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Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights

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I. INTRODUCTION

According to the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"), "[e]veryone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression."[1] Over 150 countries have ratified this agreement, but dozens have neither signed, ratified nor enforced it.[2] In some of these countries, there are few strong free speech advocates. In others, free speech lobbies have failed for a variety of reasons—government officials may believe they already allow important speech to exist without punishment, struggle to draft or implement legislation given the ambiguous contours of free speech, or face strong anti-speech groups.

In light of these conditions, I suggest that advocates for liberal free speech rules, as laid out in Article 19 of the ICCPR, should look to their courts for solutions. Foremost, courts may be uniquely positioned to enforce the ICCPR by relying on its language and reading an inherent right to political speech into the constitutions of their respective governments. In addition, judges, who in many countries receive life tenure and guaranteed salaries, do not face the same political pressure as legislators. Finally, courts have traditionally been instrumental in guaranteeing individual freedoms that might be politically contentious or amorphously defined. Thus, using courts to regulate Article 19 rights serves both strategic and normative goals: judges are more likely to recognize free speech rights by relying on international law, and they are better fit to do so.

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1 International Covenant on Civil and Political Rights (1966), art 19, 6 ILM 368, 374 (1967) (hereinafter ICCPR).

2 A full list of countries that have ratified and/or signed the ICCPR is available online at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> (visited Apr 22, 2006).

More specifically, I suggest that one country's growing experience with the enforcement of political speech guarantees—Australia's—serves as a useful case study to support these propositions. Free speech lobbies in Australia have failed. Instead, the nation's highest court, in accordance with international law, has recently recognized an implied right to political communication in its constitution, which itself contains no explicit individual guarantees. In doing so, albeit somewhat unintentionally, the High Court of Australia ("High Court") single-handedly brought Australia within the realm of ICCPR Article 19 compliance. With some qualifications, other nations can learn an important lesson from the Australian free speech experience, specifically as articulated by Justice Michael Kirby: courts may be particularly well suited to apply and enforce the ICCPR's core protections of speech. Part II reviews international free speech obligations under the ICCPR and countries' efforts to comply with them. Part III describes and analyzes Australia's struggle with judicial enforcement. Part IV argues that, as evidenced by this struggle, courts are particularly suited to enforce the free speech provisions of the ICCPR.

II. INTERNATIONAL FREE SPEECH NORMS

A. THE ICCPR: HISTORY AND APPLICATION

Pursuant to a mandate in the UN Charter, the UN Economic and Social Council created the Commission on Human Rights ("Commission") in 1946.[3] As its first task, the Commission created the Universal Declaration of Human Rights ("UDHR"), a document containing principles that many scholars now consider customary international law.[4] However, the UDHR does not contain any enforcement or interpretive mechanisms, and it is not sufficiently specific to bind nations. Thus, the Commission created the ICCPR, a comprehensive accord embodying in more detail many rights enumerated in the UDHR.[5] The ICCPR took effect ten years following its 1966 adoption,[6] after the requisite number of nations ratified it.[7]

Under Article 19 of the ICCPR, individuals have the rights to hold and express opinions of all kinds.[8] A more restrictive proposal at the time would

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3 Scott N. Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* 1 (Transnational 2003).

4 Id.

5 Id at 1–2.

6 Id at 2.

7 Thomas Buergental, *International Human Rights: In a Nutshell* 38 (2d ed West 1995).

8 Article 19 of the ICCPR provides in its entirety:

> 1. Everyone shall have the right to hold opinions without interference.

have limited the freedoms to "political liberty" and contained more exceptions allowing the suspension of speech rights.[9] To presently qualify as an exception, the restriction must be established by law and necessary to serve a listed purpose—either "the respect of the rights or reputations of others" or "the protection of national security or of public order . . . or of public health or morals."[10]

Although some Commission members say the term "necessary" means that a law must be proportional to its ends,[11] the ICCPR exceptions are potentially quite broad. For example, speakers in the United States often criticize public figures, a practice permitted by domestic courts,[12] even though such speech could theoretically, under Article 19, endanger national security or public health.

The Human Rights Committee ("Committee"), created in 1950 to monitor and interpret the ICCPR,[13] has demonstrated leniency in some cases, and discipline in others, leaving the scope of Article 19 in further doubt. For example, in *Hertzberg v Finland*, the Committee entertained a broad interpretation of "public morals" when it upheld a Finnish broadcaster's decision to censor

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> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
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> 3. The exercise of the right provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

ICCPR, art 19, 6 ILM at 374 (cited in note 1).

