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RE GORDON: AN ILLUSTRATION OF JUDICIAL ACTIVISM ARISING FROM UNCERTAINTY IN THE NEW ZEALAND BILL OF RIGHTS ACT 1990

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This paper sets out to examine the approach taken by New Zealand courts to achieve consistency with the New Zealand Bill of Rights Act 1990. Section 6 of the Act obliges the judiciary to interpret legislation consistently with affirmed rights and freedoms. In the absence of clear legislative or authoritative guidance as to how s 6 appropriately operates, there is scope for the judiciary to use this interpretative tool adventurously. Formerly, New Zealand courts have been careful in their use of s 6, placing Parliamentary sovereignty on a pedestal. Unaccustomed in New Zealand, judicial activism refers to the judiciary acting beyond their interpretative role, adopting a law-altering capacity. In 2019, the High Court in Re Gordon *interpreted 'spouses' to mean 'former spouses' for the purposes of joint adoption. The Adoption Act 1955 is a blatant product of its time. It routinely discriminates against contemporary forms of relationships. Through the application of s 6 the Court awarded a new meaning to the adoption provision, resembling judicial legislating.* Re Gordon *illustrates the potential for judicial activism in response to s 6 uncertainty. This paper does not support nor oppose the judiciary holding a more active role in New Zealand. The paper aims to reflect on how a judicially activist decision sits against the backdrop of jurisprudence demonstrating a more passive approach to interpretation. If Parliament wishes to confine the courts' role as strictly interpretative, this needs to be clarified. Higher courts could additionally offer guidance as to how future courts should approach the s 6 interpretative exercise. Whilst it may be construed as unconstitutional, the exhibition of judicial activism in* Re Gordon *might finally provoke answers to the uncertainty inherent in our Bill of Rights.*

Key Words

New Zealand Bill of Rights Act 1990; Adoption Act 1955; Re Gordon; Re Application by AMM and KJO to adopt a child; Judicial Activism.

I Introduction

New Zealand's unique constitutional structure marks it as the only country in the world that is a true Parliamentary democracy.[1] In effect, Parliament has unfettered sovereignty to legislate. Most modern countries are typically governed by an entrenched Bill of Rights, placing limits on Parliamentary law-making powers. The New Zealand Bill of Rights Act 1990 (BORA) is different in that it is an unentrenched ordinary, yet still constitutional, statute. Within this constitutional context, the legislation affirming fundamental rights and freedoms has frequently been at odds with other Parliamentary statutes.

BORA contains a unique set of provisions to maximize human rights protection, whilst leaving Parliament's law-making power intact. This is infrequently a seamless balancing act. The courts in New Zealand cannot redefine legislation to stop Parliament's infringement on protected rights.[2] Even so, the judiciary has managed to depart from the intended meanings of statutory words through s 6 BORA.[3] Section 6 obliges courts to give preference to an alternative meaning of a provision that is more consistent with BORA affirmed rights and freedoms.

Re Gordon (*Gordon*) demonstrates the potential power of this interpretative tool.[4] The Court found a new and expanded meaning of the phrase 'spouses' in the Adoption Act 1955, despite the provision being unchanged since its enactment.[5] Allowing a divorced couple to apply for adoption jointly as 'spouses' seems like a contemporary outcome.

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[1] David Erdos "Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)" (2007) 5 ICON 343 at 345.

2 New Zealand Bill of Rights Act 1990, s 4 reads: "No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),— (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) decline to apply any provision of the enactment— by reason only that the provision is inconsistent with any provision of this Bill of Rights."

[3] Section 6 reads: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

[4] *Re Gordon* [2019] NZHC 184, [2020] 2 NZLR 436.

[5] Section 3(2) reads: "An adoption order may be made on the application of 2 spouses jointly in respect of a child."

However, its merit appears to fall outside the ambit of the judiciary's interpretative role as stipulated by s 6.

Gordon demonstrates an unprecedented approach in New Zealand that has arisen through the uncertainty surrounding s 6. This paper argues that the lack of extensive jurisprudence, especially by the higher courts, regarding the s 6 BORA framework has opened the gates to judicial activism, as illustrated in *Gordon*.

Judicial activism refers to the judiciary acting beyond their interpretative role, diverging into judicial legislating.[6] Inventing new meanings contrary to that intended by Parliament encroaches on the legislative sovereignty Parliament has been careful to protect. This paper argues that without extensive jurisprudence on s 6 BORA, it has been left to "subjective judicial evaluation" to determine when interpreting enactments becomes legislating.[7]

Part II of this paper will detail the s 6 BORA backdrop that *Gordon* was decided upon. The relevant literature and jurisprudence on s 6 will demonstrate the ambiguous nature of the courts' rights-protecting role.

Part III will analyse the application of BORA within adoption law. The tension between BORA and the Adoption Act 1955 has frequently been relieved through s 6 BORA, but through careful and constrained judicial interpretation.

Part IV will consider the impact of *Gordon* in light of relevant case law. Part V considers whether there is a place for judicial activism within New Zealand's constitution, and the potential consequences of a judicially activist decision.

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[6] Kerrin Eckersley "Parliament v The Judiciary: The Curious Case of Judicial Activism*"* (LLM Research Paper, Victoria University of Wellington, 2015) at 4; and Jeremy Waldron "Compared to What? Judicial Activism and New Zealand's Parliament" (2005) 11 NZLJ 441 at 441.

[7] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [7.12.2].

II The Uncertainty of s 6 BORA

A Re Gordon: The Facts

The basis of this paper rests on the case *Gordon*, decided in the High Court in 2019. Ms Gordon and Mr Archer were married when they began fostering 2-year-old Tiffany. The couple subsequently separated but remained devoted and loving parents to Tiffany. The couple later divorced and both remarried. Tiffany, at the age of 18, requested her foster parents apply for her adoption. Tiffany regards Ms Gordon and Mr Archer has her real parents and sought to have this relationship legally recognised.

The Family Court held that Ms Gordon and Mr Archer could not apply for adoption under s 3(2) of the Adoption Act, by reason of their status as divorcees.[8] Section 19 of BORA and s 21(1)(b)(v) of the Human Rights Act prohibits discrimination on the grounds of marital status, specifically being "a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended".[9] Albeit, under s 3(2), only 'spouses' can apply for joint adoption.[10] Whilst the Court held s 3(2) to be discriminatory, extension of the phrase was not reasonably possible under s 6 of BORA.

