Legislation that overrides judgments or interferes in court proceedings: when is it justified?

Paul Rishworth QC

Auckland

Important further questions

- What is the benchmark, or standard, of justification?
- Is it the *Bill of Rights?*

(and thus a matter for rights-vetting as part of the law-making process with the possibility of a s 7 Report and at least an opinion from Justice of Crown Law on consistency? And the possibility of post-enactment litigation by an affected person seeking a ”declaration of inconsistency”?)

- Or, is it a matter of political judgment, to be judged in the legislature?
- Either way, who must make the case for justification, and how?

The factors involved in the ultimate judgment are the same

- But if the Bill of Rights contains a right against retrospective legislation the factors must be weighed and legal advisers (and the Attorney-General) will express the outcome as a matter of BORA consistency
- Conversely, if it is not a matter to which the Bill of Rights speaks, those same factors are necessarily involved in the policy judgment as to whether the legislative measure is justified and defensible.
- In the latter case, there is no *authoritative* decision-maker on the "rights-consistency" of the legislation. As with all policy choices, it is a matter for debate (within which there will, of course, be better or worse arguments but no ultimate arbiter of their merit).

Defining the problem

"It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about and pick up the pieces."

Lon Fuller, *The Morality of Law* (1969), p 60

Some examples

- Solicitor’s General Reference re driving licence suspensions (scenario 3)
- *Mangawhai Ratepayers* case and the rates validation legislation (to be discussed)
- Kapiti District speed limits
- Ombudsman name protection
- The 1992 Sealords Deal legislation
- *Spencer v Attorney-General* (paying family carers)
- Homosexual Law Reform and the mistake re HC jurisdiction
- Expungement of homosexual offences
- Western Samoa citizenship
- Clyde Dam empowering legislation

Relevant principles

- First, there is no *legal* impediment to enacting a law to validate an action held by a court to be invalid (or which is the subject of a *pending* case, or which *could be* the subject of a case). This is because of the doctrine of parliamentary supremacy.
- Second, there are strong conventions (sourced from the constitutional principle of separation of powers and rule of law) that the legislature generally *not* interfere in judicial proceedings.
- Third, there are some relevant statutory rights in NZ law (which instantiate those conventions): s 10A Crimes Act 1961; ss 25(g) and 26(1) New Zealand Bill of Rights Act 1990; and arguably s 27(2) and s 27(3) New Zealand Bill of Rights Act 1990.

Guidelines ch 12

- In all cases, if legislation is being considered to overturn a court decision, or to alter the law at issue in existing proceedings, Crown Law should be consulted. Such legislation needs to be justified as being in the public interest and impairing the rights of litigants no more than is reasonably necessary to serve that interest.

The Bill of Rights

- If the Bill of Rights speaks to retrospective legislation then it shifts the paradigm for considering retrospective legislation from the *political* (is it consistent with the “rule of law”) to the *legal* (is it consistent with s 27(2) or (3))
- This has implications for rights vetting under s 7 and “declarations of inconsistency” that may be sought for enacted legislation
- *Mangawhai Ratepayers v Kaipara District Council* is an instance of the latter being sought

Mangawhai Ratepayers & Residents Assoc v Kaipara District Council [2015] NZCA 612 (CA)

- KDC levied rates to repay borrowing for wastewater treatment plant.
- KDC had not complied with relevant statutory requirements and its rates were likely invalid on that account
- What consequences? MRRA brought JR proceedings for declarations of invalidity.
- But, LGA 2002 validated the borrowings. And the KDC procured enactment by Parliament of the KDC (Validation of rates and Other Matters) Act 2013.
- Is that 2013 legislation consistent with s 27(2)?

Heath J in the High Court

[81] There are two questions in this case:

(a) Is the Validation Act inconsistent with the Bill of Rights and the rule of law?

(b) If so, is it appropriate for the Court to make a declaration of inconsistency?

- Holds that s 27(2) is prima facie implicated but, given the s 7 advice from MOJ (of consistency) and Parliament's careful assessment (and a wide margin of appreciation) the limit on s 27(2) is reasonable.

Section 27 Bill of Rights

27 Right to justice

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

In the CA the Crown argues:

- Section 27(2) is not implicated even in a prima facie sense.
- There is still a right to JR which the plaintiff has exercised
- But there is no right to the continuation of the law whereby the JR will succeed (such that validation of illegality, and hence the failure of JR)
- On that basis no "s 5 analysis" is required (though as a matter of political morality it is right that the legislature undertook an inquiry into the pros and cons of validation

Miller J, on how s 27(2) affected interpretation of LGA, and Validating Legislation

[78] To recognise the instrumental nature of the protected s 27(2) right is to conclude that an enactment's impact on substantive rights and interests may be taken into account when considering whether the enactment limits the right to judicial review. It does not follow that the court will readily conclude that there exists an apparent conflict between the enactment and the protected right, still less that such conflict cannot be reconciled under s 5. I do not mean to imply that proportionality review is required as a matter of course. In many cases the justification is obvious and the Crown should not be put to the trouble of mounting a comprehensive defence. It seems to me that the courts are capable of managing that problem where it arises.63

Harrison and Cooper JJ (majority)

- [205] In the circumstances, we consider [counsel] was correct when he submitted that the MRA's argument assumes there is a constitutional principle that validating legislation, of its nature retrospective, is objectionable. That is not so. Validating legislation has frequently been passed where Parliament has formed the judgment that it is necessary in the overall public interest to rectify errors by local authorities. Parliament is the appropriate forum for addressing such issues. The BORA proscription of laws with retrospective effect is limited to the criminal field.

