Editor's Note

Rule making and precedent under the Civil Procedure Rules 1998—still an unsettled field

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One of the more striking differences between England and most other countries is that in England rules of procedure have been judge made. In the United States, as well as in jurisdictions of continental Europe, rules of procedure emanate from the legislature. In his excellent book *The Rule-Making Authority in the English Supreme Court*,[1] Samuel Rosenbaum wrote of English procedure prior to the mid-19th century reform:

> "Obviously, the methods and proceedings of the King's justices were not, in the beginning, matter for supervision by Parliament. First by decisions and directions given in particular cases, and later by rules and orders formulated for general use, the judges of each of the superior courts gradually built up a procedure suited to the character of the issues that came before them at trial. So well recognised was this form of authority when Parliament set out upon its career as law reformer about the middle of the nineteenth century, that rather than upset a useful and established custom, it clothed the custom with its sanction and elevated it into the dignity of statute law. Such is the character of the Rule Committee as constituted under the Judicature Acts."

To this day judges remain, directly or indirectly, the originators of rules of procedure. The Civil Procedure Rules 1998 (CPR) themselves were after all devised by a judge, Lord Woolf. The Civil Procedure Rules Committee (CPRC), which is the direct successor of the Rule Committee mentioned by the author, is dominated by the judiciary. Further, the CPRC itself would on

[1] Samuel Rosenbaum, *The Rule-Making Authority in the English Supreme Court* (Boston: Boston Book Company, 1917) (reprinted by Fred B. Rothamn & Co, Littleton Colorado, 1993) pp.4–5.

occasion make rules that reflect new judicial practice or in response to judicial prompting.

The Civil Procedure Act 1997 (CPA 1997), and more recently the Constitutional Reform Act 2005, sought to regulate rule making in procedure and place it on a sounder statutory basis. But these efforts have not been entirely successful. The Court of Appeal decision in *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171 has brought into the open some questions about rule making in procedure that are difficult to resolve. They concern the authority by which CPR practice directions are made, the power of Judicial Officers to make rules of process outside the CPR, and the legal basis of Practice Guides. More important still, this case discusses the Court of Appeal's own authority to make rules of practice when giving judgment in a particular appeal, and the interaction between case management and rule making.

To get a handle on these issues it is first necessary to set out the legislative framework by which the CPR are made and their practice directions.

The legal standing of the Civil Procedure Rules

The CPR are delegated legislation, made by the CPRC under the authority conferred by the CPA 1997, ss.1 and 2. The rule making power "is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient" (s.1(3)).

Rules made by the CPRC must be submitted to the Lord Chancellor, who may allow, disallow or alter rules so made. Significantly, the Lord Chancellor is required to give the CPRC written reasons if he is minded to disallow its proposed rules. Rules made by the CPRC come into force on the day the Lord Chancellor directs, and are contained in a statutory instrument governed by the Statutory Instruments Act 1946. A statutory instrument containing Civil Procedure Rules is subject to annulment in pursuance of a resolution of either House of Parliament.

As delegated legislation, the CPR cannot change an Act of Parliament. The CPA 1997 s.4(1) gave the Lord Chancellor power to make consequential amendments in order to amend, repeal or revoke any enactment in consequence of s.1 or 2 of the CPA 1997 or CPR. This power is exercisable by statutory instrument and subject to annulment by negative resolution (s.4(3),(4)). Section 4(2) allows the Lord Chancellor by order to amend, repeal or revoke any enactment passed or made before the section came into force, in order to facilitate the making of CPR. Orders made under this wider power have to receive the positive approval of each House of Parliament (s.4(5)).

The CPRC consists of the Head of Civil Justice, who is the Master of the Rolls, the Deputy Head of Civil Justice (if there is one), two judges of the Senior Courts of England and Wales (i.e. of what was formerly known as the Supreme Court of Judicature), one Circuit judge, either one or two district judges, one Master of the Superior Court, three barristers, three solicitors and two persons with experience in and knowledge of the lay advice sector and consumer affairs (see CPA 1997 s.2). Section 3 of CPA 1997 requires the

CPRC to consult appropriate persons before making CPR rules. Changes to the CPR are therefore normally preceded by a consultation exercise.