Ms Gordon and Mr Archer appealed. On appeal the High Court found 'spouses' could be interpreted to include divorced couples through application of s 6 BORA. The Court reviewed current social norms and values, finding that an ongoing committed relationship between parents was no longer determinative of effective joint parenting.[11] Rather, commitment to the role of parenting was paramount. Expanding 'spouses' to include former spouses was therefore more reflective of modern-day society.

It will be demonstrated in this paper that in reaching this outcome the Court overstepped its interpretative role and crossed into judicial legislating. The longstanding uncertainty

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[8] *Gordon v Archer* [2018] NZFC 3355 at [32].
[9] Human Rights Act 1993, s 21(1)(b)(v).
[10] Adoption Act 1955.
[11] *Re Gordon*, above n 4, at [35].

surrounding s 6 enabled the Court to adopt a new meaning of the phrase, undermining Parliament's intention. The remainder of this chapter will describe the background upon which this issue rests.

B The Interaction of ss 4, 5 and 6

The uncertainty of s 6 that enabled the outcome in *Gordon* can at least partially be attributed to the conflicting provisions contained in BORA. The interaction of ss 4, 5 and 6 has been at issue for New Zealand courts since BORA's enactment in 1990.

Through enacting s 6, Parliament granted the judiciary the role of protecting fundamental rights and freedoms. Courts are obliged to apply an interpretation that is consistent with BORA when such an interpretation is available. In the absence of entrenched rights and freedoms, s 6 is New Zealand's best rights-protecting mechanism.

The jurisprudence and general literature demonstrate the realistic scope of s 6's interpretative power is unsettled in light of ss 4 and 5 of BORA. Section 5 enables rights and freedoms to be limited by other enactments. This section denotes that rights are not absolute. Courts need only search for a meaning that justifiably limits the relevant right in a free and democratic society. The s 6 interpretative obligation will not always be engaged if the limitation can be reasonably justified.

Section 4 enforces legislation that limits rights and freedoms even unjustifiably. This section makes plain that BORA-consistency will not always be possible. In such instances, Parliament's intended meaning must prevail. This section speaks to Parliament's sovereignty within New Zealand's constitutional context. Parliament has ultimate law-making power; the judiciary are bound to apply this law.

Whether an enactment 'can' be given an alternative meaning under s 6 often depends on how willing the court is to find one. Section 6 on its own suggests courts should rigorously search for rights-consistent meanings, as a mandate of Parliament. When

construed with s 5, the imperative lessens as justified limits are welcomed. Section 4 further softens the obligation, reminding courts of Parliament's supremacy. If a meaning is not available, the interpretative obligation ceases. These sections portray conflicting ideas. Butler and Butler discuss the resulting tension:[12]

> On the one hand, s 6 is informed by the view that statutory language is malleable and that text is open to several interpretations … On the other hand, inherent in s 4 of BORA is the notion that a statute has particular purposes and a bounded set of possible meanings.

The uncertainty presents itself at this boundary; at what point do courts give way to Parliamentary supremacy? Claudia Geiringer summarised this difficulty, asking "where does the constitutionally permissible territory of judicial "interpretation" end and the constitutionally impermissible territory of judicial "legislation' begin?"[13]

BORA itself is silent as to how these conflicting sections most appropriately fit together. In *R v Hansen (Hansen),* Tipping J struggled with the juxtaposition of ss 4 and 6, noting "each section fulfils an important purpose, but no specific guidance is provided to the courts in deciding which purpose should prevail in the case at hand."[14]

It is upon this platform the potential for judicial activism manifests. In one regard, it is clear the judiciary has a strictly interpretative function and must not encroach on Parliament's sovereign. In another regard, the judiciary has been granted the important role of protecting society's rights and freedoms and should robustly perform this duty. Whether the courts put Parliamentary sovereignty first and foremost or emphasise their human rights mandate will largely depend on individual preference.

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[12] Butler and Butler, above n 7, at [7.9.1].

[13] Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen"* (2008) 6 NZJPIL 59 at 64.

[14] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [157].

C Formulating a s 6 Approach

1 The Scope of s 6

Commentators have frequently considered the theoretical scope of s 6 BORA. The legal profession is mixed in its view of how capable s 6 is as a human rights-protecting tool. The contentious nature of the literature reinforces the uncertainty of the provision.

Some commentators believe s 6 confers no great power on the judiciary. Professor Joseph has commented in favour of this view, holding s 6 "is not a new rule of interpretation that authorised a court to ignore intended meanings in favour of more creative rights advancing interpretations."[15] Others have observed the potential scope for s 6 to be used 'aggressively'.[16] Some commentators have stated s 6 denotes a strong interpretative obligation to promote BORA consistency.[17]

Despite the potential of s 6, John Burrows and Ross Carter recognised New Zealand courts' disinclination "to follow the radical, strongly assertive, and sometimes startling line of their United Kingdom counterparts."[18] Given the s 6 debate remains unresolved, comparison to United Kingdom case law provides tangible understanding of how s 6 has been used in New Zealand.

The United Kingdom Human Rights Act (HRA) 1998 contains a similar interpretative obligation to find a rights compatible meaning of an enactment "so far as it is possible to do so".[19] Lord Cooke has contended s 3 conveys "a rather more powerful message" than s

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[15] Phillip A Joseph *Constitutional and Administration Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [27.4.6].

[16] John F Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, 2003) at 258.

[17] Kris Gledhill "The Interpretative Obligation: The Duty to Do What is Possible*"* (2008) 1-4 NZ L Rev 283 at 284.

[18] John F Burrows and Ross Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 365.

[19] Section 3(1) reads: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

6.[20] However, this contention has been rejected by the New Zealand Supreme Court, holding s 3 conveyed no greater interpretative obligation than s 6.[21] Albeit, the United Kingdom courts have demonstrated a bolder approach to protecting human rights than New Zealand courts.

