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PRACTICE DIRECTIONS AND THE CIVIL PROCEDURE RULES

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PRACTICE directions, their kin—practice notes and practice statements—and their ancestors—Regulae Generales and Memoranda—are not the same as rules of court made under statutory authority. They are made by the courts acting on their own authority. Most are concerned with relatively minor points of practice, but many of the more recent ones go much further.

On 26 April 1999, the new Civil Procedure Rules ("CPR"), made under the Civil Procedure Act 1997, came into force and for the first time, so far as is known, an Act of Parliament actually envisages and authorises the making of practice directions as well as rules of court.

These are interesting developments that merit consideration, and, notwithstanding CPR 1.1(1), which states that the new rules "are a new procedural code", and so implies that the past has become irrelevant, such consideration is possible only in the light of what went before. It is proposed, therefore, to begin with that.

The courts' power to make practice directions is usually attributed to their "inherent jurisdiction" to control their own proceedings,[1] as to which Lord Blackburn said, in a frequently cited passage, that "from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be

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[1] Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems, 23, reprinted in *The Reform of Civil Procedural Law and other Essays in Civil Procedure* (1982), 221 (to which future references are made); Mason, "The Inherent Jurisdiction of the Court" (1983) 57 Australian L.J. 449; Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 L.Q.R. 120. See also Taitz, *The Inherent Jurisdiction of the Supreme Court* (Cape Town 1985) which, though primarily concerned with the Supreme Court of South Africa, contains numerous references to the English situation; *Connelly* v. *D.P.P.* [1964] A.C. 1254, *per* Lords Morris, Hodson and Devlin at pp. 1301, 1336, 1347, respectively; *Langley* v. *North West Water* [1991] 1 W.L.R. 697, 709, *per* Lord Donaldson M.R.

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vexatious and harassing—the Court had the right to protect itself against such an abuse ... by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court".[2]

Dealing by summary order with an abuse of the process of the court is a different thing from laying down rules of procedure in a form that resembles legislation, but the point seems to have troubled no one. Following Lord Blackburn's example and avoiding any assertion about "the earliest times", it can at least be said that there is precedent of respectable antiquity for the making by the judges of general rules or Regulae Generales, and for their doing so without the benefit of argument in the course of judicial proceedings. For example, in 1706 the Queen's Bench, under Sir John Holt C.J., made a "General Rule" that "where a *mandamus* went above forty miles, the return should be at least fifteen days; and where under forty miles, eight days at least". [3] Tidd's *Practice*, in its edition of 1828, contains a table of "General Rules and Orders" made between 1604 and 1824 which runs to 12 pages.[4]

In the 19th Century, and without abandoning the practice of using primary legislation for procedural matters, Parliament adopted the device of delegating to the judges the power to make rules of court. So, for example, an Act of 1830 provided, for cases over which the Courts of King's Bench, Common Pleas and Exchequer had common jurisdiction, that it should be lawful for the judges of those courts to make "general Rules and Orders" for regulating their procedure and that of the Court of Error.[5] This led to the making of a substantial body of rules in 1831.[6]

Three years later came the Civil Procedure Act 1833, the Act that enabled the infamous Hilary Rules of 1834[7] to be made and have the force of law.[8] Interestingly, given today's preoccupation with costs, the Act begins by saying that expense would be diminished if the pleadings in proceedings in the courts of common law at Westminster were altered, that this could be conveniently done only by rules or orders of the judges, and that "Doubts may arise as to the Power of the said Judges to make such Alterations

[2] *Metropolitan Bank* v. *Pooley* (1885) 10 App. Cas. 210, 220–221.
[3] 11 Mod. 64. See also another General Rule of Holt's of 1691, 1 Show. K.B. 336. A "Memorandum" by an assembly of the justices and Barons in 1625 may be an earlier example: Cro. Car. 34.
[4] William Tidd, *Practice of the Courts of King's Bench and Common Pleas in Personal Actions and Ejectment*, 9th ed. (London 1828).
[5] 1 Wm. 4, c. 70, section 11. The judges could act jointly or by any eight or more, of whom the three Chiefs had to be part.
[6] 1 Cr. & J. 468.
[7] 2 Cr. & M. 1. For these rules, see Holdsworth, "The New Rules of Pleading of the Hilary Term, 1834" (1923) 1 C.L.J. 261; Whittier, "Notice Pleading" (1918) 31 Harv. L.R. 501, 507.
[8] *Roffey* v. *Smith* (1834) 6 Car. & P. 662.