The CPRC can move with considerable expedition in order to correct rule deficiencies or address new problems that have arisen in practice. It works closely with the Court of Appeal, which may invite it to consider the need for change in the rules and make the appropriate amendments.

Like all delegated legislation, the CPR have the force of law only to the extent that they are within the scope of the empowering legislation. Therefore, a CPR provision may be declared ultra vires if it exceeds the empowering legislation. Rules of procedure cannot create or alter substantive law, i.e. a law that establishes a right capable of being enforced by legal proceedings. Whether a right is procedural or substantive is context dependent. The determination of whether a specific CPR provision is intra vires must turn on whether a particular right cut down by the CPR was within the ambit of the empowering provisions of CPA 1997.

The jurisdiction to make practice directions

Notwithstanding the existence of a rule making body, judges have continued to issue practice directions under their inherent jurisdiction to regulate their own practice and procedure. Prior to the CPA 1997, practice directions were issued by the Lord Chancellor, the Lord Chief Justice, Heads of Division and other judicial officers, as the Court of Appeal explained in *Bovale*.

The CPA 1997 made a modest attempt to regulate judicial rule making. Section 5 of the CPA 1997 stated that practice directions may provide for any matter which, by virtue of para.3 of Sch.1, may be provided for by CPR. Further, the 1997 Act inserted s.74A into the County Courts Act 1984, which stated that directions as to the practice and procedure of county courts may be made by the Lord Chancellor and may not be made by any other person without the approval of the Lord Chancellor. The Lord Chancellor delegated his power to the Head of Civil Justice, Sir Richard Scott V.C. and then to the Deputy Head of Civil Justice. However, since para.3 of Sch.1 dealt with the transfer of proceedings in the High Court and County Courts, s.5 of CPA 1997 had very narrow scope and the authority for making practice directions remained vague.[2]

The Constitutional Reform Act 2005 has sought to put the matter on more solid foundations. It repealed s.74A of the County Courts Act 1984 and substituted CPA 1997 s.5. Section 5 now states:

> "(1) Practice directions may be given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.
> (2) Practice directions given otherwise than under subsection (1) may not be given without the approval of
> (a) the Lord Chancellor, and
> (b) the Lord Chief Justice

[2] See Jolowicz, *Practice Directions and the Civil Procedure Rules* [2000] C.L.J. 53.

(3) Practice directions (whether given under subsection (1) or otherwise) may provide for any matter which, by virtue of paragraph 3 of Schedule 1, may be provided for by CPR.
(4) The power to give practice directions under subsection (1) includes power—
  (a) to vary or revoke directions given by any person;
  (b) to give directions containing different provision for different cases (including different areas);
  (c) to give directions containing provision for a specific court for specific proceedings or for a specific jurisdiction.
(5) Subsection (2)(a) does not apply to directions to the extent that they consist of guidance about any of the following—
  (a) the application or interpretation of law;
  (b) the making of judicial decisions.
(6) Subsection (2)(a) does not apply to directions to the extent that they consist of criteria for determining which judges may be allocated to hear particular categories of case; but the directions may, to that extent be given only—
  (a) after consulting the Lord Chancellor, and (b) with the approval of the Lord Chief Justice.''