9 Carlson and Gisvold, *Practical Guide* at 120 (cited in note 3). The idea that only political expression would be protected is tenable. Some contemporary American legal scholars believe the First Amendment should protect only this form of expression. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 28 (1971) ("The notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives.").

10 ICCPR, art 19, § 3, 6 ILM at 374 (cited in note 1).

11 Carlson and Gisvold, *Practical Guide* at 122 (cited in note 3).

12 See, for example, *Hustler Magazine, Inc v Falwell*, 485 US 46 (1988) (reversing damages awarded for intentional infliction of emotional distress after a magazine published an advertisement suggesting that the Reverend Jerry Falwell lost his virginity to his mother).

13 See Carlson and Gisvold, *Practical Guide* at 2–5 (cited in note 3). The Committee serves as one of the seven treaty bodies of the UN, each responsible for monitoring and interpreting a specific treaty, and comprises eighteen independent experts. Id at 2–3. Although it has no power to enforce the ICCPR, the Committee collects reports from states and hears individual and interstate complaints, bringing to light possible violations and interpreting the Covenant itself. Id at 4–5.

two programs about homosexuality, noting that "public morals differ widely" and "a certain margin of discretion must be accorded to the responsible national authorities."[14] In addition, it has broadly interpreted the reputation exception to apply not only to speech such as libel, but also to expression infringing on privacy and political views endorsed by the state.[15] In contrast, the Committee has denounced overbroad restrictions based on national security, reasoning that the Covenant does not allow nations to prohibit speech just because it advocates the ideology of a political enemy.[16] In general, under this exception, courts have allowed only measures outlawing speech that "incite[s] crime, violence, or mass panic."[17]

B. CURRENT LEVEL OF COMPLIANCE WITH ARTICLE 19

More than 150 nations have ratified the ICCPR, but many have not enforced it. Many countries have failed to sign the first Optional Protocol to the ICCPR, which provides an international complaint process for individuals who have exhausted domestic remedies.[18] In addition, several countries that do not consider treaties to be self-executing have not yet implemented legislation to enforce the ICCPR or passed laws further restricting speech. Finally, even in countries with legislation upholding Article 19 rights, the UN continues to issue annual reports condemning their free speech practices.

The first Optional Protocol to the ICCPR allows individuals who claim a violation of the Covenant's guarantees to submit a complaint for review and consideration by the Committee so long as they have exhausted domestic remedies.[19] Specifically, a party to the Protocol "recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."[20] Forty-eight—nearly one-third—of

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14 Id at 122, citing *Hertzberg v Finland*, United Nations Human Rights Committee Communication No 61/1979, CCPR/C/15/D/61/1979, ¶ 10.3 (Apr 2, 1982) (internal citations omitted).

15 Id at 123, citing *Ross v Canada*, United Nations Human Rights Committee Communication No 736/1997, CCPR/C/70/D/736/1997, ¶¶ 11.5–11.6 (Oct 26, 2000).

16 Id at 123, citing United Nations Human Rights Committee, *Comments by the Republic of Korea on the Concluding Observations of the Human Rights Committee: Republic of Korea. 04/05/2000*, Human Rights Committee 69th Sess, CCPR/C/79/Add.122 ¶ 7 (May 4, 2000).

17 Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* § 18.26 at 396 (Oxford 2000).

18 Carlson and Gisvold, *Practical Guide* at 2 (cited in note 3).

19 Id.

20 Optional Protocol to the International Covenant on Civil and Political Rights (1966), art 1, 6 ILM 383, 383 (1967).

countries that have ratified the ICCPR have not signed the Protocol,[21] a surprising fact given that the Committee does not have authority to make binding decisions. Perhaps some governments know of existing violations and fear the Committee will find and publicize them through the complaint process.

In addition, although some countries have implemented legislation that effectively enforces the ICCPR, many others have instituted measures that curb speech. For example, South Africa, Ireland, the United Kingdom, and the United States allow freedom of speech if it does not provoke violence, which roughly mirrors the national security language of the ICCPR.[22] Others, including Canada and New Zealand, do not explicitly include such limits and thus go beyond the language of the ICCPR.[23] Many others—such as France,[24] Russia,[25] South Korea,[26] Syria,[27] and Zimbabwe[28]—have failed to enact legislation that prevents free speech violations or, even worse, have enacted legislation prohibiting certain forms of speech.