The House of Lords decision in *Ghaidan v Godin-Mendoza (Ghaidan)* is authoritative for establishing the far-reaching interpretative obligation under s 3.[22] The House of Lords accepted that s 3 entitled the courts to interpret away from Parliament's intended meaning, so long as the interpretation goes with the "underlying thrust" of the relevant legislation.[23]

New Zealand courts have not shown the same zeal in their protection of human rights. In *Quilter v Attorney-General (Quilter)* [24] the Court held 'marriage' could not be interpreted to include same-sex couples.[25] An expanded meaning of the phrase was not reasonably available on the wording and scheme of the Marriage Act. Despite this outcome's discriminatory effect, the Court of Appeal felt they were obliged by s 4 BORA to apply the inconsistent provision.

Ghaidan and *Quilter* portray the differing uses of similar interpretative obligations. United Kingdom courts have found "it will sometimes be necessary to adopt an interpretation which linguistically may appear strained."[26] On the contrary, New Zealand courts have demonstrated a reluctance to readily strain the wording of an enactment to achieve BORA consistency.[27] Whilst there has been speculation as to how s 6 could be used, New Zealand courts have demonstrated they are unwilling to stretch the provision too far.

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[20] *Director of Public Prosecutions, ex p Kebilene v R* [2002] 2 AC 236, [1999] 4 All ER 801 (HL) at [373].
[21] *R v Hansen,* above n 14, at [13] per Elias CJ.
[22] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 All ER 411 (HL) at [30].
[23] At [33] per Lord Nicholls.
[24] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).
[25] Marriage Act 1955 (since amended).
[26] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [44] per Lord Steyn.
[27] Burrows, above n 16, at 258.

2 R v Hansen

The jurisprudence so far has not given clear guidance on the boundaries of s 6. In the landmark case *Hansen,* the Supreme Court was asked for the first time to engage with the interplay of ss 4, 5 and 6 of BORA.[28] Tipping and McGrath JJ discussed s 6, albeit in a cursory way.

Hansen was convicted of possession with intent to supply under s 6(6) of the Misuse of Drugs Act 1975. Section 6(6) sets up a reverse onus of proof, whereby a person is presumed to be in possession for the purpose of supply unless the accused can disprove this on the balance of possibilities.

On appeal, Hansen contended the reverse onus provision breaches his right to be presumed innocent until proven guilty.[29] Hansen argued the provision could be interpreted as imposing only an evidential burden. This interpretation would be more consistent with the right to be presumed innocent, and therefore must be applied.

The Supreme Court considered how the interpretative function of s 6 applies in light of ss 4 and 5 of BORA. The majority found s 6 applicable only where the inconsistency cannot be justified under s 5 (Elias CJ dissenting).[30] This logic formed the '*Hansen* approach'.[31]

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[28] *R v Hansen*, above n 14.

[29] New Zealand Bill of Rights Act, s 25(c).

[30] At [3].

[31] At [92] per Tipping J: Step 1. Ascertain Parliament's intended meaning. Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom. Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5. Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails. Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted. Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

Following the approach, majority of the Supreme Court found the limit on the right to be presumed innocent an unjustifiable infringement. Nonetheless, the Court unanimously held an alternative interpretation of the provision was not available. Tipping J held an alternative meaning was not 'tenably' available and thus would defeat Parliament's intention.[32]

McGrath J spoke of the relationship between ss 4 and 6, namely that s 4 reinforces the courts' role as strictly interpretative.[33] His Honour expressed the opinion that in light of BORA being unentrenched law, s 6 confers no greater power than s 5 of the Interpretation Act.[34] Consequently, available meanings are confined to those available on the language of the enactment and consistent with the enactments purpose. Courts are obliged to search for BORA-consistent interpretations, but within the limits set by BORA itself.[35] To interpret beyond these restrictions would be using s 6 contrary to s 4.

Comparison with the United Kingdom case, *R v Lambert (Lambert)* provides further guidance on the Supreme Court's view of s 6 as a tool.[36] *Lambert* involved a similar reverse onus provision to that in *Hansen*. The House of Lords held the provision imposed an evidential burden, rather than a legal burden. The Court in *Hansen* declined to follow *Lambert*, evidencing the Supreme Court's reluctance to 'aggressively' protect human rights.[37] Tipping J remarked:[38]

> In England s 3 appears at times to have been construed as mandating a judicial override of Parliament, if Parliament's meaning is inconsistent with a right or freedom. That, for me, would be to use s 3 (the New Zealand s 6) as a concealed legislative tool.

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[32] At [91] per Tipping J.

[33] At [179] per McGrath J.

[34] At [252] per McGrath J; and Interpretation Act 1999, s 5(1) reads: "The meaning of an enactment must be ascertained from its text and in the light of its purpose."

[35] At [179] per McGrath J.

[36] *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545 (HL), [2001] 3 All ER 577.

[37] Burrows, above n 16, at 258.

[38] *R v Hansen,* above n 14, at [158] per Tipping J.

Hansen implicitly advances limitations on the practical scope of s 6 BORA. Whilst s 6 can be used to achieve BORA consistency, an alternative meaning must be available with due regard to an enactment's text and purpose. *Hansen* establishes s 6 does not authorize courts to adopt new and unintended meanings. To do so would threaten Parliamentary sovereignty.

Despite formulating a workable approach and suggesting loose boundaries of s 6's reach, the Supreme Court failed to ascertain any definitive criteria to guide future courts. The 'text' and 'purpose' checks provide some guidance but are vague in their practical execution. Without authoritative clarity, whether an alternative meaning can be found through s 6 remains susceptible to individual judgement.

III Adoption Law and BORA

A Re Application by AMM and KJO to adopt a child

The relationship between the Adoption Act and BORA has notoriously been uneasy. Review of a landmark case in adoption law will exhibit the judiciary using the ambiguous nature of s 6 advantageously to protect a BORA affirmed right. It will be demonstrated that a rigorous application of s 6 does not resemble judicial activism where Parliamentary sovereignty is carefully preserved.

Re Application by AMM and KJO to adopt a child (AMM) was a case of inconsistency between the Adoption Act and BORA.[39] AM and KO had been in a de facto relationship for 10 years when they applied for a joint adoption order under s 3.[40] Following the approach set out in *Hansen,*[41] the Court identified the ordinarily intended meaning of 'spouses' as referring to married couples.[42] It was concluded this meaning was

[39] *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) [*AMM*].
[40] Adoption Act.
[41] *R v Hansen,* above n 14, at [92] per Tipping J.
[42] *AMM,* above n 39, at [16].

discriminatory on the basis of marital status, and not a justified breach of the right. The key issue the case fell on was whether s 6 could widen the phrase to include de facto couples in a stable and committed relationship.