Part 1 of Sch.2 to the Constitutional Reform Act 2005 provides:

''1. In this Part 'designated directions' means directions under another Act which are, by virtue of provision in that Act, to be made or given in accordance with this Part.
2. (1) It is for the Lord Chief Justice, or a judicial office holder nominated by the Lord Chief Justice with the agreement of the Lord Chancellor, to make or give designated directions.
  (2) The Lord Chief Justice may nominate a judicial office holder in accordance with sub-paragraph (1)—
    (a) to make or give designated directions generally, or
    (b) to make or give designated directions under a particular enactment.
  (3) In this Part—
    (a) 'judicial office holder' has the same meaning as in section 109(4);
    (b) references to the Lord Chief Justice's nominee, in relation to designated directions, mean a judicial office holder nominated by the Lord Chief Justice under sub-paragraph (1) to make or give those directions.
3. (1) The Lord Chief Justice, or his nominee, may make or give designated directions only with the agreement of the Lord Chancellor.
  (2) Sub-paragraph (1) does not apply to designated directions to the extent that they consist of guidance about any of the following–
    (a) the application or interpretation of the law;

(b) the making of judicial decisions.

(3) Sub-paragraph (1) does not apply to designated directions to the extent that they consist of criteria for determining which judges may be allocated to hear particular categories of case; but the directions may, to that extent, be made or given only after consulting the Lord Chancellor.''

The position now is that practice directions in accordance with Pt 1 of Sch.2 are made by the Lord Chief Justice. With the Lord Chancellor's agreement the Lord Chief Justice may nominate another judicial office holder to exercise his power. The Lord Chief Justice nominated the Master of the Rolls to exercise the power to make practice directions. Such directions may be made only with the agreement of the Lord Chancellor (subject to certain exceptions listed in Constitutional Reform Act 2005 Sch.2 Pt 1 para.3 sub-paras (2) and (3)). As a matter of good practice, practice directions under s.5(1) and Pt 1 of Sch.2 to the Constitutional Reform Act 2005 are issued after consideration by the CPRC.

It will be recollected that CPA 1997 s.5(2) (as amended by the 2005 Act), allows for practice directions to be given otherwise than under the scheme of Pt 1 of Sch.2 to the 2005 Act. Such directions can only be made with the approval of both the Lord Chancellor and the Lord Chief Justice, who cannot delegate this particular power. Unfortunately, the rules do not specify who may make such practice directions and seek the approval of these two judicial officers.

The approval of the Lord Chancellor is not required in the circumstances referred to in s.5(5), which states:

> ''Subsection (2)(a) does not apply to directions to the extent that they consist of guidance about any of the following—(a) the application or interpretation of law; (b) the making of judicial decisions.''

However, the approval of the Lord Chief Justice is still required.

Similarly, the approval of the Lord Chancellor is not required in the circumstances referred to in s.5(6), which states:

> ''Subsection (2)(a) does not apply to directions to the extent that they consist of criteria for determining which judges may be allocated to hear particular categories of case; but the directions may, to that extent be given only—(a) after consulting the Lord Chancellor, and (b) with the approval of the Lord Chief Justice.''

But the Lord Chief Justice's approval is required here and, further, the Lord Chancellor must be consulted. It follows that practice directions may still be made outside the process set out in Pt 1 of Sch.2 to the 2005 Act. But in such cases the statutory scheme requires that they should be made with the approval of the Lord Chancellor and the Lord Chief Justice, though in some situations the approval of one or the other of these judicial officers will do. While it is obvious that none of them is likely to personally make or initiate the making of such practice directions, there is nothing in the CPA 1997 or the 2005 Act to indicate how or by whom this may be done.

The power to make rules of practice outside the Civil Procedure Act 1997 and the Constitutional Reform Act 2005

In fact, practice directions have continued to be issued without reference to the CPA 1997 s.5 procedure. For instance in the *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 the Court of Appeal gave directions on the procedure to be followed in protective costs applications without any reference to the Lord Chief Justice or the Lord Chancellor. Similarly, court guides such as the Chancery Guide have been issued without reference to the CPA 1997 s.5 procedure. Judicial officers have continued to issue directions in relation to particular procedures or particular courts. The question whether these forms of issuing rules of general application are consistent with the CPA 1997 and the Constitutional Reform Act 2005 was considered by the Court of Appeal in *Bovale*.