[206] We also agree with [counsel's] submission that nothing in s 27(2) of BORA affirms as a general proposition a right to have the existing law preserved against retrospective amendment. As he put it, acceding to the MRA's argument would incorporate into s 27(2) whatever substantive entitlements happen to exist under the general law from time to time and require justification for their change under s 5 of BORA. We accept his submission that there is nothing in BORA that requires the court to proceed in that way.

[207] [Counsel]submitted that s 27(2) in fact creates a process right only. We are not sure that is a helpful label, and it may be thought to diminish the importance of the right. However we consider that in each case where it is sought to establish that legislation has wrongly removed a right to apply for judicial review, the context must be examined. The importance of the s 27(2) right cannot be addressed without consideration at the same time of the action sought to be challenged on review. When that is considered here it can be seen the MRA's application for review proceeds on the premise that it should have been insulated against Parliament's ability to pass the Validation Act. That is a claim that the Court cannot entertain. In the circumstances of this case we have concluded that enactment of the Validation Act did not breach any relevant right of the MRA.

The *Reilly* case in [2013] UKSC 68

- UK regulations for “jobseekers’ allowances” for those out of work
- In March 2012 being received by 1.6 m people, 480,000 of them nder 24
- Forecast expenditure in 2012 was £5b
- Regulations required participants to undertake unpaid work or activity to improve job prospects, and “work for your benefit” schemes
- Sanctions could be applied for non-compliance – loss of jobseekers’ allowances for a period
- Regulations held ultra vires – did not comply with Act in a field where there was a significant impact on lives etc. Schemes not properly defined. Also a failure to publicise the schemes properly
- **But** 2013 Act and new regs validated the otherwise invalid ones

Reilly v Secretary of State for Work and Pensions [2016] EWCA Civ 43

- A separate claim seeking a declaration of incompatibility of the validating legislation
- Did the retrospective validation of the sanctions applied on job seekers contravene the ECHR?
- The right to a fair trial and "equality of arms" in art 6 of ECHR "precludes any interference by the legislature … with the administration of justice designed to influence the judicial determination of a dispute" save "on compelling grounds of the general interest".
- *Zielinski v France* (1999) 31 EHRR 532 applied.
- Crown argued that the validating legislation was a reasonable limit (or in UK terms, that there were "compelling terms of general interest"

The court's treatment of the argument for there being a compelling interest

As to the inequity argument, Mr Eadie's point is of course that JSA claimants who had good cause for failing to participate, or in whose cases there had been a breach of the prior information duty, would not be liable to sanctions in any event, and that it followed that those who were affected by the 2013 Act would only be, in short, the undeserving. **It was entirely justified to deprive them of what would otherwise be a windfall. We see the force of this argument, but in our view it cannot outweigh the importance to be attached to observance of the rule of law.** The starting-point must be our rejection of Mr Eadie's previous submission that this is a mere "drafting error" case where the defect on which the claimants who had brought appeals relied self-evidently failed to reflect the intention of Parliament. In such a case it is understandable that the weight to be given to respecting the letter of the law should be less; and that is at least the primary strand in the reasoning of the ECHR in such cases as *National & Provincial*, *OGIS* and *EEG*. But here, as we have said, there is no doubt that Parliament, in enacting section 17A, and the Secretary of State, in making regulation 4 (2) (c), intended that the claimants should have the benefit of the very provisions which were then not applied. In such a case the fact that relying on those provisions might give them an undeserved benefit does not seem to us a sufficient reason for intervening in existing proceedings to deprive claimants of the outcome to which they were unquestionably entitled on the basis of the law as it then stood – and indeed which some of them had already achieved in the FTT. The integrity of the judicial process is a Convention value of fundamental importance. **The rule of law enures for the benefit of the undeserving as well as the deserving.**

Other (Unsuccessfully) claimed justifications in *Reilly* for validating legislation being a reasonable limit

- Just removing a technical error
- The quantum of money is so large that there are fiscal constraints (“up to £130m” vs £1.3m)
- Inequities as between potential claimants

NZ position cf UK position

- As things stand, the *Mangawhai Ratepayers* case affairs (2-1 majority) that s 27(2) was not implicated by validating legislation which removed rthe basis for JR
- This means that the question of justification – or reasonable limit under s 5 – is not reached as a legal question (but it is of course still *the* policy question)
- That is salient to the question of rights-vetting and post enactment declarations of inconsistency
- In UK the Reilly case is clear that it *is a* rights question – reflecting the right to a fair hearing in article 6 of ECHR – and thus a legal question and not just one of policy

Principles for deciding the policy question (whether the override or interference with proceedings is justified)

- Justice and effectiveness
  - Principle at its strongest in criminal cases
- Reasonable expectations
  - People may have acted on the basis of the law being as it is now to be declared, and not on the basis of its being as the Court has now decided
- Nature of the right or interest
  - Validating officers and appointments may not impact on individual rights (de facto officer doctrine to consider as well)
- The need of Government to govern
  - An overall decision of best interests of the country may justify (eg Sealords Deal in 1992 terminated all extant litigation by iwi, but Human Rights Committee under ICCPR agreed it was a justifiable and beneficial deal for Maori generally)

Drawing threads together

- The need for a reasoned, publicly available, justification
- Opportunity for adequate informed debate
- Ultimately, it is a matter of ***reasons for* v. *reasons against***
- The reasons for remedying error in the first place may (or may not) also constitute reasons for overturning a judgment already given, or for making the legislative solution apply *even to pending proceedings*.
- These are first and foremost policy considerations for those promoting legislation, and for legislators to consider when enacting it.
- The contribution of *law* is that it is the framework within which the policy question arises.
- *But if s 27(2) or (3) introduce a legal right against such legislation, akin to article 6 of ECHR then the question of justification is a legal one. The Reilly case and its approach to justification will be highly salient.*
- *In terms of the Mangawhai case, that is not the legal position in NZ at the current time.*