The High Court noted the uncertainty resulting from ss 4 and 6, questioning "how far should a court strive for s 6 consistency when it must be recognised that Parliament may have intended to pass a law that was inconsistent with BORA?"[43] The High Court considered a wider definition of 'spouse' with reference to the text and purpose of the Adoption Act. It was concluded that interpreting 'spouse' to include de facto couples would not unreasonably strain the language of the enactment.[44]

The purpose of limiting joint applicants to married couples was regarded as ensuring adoptive parents were a man and a woman in a committed relationship.[45] The 1955 Act reflects the value placed on the traditional family unit of its time, depicted by the presence of a *husband* and *wife*.[46] On analysis, the High Court regarded a heterosexual couple in a long-term de facto relationship as no different than if the same couple were married.[47] The desired 'mother' and 'father' figures were the same in all regards other than relationship title.

Marriage in 1955 was the epitome of 'commitment'. In modern day, living together and parenting as a de facto couple for 10 years denotes the same level of commitment. It was the consensus of the Court that extending 'spouses' to include AM and KO would not frustrate the recognised purposes of the Act. The Court felt it necessary to state this expansion as limited to heterosexual de facto couples.[48]

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[43] At [23].
[44] At [34].
[45] At [35].
[46] Bill Atkin "Adoption Law: The Courts Outflanking Parliament" (2012) 7 NZFLJ 199 at 119.
[47] At [36].
[48] At [39].

The High Court turned to the broader legislative context when considering the potential consequences of expanding the meaning of 'spouses'. Other New Zealand statutes had previously widened the phrase to include couples in relationships 'in the nature of marriage.'[49] Such statutes indicated 'spouses' was capable of bearing an expanded meaning.

A challenge was posed by multiple instances of Parliamentary inaction in response to opportunities to amend the Adoption Act. The Care of Children Act 2004 was enacted by Parliament but did not include any of the reforms of adoption law previously recommended by the Law Commission.[50] The Civil Union Act 2004 offered legal recognition to unmarried relationships. The Adoption Act was amended to reflect the Civil Union Act, but the class of joint adoption applicants was unchanged. The Relationships (Statutory References) Act 2005 further demonstrated an abstinence of Parliament to amend s 3 of the Adoption Act. The Act updated references to relationships in 103 statutes, excluding the Adoption Act. A proposed change to the definition of 'adoptive parent' was defeated 102 to 10.[51]

This could quite easily be construed as Parliament deliberately reinforcing the requirement that adoptive parents be husband and wife. However, the High Court recognised Parliament did not expressly legislate against an expanded meaning.[52] In the absence of explicit restriction, the potential for a BORA-consistent interpretation remained. The Court found no justification preventing a wider meaning of 'spouses', when such a meaning was available on the text and fit consistently with the purposes of the enactment.[53]

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[49] See Accident Rehabilitation and Compensation Insurance Act 1992 (Repealed), s3; and Companies Act 1993, s 2.

[50] Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000).

[51] Adoption Act 1955, s 2 (since amended).

[52] At [68].

[53] At [70].

This case demonstrates the scope for s 6 to be used as a powerful tool to protect fundamental rights. Whilst this is so, the High Court were only willing to adopt an alternative interpretation that satisfied the 'text' and 'purpose' checks set out in *Hansen*. Section 6 was capable of achieving BORA-consistency, but the need to tread carefully in order to protect Parliamentary sovereignty was not forgone by the Court.

B The Modernization of Adoption Law

The Adoption Act has been widely regarded as out of date.[54] The line of cases that have grappled with the failings of the Adoption Act illustrate a pattern of judicial willingness to allow expansive meanings that better reflect modern society. Section 6 BORA has provided an effective basis for this action, although cannot suffice in every instance. This is best demonstrated by reviewing the case law.

Re May provides an appropriate starting point for this exercise.[55] The case involved a legally married but separated couple who applied to jointly adopt a child. The Family Court allowed the adoption, finding the couple still qualified as 'spouses' under the ordinary definition. This decision demonstrates the power of marriage title, but also leaves a few questions. Why does the law regard a married but separated couple as more capable of parenting than a committed and stabled but unmarried couple? Does the legal status of being married simply imply greater stability? The answer to the latter would likely have been yes in 1955 when the Adoption Act was drafted. Yet, even in 2016, a time when 46% of children were born outside of marriage, marital status still held significant force.[56]

Other forms of relationships have gradually gained recognition by New Zealand courts. Prior to *AMM*, the Family Court heard the case *In the Matter of C [Adoption]*.[57] The

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[54] Atkin, above n 46, at 119.

[55] *Re May* [2016] NZFLC 3573.

[56] Law Commission *Relationships and Families in Contemporary New Zealand* (NZLC SP22, 2017) at 23.

[57] *Re C (Adoption)* [2008] NZFLR 141 (FC).

applicants, a de facto couple, were the genetic parents of C but not legally recognised as C's parents under the Status of Children Act 1969 (repealed). The Court felt it appropriate to interpret 'spouse' as including couples in relationships in the nature of marriage for the purposes of achieving consistency with BORA.[58] The judgment contained critical analysis of the Adoption Act, recognizing its failure to meet modern social norms.

Re Pierney involved a same-sex de facto couple who sought to jointly adopt the biological children of one of the men.[59] The couple had been in a relationship in the nature of marriage for nearly 10 years. The Family Court allowed the application, recognizing the result would be in the best interests of the children. This case demonstrates the nature of our continually evolving society; five years earlier the High Court in *AMM* noted "formidable barriers" to allowing same-sex couples to adopt.[60]

This may be seen as the inevitable widening of the phrase 'spouses' as a reflection of changing social norms. It is material that almost three years before *Re Pierney* was heard, same-sex marriage became legally recognised in New Zealand.[61] Relevantly, in the year prior to *Re Pierney,* the Family Court allowed an adoption order by a same-sex married couple.[62] With legislative and authoritative indication, the Court in *Re Pierney* concluded there was no justification for preventing adoption by a same-sex de facto couple.

Interestingly, in 2016 the Human Rights Review Tribunal adopted a contrasting view. In *Adoption Action Inc v Attorney General* the Tribunal held that s 3 of the Adoption Act could not be construed as allowing civil union and de facto partners to jointly adopt.[63] Even in light of *AMM*, the Tribunal felt endorsing an aggressive s 6 application would qualify as judicial legislation.[64]

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[58] At [77].