The Court of Appeal expressed the view that the issue of a practice direction is the exercise of an inherent power, even when carried out pursuant to CPA 1997 s.5(1) or (2). It held that directions given by a Head of Division under the inherent power before the 2005 Act, and a fortiori if the direction is given with the approval or agreement of the Lord Chief Justice and Lord Chancellor, cannot be ignored by a judge of the court to which the practice direction is intended nor does the judge have the jurisdiction to hold in a judgment that a practice direction should no longer be followed in that court (*Bovale* at [28]).

Court guides are not ''directions''

There is now a substantial number of court guides. They are normally issued under the authority of the Head of Division, though under no statutory scheme.[3] Court Guides deal with the procedure followed in certain courts or in certain matters. They provide a variety of information ranging from general explanation of the nature of the court in question, through a rehearsal of the main CPR provisions and practice directions, sometimes in different words, to quite detailed regulations about the conduct of proceedings. It goes without saying that they may not repeal or alter rules or practice directions made in accordance with the statutory scheme. But beyond that not much was clear about the legal status of Court Guides before the decision in *Bovale*.

Were Court Guides to be considered practice directions, they would fall under the scheme of the CPA 1997 and the 2005 Act. Section 5 of the CPA 1997, as amended by the 2005 Act, deals with ''practice directions''. Section

[3] A Guide to Emailing the Civil and Family Courts; Chancery Guide; Queen's Bench Guide: Admiralty and Commercial Courts Guide; Birmingham Mercantile Court Guide; Bristol Mercantile Court Guide; Cardiff Mercantile Court Guide; Chester Mercantile Court Guide; Leeds Mercantile Court Guide; Liverpool and Manchester Mercantile Court Guide; London Mercantile Court Guide; Patents Court Guide; Supreme Court Costs Office Guide; Technology and Construction Court Guide.

9 of the CPA 1997 defines "practice directions" as meaning "directions as to the practice and procedure of any court within the scope of Civil Procedure Rules".

This is not a helpful definition because it does nothing to distinguish "practice directions" from any other regulation of procedure. Nonetheless, the Court of Appeal took the view that there was "a distinction between directions, and guidance as to the way in which rules and practice directions will be interpreted" (*Bovale* at [36]). Court guides, the court explained, do not lay down fresh rules or directions but rather explain "as to how practice directions and rules operate is one such area" (*Bovale* at [36]). As such, the court reasoned, this was not something with which the Lord Chancellor should be concerned and therefore not something that needed his approval. It therefore concluded that court guides were outside the statutory rule-making scheme because they do not make original rules of general application. As Andrew Smith J. puts it in *Brown v Innovatorone Plc* [2009] EWHC 1376 (Comm) at [30], they have no formal status, they provide only guidance.

The conclusion that court guides are merely informal guidance is not without difficulty. If the guides are merely explanatory of the rules and practice directions, is it really necessary to have so many of them? True, different courts may emphasise different aspects of the rules and directions, but the prolixity of official texts restating or interpreting the same rules and directions is bound to increase confusion rather than simplify understanding. Since the guides involve a good deal of work by various judicial officers, there is also a resource concern. Is it really a good use of scarce judicial resources for different judicial officers to spend time and energy in devising guides that largely replicate the rules and each other?

To the extent that the guides include court-specific regulations binding on litigants, there must be a question of whether they are compatible with the statutory scheme. The Court of Appeal considered that guidance as to how a court interprets and applies rules and practice directions is different from practice directions alone. But it could be equally said that a particular interpretation of a rule or practice direction, which is embodied in a court guide, which in turn is binding on the court and the parties, is a rule of general application brought about by an administrative act of a judicial officer. If so, it is unclear by what legal authority this is done. To say that this is done under the court's inherent jurisdiction to regulate its own proceedings does not provide a wholly satisfactory answer, as will be explained below.