Finally, the UN and watchdog groups continue to issue warnings about free speech violations in countries that have ratified the ICCPR. For example, in

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21 A full list of these countries is available online. See Office of the United Nations High Commission For Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (2004), available online at <http://www.unhchr.ch/pdf/report.pdf> (visited Apr 22, 2006).

22 See S Africa Const, ch 2, § 16(2)(b) (right to freedom of expression "does not extend to . . . incitement of imminent violence"); Ireland Const, art 40, § 6.1(i) ("[O]rgans of public opinion . . . shall not be used to undermine public order or morality or the authority of the State."); Human Rights Act 1998 (UK), ch 42, sch 1, art 10, § 2 ("The exercise of these freedoms [of expression] . . . may be subject to . . . the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, [or] for the protection of the reputation or rights of others."); US Const, amend I, as interpreted in *Brandenburg v Ohio*, 395 US 444, 447 (1969) (per curiam) (declaring language designed to incite "imminent lawless action" to be not protected by the First Amendment).

23 Canadian Charter of Rights and Freedoms, art 2(b); New Zealand Bill of Rights Act 1990, § 14.

24 See, for example, Jon Henley, *France Outlaws Sexist and Anti-Gay Insults: Legislation Is Aimed at Curbing Rising Homophobia, but Civil Liberty Groups Say Threats of Imprisonment and Heavy Fines Go Too Far*, Guardian Foreign Pages 13 (Dec 24, 2004).

25 See, for example, Sophia Kishkovsky, *Russian Lawmakers Advance Counterterrorism Measures*, NY Times A10 (Dec 18, 2004) (citing proposed legislation that would give the Kremlin authority to curtail free speech).

26 See, for example, Barbara Demick, *South Korean Sentenced Over 'Ideology'; Sociologist Charged with Propagating the North's Doctrine Is Given a Seven-Year Term. Critics View the Case as a Cold War Throwback*, LA Times A3 (Mar 31, 2004).

27 See, for example, Howard Schneider, *Free-Speech Case in Syria Shows Limits of Openness*, Wash Post A38 (Nov 23, 2001) (detailing the case of someone charged with undermining national unity through speech at "civil society" sessions).

28 See, for example, Peta Thornycroft, *Mugabe Outlaws Opposition and Bans Free Speech*, Daily Telegraph 13 (Dec 19, 2001).

December of 2004, the UN Special Rapporteur on Freedom of Opinion and Expression denounced efforts by some nations to restrict access to public information.[29] More specifically, the UN has called for changes in several countries that have ratified the ICCPR—including Belarus,[30] Colombia,[31] the Ivory Coast,[32] North Korea,[33] Serbia and Montenegro,[34] and Turkmenistan.[35] In addition, watchdog groups such as the London-based Article 19 continue to find violations of international free speech regulations in countries across the world.[36] Thus, even governments in countries that have signed the ICCPR have been unwilling or unable to meaningfully enforce Article 19.

III. THE AUSTRALIAN EXPERIENCE

A recent case decided by the High Court, *Coleman v Powers*, through a concurring opinion by Justice Michael Kirby, may provide an innovative way to enforce obligations of the ICCPR without the need for legislation. *Coleman* warrants a closer examination of Australia's free speech law.

A. AUSTRALIAN LAW PRIOR TO *COLEMAN*

The Australian constitution contains no express provision for free speech, and prior to the 1990s, courts deciding defamation cases relied on common law

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29 UN Press Release, *Experts on Freedom of Expression Call for Steps to Change or Repeal Laws Restricting Access to Information* (Dec 15, 2004), available online at <http://www.unhchr.ch/huricane/huricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument> (visited Apr 22, 2006).

30 UN Commission on Human Rights, *Report on the Sixtieth Session: Part I*, UN Doc E/CN.4/2004/127 at 64–67 (2004).

31 UN Press Release, *Special Rapporteur on Freedom of Expression Completes Mission to Colombia* (Mar 1, 2004) (denouncing speech-restrictive anti-terrorism measures), available online at <http://www.unhchr.ch/huricane/huricane.nsf/view01/D0A63B70B2764EF0C1256E4B00303891?opendocument> (visited Apr 22, 2006).

