Procedural rules should serve justice rather than obstruct it, as exemplified in Sudanese cases such as *Hameeda Abdullah Kanoan v Fathi Hamid* and *Yusuf Salih F v Saadia Mustafa*.[106] Inherent powers, according to Jacob's distinction, vary between higher and lower courts, with higher courts deriving these powers from inherent jurisdiction and lower courts from legal provisions. Sudanese legislation, particularly article 285 of the Sudanese CPC, clearly defines the scope of inherent powers, emphasizing their role in preventing abuse of proceedings and promoting justice. Courts in Sudan, as evidenced in cases like *Sudan Government v Pio Madibo*, have consistently adopted the perspective that inherent powers should be employed solely to prevent injustice and uphold principles of justice while refraining from overriding explicit legal provisions.[107]

A critical consideration in our exploration has been the balance between implicit inherent powers and explicit legal provisions. While inherent powers can bridge gaps and address shortcomings in the law, they should not be used to override or replace statutory rules. Implicit inherent powers are supplementary and complementary to explicitly stated statutory rules, intended to prioritize substantive outcomes over procedural rigidity. Finally, on the controversial issue of whether courts possess the authority to establish procedural rules independently through inherent powers, I acknowledge that courts often rely on inherent powers to formulate procedural guidelines, but I assert that these should not supersede explicit statutory rules, especially when they impact substantive rights. The discussion highlights the need for a balanced approach, where inherent powers are utilized to address gaps in the law while respecting legislative intent and avoiding a potential conflict of interests.

106 Above at notes 72 and 73.

107 *Sudan Government*, above at note 77.

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The doctrine of inherent powers and inherent jurisdiction remains a dynamic and evolving area of legal discourse. The perspectives presented here underscore the importance of maintaining a delicate equilibrium between judicial discretion and adherence to established legal frameworks. As legal systems continue to adapt to changing circumstances and challenges, the nuanced understanding of inherent powers and inherent jurisdiction will undoubtedly play a pivotal role in shaping the course of justice.

Competing interests. None

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