However, as already noted, the real trouble with the Court of Appeal's explanation of the status of court guides is that it reduces their legal standing to such an extent that the question inevitably arises whether they are worth the trouble.

The inherent judicial jurisdiction to make gap-filling rules

The Court of Appeal has continued to lay down rules of general application to govern particular processes, such as reopening an appeal or making protective costs orders. Has this jurisdiction survived the statutory scheme of the CPA

1997 and the 2005 Act? The question was addressed head on by the Court of Appeal in *Bovale*. A majority of the court, Waller and Dyson L.JJ., considered that the court continues to possess this jurisdiction where there is a gap in the rules or practice directions.

To reach this conclusion the Court of Appeal had to find that rules of process of general application established by a court decision are not "practice directions" within the meaning of CPA 1997 s.9. For if such rules of process did come under this definition, it would be incumbent on the court to obtain, before issuing such a judgment, the approval of the Lord Chancellor and the Lord Chief Justice under the CPA 1997 s.5(2). The majority considered that, "it is counter-intuitive to expect a court to have to obtain the approval of the Lord Chancellor or indeed the Lord Chief Justice before its judgment could be effective" (*Bovale* at [29]). However, such conclusion is counter-intuitive only if one starts from the assumption that the court should continue to have rule making powers, which was the issue in question in the first place.

The majority noted that before the 2005 Act the Court was able to make rules regulating procedure in the exercise of its inherent jurisdiction. It stressed that when a court did so in a judgment the court was exercising its judicial power, in contrast to the issue of a practice direction which involves the exercise of an administrative power (*Bovale* at [38]). The majority accepted that on a literal reading a judgment which includes directions as to procedure is a "'practice direction' within the meaning of section 9(1)" but went on to state: (at [39]):

> ". . . But we cannot accept that this is what Parliament intended when it enacted the 2005 Act. We start from the position that it was unlikely to have been intended by Parliament to require judges exercising their judicial power to obtain the consent of the Lord Chancellor or the Lord Chief Justice before handing down any judgment. The Lord Chancellor is no longer a member of the judiciary but, even more fundamentally, to require the approval by any person outside the judge or judges hearing the case of a judgment before it can be delivered, interferes with the independence of the judge or judges hearing the case."

The trouble with this reasoning is that it can equally point in the other direction. True, the Lord Chancellor ceased to be a member of the judiciary in order to achieve a separation of powers. But by the same token separation of powers requires the judiciary to cease legislating. This is why it would make sense to either remove legislative power from the judiciary or subject it to the 2005 statutory scheme governing legislation on matter of procedure.

To this last point the majority's only response was:

> "[41] We do not consider, however, that Parliament intended to fetter the courts' powers to that extent. In our view in its definition of 'practice directions' Parliament simply did not intend to include judgments. The legislators would have recognised that the courts could not vary the rules because they have the force of delegated legislation. They would have recognised that the courts could not vary practice directions issued under section 5 by a judgment. They would thus have appreciated that the only

> occasion for giving some 'directions' as to the appropriate procedure to be followed would be in 'gap' cases.
>
> . . .
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> [44] In our judgment, clear language would have been needed (a) to abrogate this power altogether and, in particular, in gap cases and (b) to require the approval of the Lord Chancellor to the exercise of the power. That clear language is not to be found in the Statute. The definition of 'practice directions' in section 9(1) is not enough. The words 'directions as to the practice and procedure of any court within the scope of CPR' are at least capable of referring only to directions which are issued by 'practice directions' as such i.e. by so-called practice directions of the kind which before the 2005 Act were issued by the courts acting in an administrative capacity.''