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without the Authority of Parliament". It was therefore enacted that, subject to certain restrictions, the judges should make rules for such alterations to pleading as seemed to them expedient.[9] The same Act also gave power to the judges to make rules for the admission by one party of documents intended to be used in evidence by the other, in order to reduce the expense of their proof.[10]

Perhaps as a result of legislation of this kind, evidence of the courts' activity in the making of rules outside their statutory powers is not easy to find in the years running up to the Judicature Acts. The first rules of court following the Judicature Act 1875 were scheduled to the Act itself and so had direct Parliamentary authority, but that was a temporary measure only: the Act provided for rules to be made by the Supreme Court with the concurrence of a majority of the judges, a majority that had to include the Lord Chancellor.[11] It was not long after the Act of 1875, however, that the courts began once more to make regular use of their extra-statutory rule-making power. As early as November 1875 a "memorandum" was issued by James L.J. dealing with a variety of matters,[12] and the *Weekly Notes* are replete with examples thereafter.

Few of these went beyond making relatively small improvements in efficiency: the numerous procedural problems arising out of the interpretation and application of the Judicature Acts and the rules made under them were resolved by judicial decision. During the 20th Century, the number of practice directions, practice notes and practice statements was large, but, again, most dealt with minor matters until the famous practice statement of 1966, through which the House of Lords freed itself from its self-imposed obligation to abide by its own precedents.[13]

That might have suggested to the judges that practice directions and the like could be put to more important use than before, but nothing much else of importance seems to have occurred until the mid 1970s. Since then, however, practice directions have frequently been used to bring about significant developments in procedure.

[9] 3 & 4 Wm. 4, c. 42, preamble and section 1. As under the earlier legislation, the judges could act through any eight or more of their number of whom the Chiefs were to be three. The power created had to be exercised within five years and rules made had to be laid before Parliament.

[10] *Ibid.* section 15. Rules could also be made concerning the costs of proving documents and, by section 35, about the taxation of costs. The Uniformity of Process Act 1832 (2 & 3 Wm. 4, c. 39) is another example from the same period of an Act giving the judges power to make rules.

[11] Supreme Court of Judicature Act 1875, section 17. See also, Appellate Jurisdiction Act 1876, section 17; Supreme Court of Judicature Act 1881, section 19. Rules made had to be laid before Parliament and were subject to negative resolution.

[12] (1875) 1 Ch. D. 41.

[13] *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234.

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They have been used, for example, to create a procedure for giving effect to the House of Lords' decision that a judgment may be given in a foreign currency[14] and for dealing with Mareva injunctions and Anton Piller orders.[15] They have been used to introduce the listing system which, amongst other things, gave birth to the Crown Office List,[16] to give force to the second and subsequent editions of the Commercial Court Guide[17] and the Chancery Guide,[18] and to encourage the use of alternative dispute resolution for cases in the Commercial Court.[19] A good deal was done to anticipate the Woolf reforms by the introduction of case management,[20] and major reforms were brought about in the procedures of the Court of Appeal.[21] Finally, mention may be made of the code of practice, contained in a practice direction of June 1999, for dealing with "devolution issues" arising out of the Government of Wales Act 1998.[22] This goes so far as to impose positive obligations on the Attorney-General and on the Assembly; if either wishes to become a party to the proceedings, he or it must send to the court and to the parties a notice within a specified time and ("substantially") in a specified form.

It would be tedious to continue with this list. Enough has been said to show that practice directions have come to be widely used by the judges as a form of quasi-legislation to supplement the full-blooded legislation contained in the rules of court.

Whether the court's power to regulate its own procedure is "inherent" and derived from the very nature of a court, or whether it has some other source, it is clearly not a power conferred by

[14] *Practice Direction (Judgment in Foreign Currency)* [1976] 1 W.L.R. 83. See *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443.

[15] *Practice Note (Court of Appeal: Anton Piller Orders)* [1981] 1 W.L.R. 1420; *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 1 W.L.R. 1233; *Same* [1996] 1 W.L.R. 1552.

[16] *Practice Direction (Trials in London)* [1981] 1 W.L.R. 1296. Though the Direction nominally applies only to applications in London, there is provision to see that all applications for judicial review are actually dealt with in London save in cases of great urgency: *Practice Direction (Crown Office List: Criminal Proceedings)* [1983] 1 W.L.R. 925, para. 2.