[59] *Re Pierney* [2015] NZFC 9404, [2016] NZFLR 53.

[60] *AMM,* above n 39, at [39].

[61] Marriage Amendment Act 2013, s 5.

[62] *Re Application by Reynard (Adopt a Child)* [2014] NZFC 7652, [2015] NZFLR 87.

[63] *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113.

[64] At [158].

C Implications

The Adoption Act has clearly failed to keep up with modern day society. Bill Atkin regarded this failing, giving credit to the courts for "ensuring a degree of modernization" of adoption law.[65] The rate at which society evolves has continued to exceed the law, as evidenced by shortcomings in the law's ability to address new forms of relationships. An example can be seen in *Paul v Mead*.[66] The issue was whether polyamorous relationships (relationships involving more than two parties) fell under the Property (Relationships) Act 1976. The High Court held that a relationship of this kind did not naturally fall under the Act, nor could the enactment be stretched in order for it to do so.[67] This case provides an example of social change that falls through the legislative gap beyond judicial, or s 6, recovery.

Whilst it is uncontroversial that the Adoption Act is ill-fitting to modern society, whether s 6 can provide a panacea is contentious. So far, this question has been answered on a case to case basis. Even with ongoing uncertainty in its application, some cases have seen s 6 bridge the legislative gap between adoption law and social standards.[68] Other cases have recognised the limitations of s 6 and succumbed to the s 4 mandate, in similar fashion to the Supreme Court in *Hansen*.[69]

The case law, to some extent, solidifies the principal of Parliamentary sovereignty. Even in cases where an alternative meaning was available, courts showed a reluctance to depart too far from Parliament's original intention. The expansion of 'spouses' has notably been

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[65] Atkin, above n 46, at 199.

[66] *Paul v Mead* [2020] NZHC 666.

[67] At [58].

[68] See generally *AMM,* above n 39; and *Re Pierney* above n 59.

[69] See generally *Paul v Mead* above n 66; and *Adoption Action Inc v Attorney-General,* above n 63.

foreshadowed by Parliamentary indication that a wider definition is reasonably possible.[70] Recognizing the importance of protecting fundamental human rights and freedoms has been carefully balanced with the desire to remain in one's own constitutional lane. Viewed as a whole, the approach taken by New Zealand courts falls shy of judicial activism.[71] It is upon this backdrop that *Gordon* materializes as a highly significant case in adoption and human rights law.

IV Reconsidering Gordon

The Court in *Gordon* seemingly understood a s 6 analysis to consist of an examination of societal norms and values. This unorthodox approach shows little resemblance to the s 6 analyses previously seen in New Zealand. Tipping and McGrath JJ in *Hansen,* as well as the High Court in *AMM,* suggested a more black-letter law approach to interpretation, akin to s 5 of the Interpretation Act. This paper does not purport the outcome of *Gordon* was wrong, but rather uses the distinguishable approach taken to emphasise the practical effect of the s 6 uncertainty. With no legislative guidance or authoritative jurisprudence that can be adhered to, courts have been relatively unbound in their applications of s 6. To appreciate the legal significance of the outcome in *Gordon,* it is necessary to consider the Court's reasoning in light of jurisprudence.

A Re Gordon

1 The Judgment

The Court in *Gordon* followed the *Hansen* approach.[72] The Court found inconsistency with the right to be free from discrimination, and concluded this inconsistency was not justified.

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[70] See generally *Re Pierney,* above n 59; Marriage Amendment Act, above n 61; and *Re Application by Reynard (Adopt a Child),* above n 62. See generally also *AMM,* above n 39; Accident Rehabilitation and Compensation Insurance Act, above n 49; and Companies Act, above n 49.

[71] See Eckersley, above n 6, at 4; and Waldron, above n 6, at 441.

[72] *R v Hansen,* above n 14, at [92] per Tipping J.

The author agrees with the Court's application of the first three steps of the *Hansen* approach.[73]

The crux of the judgment for the purposes of this paper is the Court's application of step five of the *Hansen* approach.[74] The Court considered an alternative meaning of 'spouses' that is consistent or less inconsistent with the right to be free from discrimination on the grounds of marital status. The Court identified the purpose of limiting joint applicants as assurance that adopted children are provided with *joint* care and support.[75] The requirement of marriage had always been thought to ensure this joint responsibility. However, other forms of relationships are now also recognised as capable of joint action.

The case law previously outlined evidence an emphasis on the nature and quality of relationships, rather than solely relationship title. Recognition has been awarded to 'stable and committed' relationships 'in the nature of marriage'.[76] The Court in *Gordon* acknowledged these types of relationships now viewed as capable of coherent action and commitment to shared responsibility.[77] Thus far in the judgment the Court has only confirmed what has been gradually solidified in adoption case law.

The Court went on to state that society no longer depicts marriage, or even romantic commitment, as an ingredient for successful parenting.[78] Rather, the test falls on whether two people can demonstrate commitment to the role of parenting, and an "actual or potential parent/child relationship in a substantive sense."[79] That, in the Court's opinion, is the proper purpose for limiting the class of joint applicants to 'spouses'. Following this reasoning, the Court concluded that parents' commitment to their children remains regardless of the legal relationship between them.[80] Logically, the legal change to the status

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[73] At [92] per Tipping J.
[74] At [92] per Tipping J.
[75] *Re Gordon,* above n 4, at [33].
[76] See *Re C (Adoption),* above n 57, at [77].
[77] At [34].
[78] At [35].
[79] At [36].
[80] At [37].

of Ms Gordon and Mr Archer's relationship does not affect their commitment to jointly parent Tiffany. As so, the Court found s 3(2) should be interpreted to include former spouses.

2 A Comparison: Richardson v Griffiths

In *Richardson v Griffiths,* a contrasting decision was reached to that in *Gordon*.[81] Mr Griffiths and Ms Richardson had been Layla's parental figures for 16 years when they applied for her adoption. The couple's marriage had been dissolved and both had new partners, but they continued to jointly care for and support Layla.