Unfortunately, these views do not overcome the main difficulty, which is not one of language but of substance, as Stanley Burnton L.J. pointed out in his minority opinion. What is a practice direction, he said, ''must depend on its content rather than the occasion on which or the form in which it is issued'' (*Bovale* at [76]). He went on to explain:

> ''[77] It is clear that section 5 has no application to judgments which do not contain a practice direction: it does not purport to do so. A judgment is essentially a reasoned decision on the procedural or substantive issues in the particular case or cases before the court. It is an exercise of the judicial function. Before the intervention of statute, the issuing of a practice direction was also an exercise of the judicial function, since it was the exercise of an inherent power of the judiciary.
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> . . .
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> [80] Clearly, . . . the court can give directions as to the procedure to be followed in the case before it, and those directions may depart from the provisions of the CPR or practice directions generally applicable. What in my judgment it cannot do, however, without the approval of the Lord Chief Justice and the Lord Chancellor, is give a mandatory direction as to future practice and procedure in cases that are not before the court.''

While the foundation for the majority's ruling is shaky, there is no doubting the majority's conviction that the court should retain its judicial rule making power where there is a gap in the rules. It considered it to be in the public interest that a court acting in its judicial capacity should be able to provide guidance to those who might want to apply for orders which are not catered for by rules or practice directions, such as protective costs orders (*Bovale* at [42]).

To allay concern that this is at odds with the principal aim of the Constitutional Reform Act 2005 of achieving greater separation of powers between adjudication and legislation, the majority in *Bovale* pointed out that any judge-made procedure would be examined by the CPRC and either

approved and encompassed into a rule or practice direction or varied as the case might be.

Again, the availability of CPRC revision is not a complete answer to the separation of powers argument. As noted by Stanley Burnton L.J., there is no impediment to the court making the order that is most appropriate to the case before it under its case management powers. Once the court has made such an order, it is likely that other courts will follow when faced with similar circumstances. But the Court of Appeal majority was not satisfied with that, it wished to enshrine the inherent jurisdiction to make rules of general application. Yet, there is little constitutional justification for the continuation of this practice. A court dealing with the issues arising in a particular case may lack the broader understanding that is required for legislation. Some, or even all, of the members of the Court of Appeal panel hearing the appeal may lack expertise in procedure. The plain fact is that, all else being equal, the court is not necessarily the best legislature, not even in matters of procedure.

Finally, the majority's point that the CPRC can act quickly to respond by approving or overturning court-made rules argues against the inherent jurisdiction. For the quick response capability of the CPRC enables it to fill gaps without needing Court of Appeal to do so. The Court of Appeal can limit itself to what it does best: deciding issues that arise in the particular appeal and express views about the desirability of procedural improvement, which can then be followed up by the CPRC.

The power to deviate from rules and directions in giving case management directions

Since the court is under a duty to actively manage cases with a view to promoting the overriding objective, the court has wide ranging case management powers. These powers allow it to issue case management directions that depart from the CPR and its practice directions or indeed are contrary to them. The interaction between the court's case management powers and the court's obligation to abide by rules and practice directions was also considered in *Bovale*.

In that case the claimant's planning application had been rejected. He issued CPR Pt 8 proceedings seeking to quash the inspector's decision under s.288 of the Town and Country Planning Act 1990. The Rules do not require a defendant to a CPR Pt 8 proceeding to serve a defence. Collins J. who heard the case in the Administrative Court thought that it was undesirable that a claimant should have to prepare his case not knowing the defendant's grounds for resisting the claim. He therefore ordered that in the Administrative Court defendants to claims under the 1990 Act should file summary grounds of defence within 10 weeks of the giving of case management directions.

The Court of Appeal found the judge's ruling to be ultra vires (*Bovale* at [27]):

> ''(i) Since the rules have the force of delegated legislation, he has no power to alter them whether by judgment or practice

direction; in particular cases a judge will be free to exercise case management powers under CPR 3. Those powers are given by the statutory rules, but a judge cannot simply alter the rules or practice directions with general effect.

(ii) If and in so far as a practice direction has been made under section 5(1) a judge would only have power to vary the same if he was a judicial officer nominated by the Lord Chief Justice and obtained the agreement of the Lord Chancellor (see section 5(4)(a) and Pt 1 of Schedule 2). This limitation would seem only to apply to a practice direction issued under the section 5(1) procedure since there does not appear to be any embargo on one practice direction being varied or replaced by another under section 5(2) but that can only be 'with the approval' of the Lord Chief Justice and the Lord Chancellor.