[17] *Practice Direction (Commercial Court: Revised Practice)* [1990] 1 W.L.R. 481; *Practice Direction (Commercial Court: Practice Guide)* [1994] 1 W.L.R. 1270.

[18] *Practice Direction (Chancery Division: Procedure and Case Management)* [1995] 1 W.L.R. 785.

[19] *Practice Statement (Commercial Cases: Alternative Dispute Resolution)* [1994] 1 W.L.R. 14; *Same (No. 2)* [1996] 1 W.L.R. 1024. This lead was soon followed in other courts: *Practice Note (Civil Litigation: Case Management)* [1995] 1 W.L.R. 508, Pre-trial Check-list, Points 10–13.

[20] *Practice Direction (Civil Litigation: Case Management)* [1995] 1 W.L.R. 262, 508.

[21] Relevant practice directions from 1926 to 1999 are consolidated in *Practice Direction (Court of Appeal) (Civil Division)* [1999] 1 W.L.R. 1027. This mammoth document, which includes 9 annexes, occupies 53 pages of the reports. Procedure in the House of Lords is laid down entirely by the House itself: Practice Directions and Standing Orders applicable to Civil Appeals, *Supreme Court Practice*, 1999, paras. 19A-21–19A-24.

[22] *Practice Direction (Supreme Court Act: Devolution)* [1999] 1 W.L.R. 1592. The code applies to all courts, civil and criminal, except the House of Lords. Should a devolution issue under either the Northern Ireland Act 1998 or the Scotland Act 1998 arise in proceedings in England and Wales, the procedure laid down in the code "should be adapted as required".

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statute.[23] It follows that no practice direction can stand against a conflicting statutory rule. This was made clear, for example, by Lord Devlin, when he said that the power of the judges to make and enforce rules of practice was "subject of course to any statutory rules".[24] Lord Denning seems to have held that powers possessed by the courts which are not "judicial" must be "administrative":[25] decisions made in the course of litigation are, no doubt, judicial whether or not they are made under the inherent jurisdiction, but practice directions are not made in the course of litigation. They may look like legislation, they may be legislative in form even to the extent of including a definition section,[26] but judges are not legislators unless and to the extent that Parliament otherwise directs.

In fact, until 1894, Parliament did otherwise direct: power to make rules of court was delegated to the judges, or to a committee consisting only of judges. In 1894, however, others were admitted to the membership of a newly constituted rule-making committee,[27] and that pattern has been repeated ever since. The former Supreme Court Rule Committee included barristers and solicitors[28] and the new Civil Procedure Rule Committee includes, in addition to judges at all levels, three persons with a Supreme Court qualification, three persons having the right to conduct litigation, one person with knowledge of consumer affairs and one person with experience in the lay advice sector.[29]

Since 1894, therefore, the power to make practice directions and the power to make rules of court have been in different hands, but this, in itself, creates no special problems: in any conflict between a rule of court and a practice direction, the latter would have to yield. Since the Civil Procedure Act 1997 came into force, however, matters have become more complex. In the past, practice directions

[23] Jacob, *loc. cit.*, n. 1, at p. 224. Sir Jack suggests that the inherent jurisdiction of the court lies behind the modern practice of granting legislative powers to a rule committee: *ibid.*, at p. 229. That may well be historically correct, but it does not change the nature of practice directions.

[24] *Connelly* v. *D.P.P.* [1964] A.C. 1254, 1347; *Harrison* v. *Tew* [1990] 2 A.C. 523, 534, *per* Lord Lowry; *I.C.I.C.* v. *Tsavliris Maritime Co.* [1996] 1 W.L.R. 774, 788, *per* Mance J. This does not mean that where there is no conflict the two cannot stand together: *Mercer Corpn.* v. *Rolls Royce Ltd.* [1971] 1 W.L.R. 1520; *S.* v. *McC; W.* v. *W.* [1972] A.C. 24, 46, *per* Lord MacDermott. See also *Gittins* v. *W.H.C. Stacy & Son Pty. Ltd.* [1964–5] N.S.W.R. 1793 (court can impose sanctions for non-compliance with a practice direction).

[25] *Att.-Gen. of The Gambia* v. *N'Jie* [1961] A.C. 617, 630.

[26] *Practice Note (Court of Appeal: Procedure)* [1995] 1 W.L.R. 1031.