Like in *Gordon,* s 3(2) of the Adoption Act posed a problem. The Court considered adoption case law in determining whether 'spouses' could bear an expansive meaning under s 6 BORA. Distinction was made between same-sex/de facto/married but separated couples, and two people whose marriage had been dissolved; the latter being titled 'legal strangers'.[82] The Court noted that in previous cases particular importance was placed on the requirement for an ongoing committed relationship *between applicants*.[83] The obvious point of difference here being the absence of any committed relationship between Mr Griffiths and Ms Richardson. The Court went on to conclude that 'spouses' could not be interpreted to include former spouses:[84]

> To do so would be inconsistent with both the text and purpose of the Act, to such an extent that it would render s 3(2) nugatory, and would strain the meaning of spouse in a way that was never intended, and which is inconsistent with intention that adoption orders be made in favour of persons in committed relationships.

Richardson v Griffiths provides an example of Parliamentary sovereignty prevailing. Despite its unjustified discriminatory effect, s 3(2) could not reasonably bear an expanded

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[81] *Richardson v Griffiths* [2018] NZFC 3355, [2018] NZFLR 695.

[82] At [28].

[83] See *AMM,* above n 39, at [36].

[84] At [39].

meaning. The Court held Mr Griffiths' and Ms. Richardson's commitment to Layla as parents was not sufficient to render them 'spouses'.[85] Contrastingly, Ms Gordon and Mr Archer's commitment to Tiffany as parents formed a substantial part of the Court's reasoning for allowing their joint adoption in *Gordon*.[86]

These outcomes are remarkedly different, despite the similar circumstances. This difference reflects the subjective nature of the s 6 interpretative exercise. Butler and Butler discussed this problem, noting that judges can and will apply s 6 to differing extents:[87]

> Those judges who believe in the goals of fundamental rights protection will be more likely to give great weight to s 6 of BORA. Those who believe that people's rights and freedoms are sufficiently protected under existing law… or believe that the words of the other enactment should be departed from only in the case of clear ambiguity, will be more likely to see s 4 as the key to any interpretation issue.

B Gordon in Light of Jurisprudence

1 Further Modernization of Adoption law?

It is appropriate at this point to reflect on the Court's analysis in light of previous case law. In doing so, it will be demonstrated that expanding 'spouses' to include former spouses does not follow the observed pattern of modernization of adoption law.

The Court in *Gordon* acknowledged the allowance of a broader range of adoption applicants, regardless of their sex, sexuality or relationship title. These alternative forms of relationships did not reach this point of acceptance overnight, rather over decades of gradual evolvement. The widening of the phrase 'spouses' has reflected the legal and political contexts throughout time. Earlier decisions or amendments to statutes have guided courts through the gradual modernization of the Adoption Act. However, no legislative change or authoritative judgment has indicated that 'spouses' could reasonably be

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[85] At [38].

[86] At [35]-[36].

[87] Butler and Butler, above n 7, at [7.9.2].

interpreted to mean former spouses. There has been explicit reference to divorced couples falling outside the ambit of possible meanings.[88]

The emphasis in cases that have contributed to the gradual widening of 'spouses' has repeatedly been placed on 'stable and committed' relationships.[89] In *AMM*, the High Court recognised the purposes of limiting joint applicants to spouses as firstly ensuring that applicants are a man and a woman.[90] It is clear this purpose no longer stands true. Same-sex couples have successfully applied for joint adoption on a number of occasions.[91] This purpose was overturned as a result of Parliament formally offering same-sex couples the rights only heterosexual couples previously enjoyed.[92] The critical point being that this requirement was forgone by Parliamentary action, not because the judiciary (albeit they very likely did) felt it was no longer appropriate.

The second purpose identified in *AMM,* that applicants are in a committed relationship, has not been treated in the same way.[93] The case law outlined in part III signals that a committed relationship between joint applicants is still a fundamental requirement under the Adoption Act. Ross Carter has even suggested that forgoing the stable and committed relationship requirement is more controversial in policy terms than forgoing the requirement of a man and woman.[94] Considering the latter no longer stands, without the presence of a committed relationship the phrase 'spouses' bears a completely new meaning to that in 1955.

Other New Zealand statutes that now recognise relationships other than marriage still emphasise the importance of couples actually being in a relationship. Section 18 of the Accident Compensation Act 2001 states a person is not the spouse of a claimant if living

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[88] *Re May*, above n 55, at [62].
[89] See generally *AMM,* above n 39; and *Re Pierney,* above n 59.
[90] *AMM,* above n 39, at [35].
[91] See generally *Re Pierney,* above n 59; and *Re Application by Reynard (Adopt a Child),* above n 62.
[92] Marriage Amendment Act 2013, s 5.
[93] At [35].
[94] Ross Carter ""Spouses" in the Adoption Act" (2010) 7 NZLJ 271 at 275.

apart, or not contributing financially. Section YA 1 of the Income Tax Act 2007 clarifies 'spouse' does not include a separated person.

The outlier in adoption cases is *Re May,* where the absence of a stable and committed relationship was overlooked given the couple's marriage status. In that case, the fact of marriage plainly met the s 3 standard. In sum, married couples or couples in relationships in the nature of marriage fit the s 3(2) definition of spouses. Couples whose marriage has been legally dissolved do not fit either of these defined categories.

Allowing former spouses to jointly adopt as 'spouses' marks a significant leap from the gradual expansion of the phrase previously demonstrated by case law. Unlike the adoption cases discussed, no judicial or Parliamentary indication foreshadowed this expansion. How then, did the Court in *Gordon* find spouses could be interpreted to include former spouses? The answer, of course, lies in s 6 BORA.

2 The s 6 Approach(es)

The application of s 6 BORA in *Gordon* compares interestingly to previous applications. In *Hansen,* the primacy of s 5(1) of the Interpretation Act was established,[95] according to Phillip Joseph.[96] Blanchard J expressed:[97]

> Section 6 can only dictate the displacement of what appears to be the natural meaning of the provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

John Burrows endorsed this proposition, but he and other commentators have acknowledged potential for s 6 interpretation to go further.[98] Despite the theoretical

[95] Interpretation Act 1999.

[96] Joseph, above n 15, at [27.4.6].

[97] *R v Hansen*, above n 14, at [61] per Blanchard J.