(iii) He has power to issue a practice direction under section 5(2) but only with the approval of the Lord Chief Justice and the Lord Chancellor.''

Accordingly, a judge is not free to announce that henceforth the court intends to disapply or vary the rules or practice directions issued under the statutory scheme (*Bovale* at [26]).

But what if a judge, who regards it unsatisfactory that the CPR Pt 8 claimant before him should have to produce a skeleton argument without knowing the defendant's grounds of resistance, reverses the order of filing a skeleton argument and orders that the defendant should file its skeleton argument first? This is what Collins J. did in *Bovale*. It was argued that this cannot be regarded as a Rule change; it is a simple case management direction addressed to the particular defendant in the particular proceedings. This too the Court of Appeal found unwarranted holding that (*Bovale* at [70]):

> ''[P]arties are entitled to start from the position that the relevant rules and practice directions will apply to their case; the onus will be on the party seeking a different form of process and indeed on the judge who may of his own motion wish to exercise his case management powers in a particular case to demonstrate that the case is outside the norm. What Collins J was not entitled to do was to put the onus entirely the other way round and impose an onus on a defendant to persuade the court that some procedure inconsistent with the rules and practice directions should not be followed.''

The court stressed that it was expressing no views on whether Collins J. directions were sensible and conducive to improving the management of cases in the Administrative Court. But it thought that ''the correct process is to have the matters considered in accordance with the procedure now adopted for the issuing of practice directions under s.5(1) allowing for full consultation with all those affected'' (*Bovale* at [73]).

This makes sense, but the same may be said of any rule making in the course of judgments, including of course ''gap-filling'' by the Court of Appeal.

Conclusion

The CPA 1997, as amended by the Constitutional Reform Act 2005, provides the foundation for the CPR 1998 as delegated legislation by empowering the Civil Procedure Rules Committee to make rules of procedure. The CPRC is a representative body containing persons with a variety of experience, who act upon wide consultation and with the approval of the Lord Chancellor. Its rules are subject to annulment by Parliament. This rule making in procedure is now a clear, transparent and accountable legislative process. The same may not be said of all the remaining procedural rule-making powers.

As part of its drive to implement greater separation of power in the English legal system, the Constitutional Reform Act 2005 sought to improve on the arrangements of the 1997 Act. In Pt 1 of Sch.2 to the Act it established a statutory framework for making CPR practice directions. These practice directions are made by the Master of the Rolls and are issued after consultation with the CPRC.

However, s.5(1) of the CPA 1997 (as amended) allows for practice directions to be made outside the above scheme. Such directions may not be given without the approval of the Lord Chancellor and the Lord Chief Justice (though for some directions the approval of one of them suffices). Unfortunately, the legislative scheme says nothing about who may actually initiate the process and frame the directions.

Furthermore, the statutory scheme makes no express mention of the numerous court guides that have sprung up since the CPR, nor about the Court of Appeal's continuing exercise of its inherent jurisdiction to make rules of practice. The Court of Appeal has now held in *Bovale* that court guides have no formal status and merely provide guidance. Since they establish no binding rules, it is difficult to justify their continued existence. Nor is it easy to justify the Court of Appeal's rule making power for the purpose of making what the court called in *Bovale* "gap-filling rules". Now that we have a properly established, accountable, representative body in the shape of the CPRC which, moreover, can quickly react to emerging needs, there is no longer a need for judges to continue to make rules. Insofar as individual cases may require solutions that are outside the rules, the court has ample case management powers to provide them on a case by case basis. But for the court to continue legislating in this field goes counter to policy of separation of powers. Now that our Supreme Court judges have been stripped of their legislative powers it would be fitting for the Court of Appeal to follow suit.