[27] Supreme Court of Judicature (Procedure) Act 1894, section 4. Those admitted were the President of the Law Society and two others, one of whom had to be a practising barrister.

[28] Supreme Court Act 1981, section 85.

[29] Civil Procedure Act 1997, section 2(1). Formerly, and subject to negative Parliamentary resolution, rules could be made by the Lord Chancellor together with any four members of the Committee. Supreme Court Act 1981, ss. 84(8), 85(1). Under the 1997 Act, the Lord Chancellor is not a member of the Committee. Rules must be signed by at least eight members and submitted to the Lord Chancellor who may allow or disallow them: Civil Procedure Act 1997, s. 2(8). They are still subject to negative resolution: *ibid.*, section 3.

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had no place in the statutory scheme of things: the Act of 1997 makes specific provision for their use.

The New Dispensation

Three distinct situations are envisaged. First, a new section 74A is added to the County Courts Act 1984 giving power to the Lord Chancellor to make directions as to the practice and procedure of county courts.[30] Secondly it is enacted that practice directions may provide for any matter which, by virtue of paragraph 3 of Schedule 1, may be provided for by rules;[31] this is a very limited provision since paragraph 3 refers only to the transfer of proceedings within the High Court or between County Courts. Thirdly, paragraph 6 of Schedule 1 provides that "Civil Procedure Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions."

In none of its references to practice directions does the Act condescend to give the phrase a meaning, and only in reference to the County Courts does it say by whom they are to be made.[32] There is nothing to suggest that the Civil Procedure Rule Committee itself has power to make practice directions, and the court's traditional extra-statutory power survives unscathed.[33] Now, however, the Act has created an additional, statutory, power to make directions under the Civil Procedure Rules, and that power, presumably, inheres in the court.

This is confusing and, perhaps, confused. Rather more than half of the "Parts" into which the Civil Procedure Rules are divided are accompanied by practice directions, each described as supplementing the Part to which it applies, but their content is not restricted to the kind of provision envisaged by paragraph 6. Broadly speaking it falls into three different categories:

First, there are provisions which do fall within paragraph 6. So, for example, Part 7 deals with starting proceedings, and CPR 7.9 provides that a practice direction may list claims for which there is a specific claim form and, in relation to such claims, "may disapply

[30] Act of 1997, section 5(2).

[31] Section 5(1).

[32] The new section 74A allows the Lord Chancellor to authorise another person to make directions on his behalf but, subject to that, it provides that directions as to the practice and procedure of county courts may not be made by any other person without his approval. This effectively overrules the Court of Appeal's decision in *Langley* v. *North West Water* [1991] 1 W.L.R. 697, 709, *per* Lord Donaldson M.R. and adopts the more traditional view, most recently expressed by Ward L.J. in *In re M. (A Minor) (Contempt: Committal of Court's own Motion)* [1999] 2 W.L.R. 810, 817, that the county court, "being a creature of statute, has only those powers which are conferred upon it by statute and, unlike the High Court, it does not, save for very limited exceptions, have any inherent jurisdiction".

[33] See, *e.g.*, the "devolution" practice direction (n. 22 above) which was made after the CPR came into force.

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or modify these Rules as appropriate": a practice direction then creates and regulates a special "Consumer Credit Claim". This is squarely within the paragraph, but the paragraph can probably also accommodate such formulae as "except where ... a practice direction makes a different provision",[34] or "any other standard directions set out in the relevant practice direction",[35] but what about the simple statement "The relevant practice direction applies"?[36] If this is an attempt to bring the whole of the practice direction within paragraph 6 so as to give to all its provisions the force of delegated legislation, surely it fails.

Secondly, and in very large measure, they contain instructions, often using the word "should" rather than "shall" or "must", which fill out the content of the Parts to which they apply. Part 17, for example, deals with amendments to statements of case, and the relevant practice direction completes the details of the procedure to be followed where an amendment can only be made with the court's permission.[37] There is no specific statutory authority for the making of practice directions of this kind, but there is probably nothing to prevent their being made by the court under its "inherent" or extra-statutory power.

Thirdly, they contain purely explanatory matter, including cross-references to other Parts of the rules. This is useful, but it is such as could properly have been written by any commentator: it is not to be supposed that this explanatory matter constitutes authentic interpretation providing authoritative guidance, and it can be described as giving "directions" only in the sense that a sign post gives directions.