[98] Burrows, above n 16, at 258; and Geiringer, above n 13, at 89.

potential, the High Court in *AMM* accepted the 'text' and 'purpose' considerations as guiding criteria in its s 6 analysis.[99]

An argument may be raised that the Court in *Gordon* simply did what the High Court did in *AMM* in a different context. That being widening the meaning of 'spouses' to better reflect modern society. Whilst there is merit in this argument, the two Courts reached these conclusions through distinct applications of s 6 BORA. The Court in *Gordon* asserted that interpreting 'spouses' to include former spouses does not unduly strain the language of the Adoption Act, nor undermine its purpose.[100] This appears to be the closest resemblance to a precedential application of s 6 in the decision.

In relation to whether an interpretation is open in light of the text of enactment, the word 'strain' has repeatedly been toyed with. Although Elias CJ believed a strained meaning could be applied, majority of the Supreme Court in *Hansen* disagreed.[101] It is therefore relatively authoritative that a s 6 interpretation must be reasonable in that it does not unduly strain the language of an enactment. This begs the question; what classifies as 'straining' the language of an enactment? BORA is silent on this matter.

In *AMM,* the High Court felt comfortable adopting a meaning that fit agreeably within the Adoption Act, other than occasional awkwardness.[102] It is arguable 'former spouses' presents greater obstacles. However, in the absence of any substantial direction, whether an alternative meaning 'strains' the language of an enactment is largely left to subjective judgement. Tipping J reflected on the difficulty inherent in the s 6 interpretative task:[103]

> If that creates analytical and substantive uncertainty, such is the result of what is necessarily a rather subjective exercise, with little to guide the judge except intuitive perceptions of whether a particular meaning "can" be given to parliamentary words. That, after all, is the s 6 test.

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[99] *AMM,* above n 39, at [34]-[37].
[100] *Re Gordon,* above n 4, at [37].
[101] *R v Hansen*, above n 14, at [13]; and [61].
[102] *AMM,* above n 39, at [34].
[103] *R v Hansen,* above n 14, at [157] per Tipping J.

The Court in *Gordon* focused heavily on societal norms and values. This paper acknowledges most, if not all, of the contentions made in the judgment to be an accurate representation of modern society. The content of the claims made regarding social norms are not the focus of this paper. The fact the Court drew on these societal factors, instead of performing the classic interpretative exercise, is significant.

The cautious, black-letter law application of s 6 is arguably attributable to the judiciary's desire to respect Parliamentary sovereignty. The focus has been on searching for alternative interpretations that can be reasonably found within an enactment, using the text and purpose as guiding resources. In *Gordon,* the predominant resource used was societal context. Context is and always has been an important aspect of the judiciary's interpretative function. The Interpretation Act affirms this.[104] Previous cases, however, have afforded less weight to social context than in *Gordon*, with a greater focus on the principles in s 5 of the Interpretation Act 1999.

The approach adopted by the Court in *Gordon* seems more reflective of the United Kingdom judiciary's 'adventurous' interpretative style.[105] Section 3 of the HRA (UK) has been construed as mandating a strong presumption in favour of rights-consistent interpretations, sanctioning the departure from Parliamentary intention.[106] This has been partly attributed to the influence of other European countries, where a freer interpretative style is observed.[107] New Zealand courts have repeatedly declined to follow in the United Kingdom's footsteps. However, the liberal outcome in *Gordon* indicates the potential remains for New Zealand's judiciary to take a similarly adventurous path.

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[104] Section 6 reads: "An enactment applies to circumstances as they arise."

[105] Petra Butler "Cross-fertilisation of Constitutional Ideas: the Relationship between the UK Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's statutory Bill of Rights: Constitutional and Comparative Perspectives* (183, ebook ed, Oxford University Press, 2014) at 251.

[106] *Ghaidan v Godin-Mendoza*, above n 22, at [50].

[107] Burrows, above n 16, at 258.

It is important to emphasise the Courts in the cases discussed were performing their role under s 6 BORA as each Court understood that role to be. The different approaches to the s 6 exercise simply reinforce this paper's contention that such differences are the result of BORA's inherent ambiguity. Whether a court places more weight on Parliamentary sovereignty or on the importance of protecting fundamental rights is left to the discretion of the court.

C Judicial Activism?

Gordon indicates the scope for s 6 BORA to be used as a platform for an activist judiciary in New Zealand. The Court's interpretation of s 3(2) of the Adoption Act can be likened to judicial activism.

In the Court's application of s 6, the phrase 'spouses' was awarded a new and unintended meaning. Parliament in 1955 cannot reasonably have intended 'spouses' to mean divorcees. The plain meaning of 'spouses', being ill-fitted to current social norms, was expanded substantially from its previously afforded realm of possible meanings. This expansion occurred in the absence of Parliamentary indication that such a meaning was available. This, by the definition previously referred to, is judicial activism.[108]

Judicial activism was a legitimate fear during the passing of BORA, and then again following the introduction of the Supreme Court in New Zealand.[109] A supreme Bill of Rights would have awarded the judiciary power to invalidate Parliamentary Acts. Quashing these fears, BORA passed as unentrenched law. Parliamentary sovereignty is clearly cemented through s 4 BORA. It has been recognised the judiciary's function is far from what it would have been had BORA been supreme law. McGrath J reflected on the

[108] Eckersley, above n 6, at 4; and Waldron, above n 6, at 441.

[109] Eckersley, above n 6, at 1 and 5.

relationship between constitutional branches as a result of BORA, noting "New Zealand courts from time to time will be constitutionally bound."[110]

Upon the introduction of the Supreme Court, there was concern that the constitutional power dynamics would shift.[111] However, the case law has demonstrated the Supreme Court has not been judicially active, but rather routinely avoided "stepping on Parliament's constitutional toes."[112]

Despite precedent, this paper contends there remains scope for an activist judiciary. Parliament conferred an important responsibility to the judiciary in enacting s 6 BORA. There is no New Zealand court decision that clearly identifies how actively the courts can protect human rights. It remains unclear where the boundaries of the s 6 interpretative exercise lie and at what point s 4 defaults.

Consequently, judicial activism remains open to courts. Some commentators have argued this is how s 6 should be used. Kris Gledhill contends the text and purpose considerations are absent in s 6, thus these interpretative limitations have been self-imposed by courts.[113] Gledhill criticises the Supreme Court's application in *Hansen:*[114]

> …the approach adopted involves a narrow and legalistic approach…that undermines the protection of fundamental rights and amounts to an unwarranted conclusion that Parliaments' intention…was to provide lesser protection to fundamental rights in New Zealand…

In another view, whilst Parliament intended the courts to assist in the protection of human rights, Parliament also legislated to preserve its supremacy. From this perspective, the courts have an important interpretative function, but strictly that. Legislative change is a

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[110] *R v Hansen,* above n 14, at [259] per McGrath J.
[111] Eckersley, above n 6, at 8.
[112] Butler, above n 105, at 264.
[113] Gledhill, above n 17, at 327.
[114] At 284.

job left to Parliament. In her Honour's attempt to define judicial activism, Elias CJ captured this division: [115]

> More moderately the term may be used to describe a judge who is thought to be too ready to overturn precedent or fill a need in the law that would be better left to Parliament.

The problem outlined in this paper is that without any real guidance, the proper application of s 6 remains unclear. *Gordon* demonstrates s 6 has real potential to be used in an adventurous and activist way. Could judicial activism exist within the power conferred to the courts through s 6 BORA? Could Parliament have intended human rights and freedoms to be protected firmly through creative interpretation? The following chapter will discuss how these questions might be answered in the future.

V Where to From Here?

Whilst there is theoretical argument that s 6 can be used to actively protect human rights, the application in *Gordon* was a bold departure from the typical New Zealand approach. The remainder of this paper will reflect on alternatives to judicial activism, and what influence a judicially activist decision might have.

A Declarations of Inconsistency

Parliament can enact legislation that unjustifiably breaches a human right, and the judiciary are obliged to apply such legislation by virtue of s 4. Formal declarations of inconsistency have been an available, but scarcely used, remedy for such instances. There has been judicial reluctance to issue a declaration. This is largely due to uncertainty in what a formal

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[115] Sian Elias, Chief Justice of New Zealand "The Next Revisit: Judicial Independence 7 years on" (8th Neil Williamson Memorial Lecture, Christchurch, 30 July 2004).

declaration actually achieves.[116] The first declaration of inconsistency was made by the High Court in *Taylor v Attorney-General,* 25 years after BORA was enacted.[117]

In *Adoption Action Incorporated v Attorney-General*, the Human Rights Tribunal declared six provisions in the Adoption Act to be inconsistent with BORA. [118] Among these provisions was s 3(2). The Government disagreed with the finding that s 3(2) is inconsistent with the right to be free from discrimination.[119] The Government recognised that courts in New Zealand have repeatedly interpreted 'spouses' in a rights-consistent form, thus resolving any inconsistency.[120] This was in relation to same-sex, de facto and civil union couples.

Whether preventing divorced couples from jointly adopting on the basis of marital status is an unjustified inconsistency was not considered at the time. In light of more recent cases, a declaration of inconsistency would likely bring the issues relating to former spouses into the realm of Parliamentary awareness.

Additionally, the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (the Bill) is currently being considered by the select committee.[121] The Bill proposes that the Attorney-General present declarations of inconsistency made by courts to the House of Representatives for Parliamentary response.[122] This is significant as previously Parliament was not required to respond to declarations made by the judiciary.

What this means is that courts now have a legitimized process by which to draw Parliamentary attention to unjustified inconsistencies with BORA. The Bill in some ways

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[116] Butler, above n 105, at [275].

[117] *Taylor v Attorney-General* [2015] NZHC 1706 at [79].

[118] *Adoption Action Incorporated v Attorney-General,* above n 63.

[119] Amy Adams *Government Response to Declarations of Inconsistency by the Human Rights Review Tribunal in Adoption Action Incorporated v Attorney-General* (Ministry of Justice, August 2016) at 5.1.

[120] At 6 and 10.

[121] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2019.

[122] Section 7A.

indicates Parliament's wish to preserve its sovereignty. By offering a formal mechanism to respond to inconsistency, the need for an activist judiciary is lessened.

A declaration of inconsistency seems a viable alternative option for the Court in *Gordon.* Rather than updating the phrase 'spouses' through creative interpretation, the inconsistency could have been formally presented to Parliament through a declaration. With the Bill in progress, future BORA inconsistency cases could utilize this remedy more frequently, and more confidently.

B The Need for Clarity

The Bill provides an option for courts but does not completely address the problem of s 6 BORA. The outcome in *Gordon* may signal to Parliament that the current uncertainty surrounding the application of ss 4 and 6 of BORA risks judicial activism. If this is something Parliament wishes to avoid, then the appropriate application of these provisions needs clarifying.

Alternatively, a Supreme Court decision could formulate more definitive criteria for s 6. Despite being touched on in *Hansen,* there remains inherent uncertainty in the extent of the judiciary's rights-protecting role. Whether the Supreme Court confirms the broader scope of s 6 power, or reinforces previously seen limits, future courts will benefit from more explicit guidance.

The reception of the outcome in *Gordon* is yet to be seen. If received negatively, both Parliament and the higher courts may finally offer some guidance as to the application of s 6 BORA. If *Gordon* is well received future courts may follow suit, adopting a more assertive rights-protecting role within New Zealand's constitution.

VI Conclusion

Gordon sits in the line of case law signaling the Adoption Act needs updating. The courts have done an adequate job in ensuring adoption law stays current through their interpretative function. However, *Gordon* demonstrates there is a grey area, where this function begins to resemble judicial legislating.

New Zealand case law has demonstrated courts are reluctant to overtly depart from the meaning of an enactment intended by Parliament. The structure of our constitution centers around the doctrine of Parliamentary sovereignty. Parliament has legislated to give continuing effect to this principle.

Parliament has also legislated to empower the judiciary to protect and uphold fundamental rights and freedoms contained in BORA. How assertive the courts can be in performing this role is not made clear by BORA. New Zealand courts have struggled to define the limits of their interpretative function under s 6.

Gordon illustrates that in the absence of any definitive guidance from Parliament or higher courts, judicial activism may increasingly become the answer to the s 6 uncertainty. Future courts may similarly exercise their rights-protecting role with more vigor.

An activist judiciary poses a threat to Parliamentary sovereignty. In the face of this threat, Parliament may finally offer clarity as to how actively it expects courts to protect BORA affirmed rights. If one thing has become clear in reviewing the adoption case law, it is that Parliament is often slow to make these changes. In the meantime, future courts would benefit from Supreme Court guidance as how to properly exercise their s 6 function.

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