The practice directions which were issued with the rules are described as having been made and amended by the Vice-Chancellor, which gives them the colour of having been made by the court, but it seems likely that they were drafted within the Lord Chancellor's Department alongside the rules, and were subsequently approved by the Vice-Chancellor. There is nothing to suggest that other judges were consulted or that the Civil Justice Council was involved.[38] So much was probably inevitable since the first set of practice directions had to be prepared and published before the rules to which they are attached came into force. Practice directions are, however, rarely made by a single judge without consultation

[34] *E.g.*, CPR, 6.1, 6.2, 6.3.
[35] CPR, 27. 4 (3) (a) (ii). See also, *e.g.* CPR, 31.6(c), 31.(9), 32.8, 34.13.
[36] CPR, 59.2, currently in draft only.
[37] Many examples of this kind of thing could be given. Indeed, many Parts of the CPR make no reference to practice directions but are, nevertheless, supplemented by them.
[38] The Council consists in part, but not exclusively, of members of the judiciary and of the legal professions. Its functions include advising the Lord Chancellor and the judiciary on the development of the civil justice system: Civil Procedure Act 1997, s. 6.

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with his brethren, and the modern practice has been actually to state the consultation which has taken place.[39] Once the new system of procedure has settled down, the making of practice directions and their amendment should become once more the business of the courts in substance as well as in form.

If and when that happens, and leaving out of account the purely explanatory part of the existing practice directions, there will remain the dichotomy between directions made under the authority of a rule, on the one hand, and directions made under the extra-statutory power, on the other. The former have the force of delegated legislation while the latter do not.

No doubt both forms of practice direction must yield to (superior) statutory authority in the shape of the Civil Procedure Rules themselves and any amendment or addition to those rules made by the Civil Procedure Rule Committee, but what of the relationship between them? In theory, directions made under the extra-statutory power must be in conformity with those made under statutory authority, but the application of the theory may not always be easy in practice. In the first place, it will not always be easy to tell one kind of practice direction from the other, and if an "ordinary" practice direction is challenged as in conflict with one made under a rule of the CPR, the judiciary will have to be the judge of its own activities as legislator and as quasi-legislator. That, to put it no higher, is awkward.

The greatly increased use of practice directions which has come with publication of the new Civil Procedure Rules is probably attributable to an expectation that frequent modifications will prove necessary during the early years of the new scheme of things,[40] and to the thought that the more easily those modifications can be carried out, the better. Such short term practical considerations must not, however, be allowed to divert attention from the proper allocation of legislative authority. There is a tendency in modern practice to rate expediency above principle, but, however expedient it may be, it is wrong in principle formally to confer legislative authority on the courts.

It is now more than 100 years since the judges lost their monopoly of the statutory rule making power to committees

[39] A practice direction signed by Lord Woolf M.R. and dated 17 November 1998, for example, states that its content had been the subject of consultation with the members of the Court of Appeal and that it set out the collective views of the Court: *Practice Direction (Leave to Appeal and Skeleton Arguments)* [1999] 1 W.L.R. 2. See also the practice statement made by Lord Bingham C.J. a few days later: *Practice Statement (Supreme Court Judgments)* [1999] 1 W.L.R. 1.

[40] A goodly number of modifications to the "definitive" version of the rules and practice directions was required even before they came into force and more continue to emerge.

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whosemembership goes beyond the judiciary,[41] and the present committee has a wider membership than its predecessors. This can only be read as the implementation of a Parliamentary intention that a wide range of experience, including that of people not necessarily members of the legal profession, should inform the making of rules of procedure. It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate. Matters, which now fall within the scope of judicial legislation under the rules, should be dealt with by the rules themselves, and the opportunity that the Rule Committee now has to avoid its proper responsibility, by delegating its business to the courts, should be removed by Parliament.[42] This would leave intact the extra-statutory power of the court to do what it could do before the Act of 1997 took effect, namely to deal with matters of detail and, within the limits allowed by legislation, occasionally to introduce new procedural techniques made necessary by developments in the law. Practice directions should not be used as a cheap and easily amended form of legislation on matters for which proper legislation under the eye of Parliament is more appropriate.

[41] Above, n. 27.

[42] This would require repeal of paragraph 6 of schedule 1 of the Act of 1997. If it is considered that this would make the working of the Committee too cumbersome, the requirement that rules made by it must be submitted to the Lord Chancellor for his approval or disapproval (section 2(8) in part) before being laid before Parliament could also usefully be repealed.

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