32 UN Press Release, *Special Rapporteur on Freedom of Expression Ends Visit to Côte D'Ivoire* (Oct 2, 2004) (denouncing the beating of three journalists covering a presidential event), available online at <http://www.unhchr.ch/huricane/huricane.nsf/view01/E9A9345FDBC48DA3C1256E36003558A1?opendocument> (visited Apr 22, 2006).

33 UN Commission on Human Rights, *Report on the Sixtieth Session: Part I* at 60–64 (cited in note 30).

34 UN Press Release, *Special Rapporteur on Freedom of Opinion and Expression Completes Mission to Serbia and Montenegro* (Oct 19, 2004) (noting the high number of libel suits and mistreatment of journalists), available online at <http://www.unhchr.ch/huricane/huricane.nsf/view01/5320BE63996BFA22C1256F50003E8A31?opendocument> (visited Apr 22, 2006).

35 UN Commission on Human Rights, *Report on the Sixtieth Session: Part I* at 57–60 (cited in note 30).

36 See generally *Article 19: Global Campaign for Free Expression*, available online at <http://www.article19.org> (visited Apr 22, 2006).

rules.[37] Under these rules, libel plaintiffs had to prove three elements—publication, identification of the plaintiff, and defamatory meaning—and defendants had three main defenses—"truth, opinion, and privilege."[38] Moreover, although there had been several attempts to legislate the protections found in Article 19 in the states, territories, and nationally, all had failed.[39] Opponents voice several arguments, among them fears that such legislation would politicize the judiciary; confidence that the government and courts already protect rights; skepticism that enumerating rights would change their enforcement; worries that defining such a list would limit rights; and dissatisfaction with the potential costs of litigation.[40]

In line with at least one of these arguments—that courts adequately protect rights—the High Court began in the 1990s to hold that the Australian constitution implicitly protects political communication. This culminated in the landmark case *Theophanous v Herald & Weekly Times*, in which a legislator sued a newspaper and the author of a letter criticizing his views on immigration policy.[41] The court held that political discussion, "discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office . . . [and] discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate," is protected by the Australian constitution.[42] But, to avoid liability, the justices reasoned, a defendant must prove he was unaware the published statements were false, he did not publish the material recklessly, and the publication was reasonable.[43]

The High Court rejected a challenge to this implied constitutional protection in another landmark case in 1997. In *Lange v Australian Broadcasting Corporation*, in which former New Zealand Prime Minister David Lange sued a television station for its on-air comments that he was unfit to serve in public

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37 See generally *Theophanous v Herald & Weekly Times*, 182 CLR 104, 140 (1994) (Austl).

38 Russell L. Weaver and David F. Partlett, *Defamation, the Media, and Free Speech: Australia's Experiment with Expanded Qualified Privilege*, 36 Geo Wash Intl L Rev 377, 382 (2004).

39 Roy Jordan, Parliamentary Library of Australia, Research Note No 42 2001–02, *Free Speech and the Constitution* (June 4, 2002), available online at <http://www.aph.gov.au/Library/pubs/rn/2001-02/02rn42.htm> (visited Apr 22, 2006).

40 Id.

41 *Theophanous*, 182 CLR at 118.

42 Id at 124.

43 Id at 141. The justices carefully noted that the free speech paradigm in Australia differs from those in Canada and the United States in that the former seeks to protect only political discussion as "an indispensable element in ensuring the efficacious working of representative democracy and government," not "freedom of expression generally as a fundamental human right." Id at 125.

office,[44] the High Court used its power to declare Australian common law by extending the qualified privilege defense to communication about government or political matters.[45] The justices relied primarily on sections 7 and 24 of the Australian constitution, which provide, respectively, that Senators and Members be directly elected by the people.[46] The unanimous court reasoned that "related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors."[47]

B. *COLEMAN*

Against this backdrop, the High Court decided *Coleman v Power*. The case involved an incident in March 2000 in which Queensland police approached graduate student Patrick Coleman in a local mall as he handed out pamphlets urging citizens to "[g]et to know your local corrupt type cops" and naming specific officers as alleged crooks.[48] When one such officer, Brendan Power, addressed him, Coleman said: "This is Constable Brendan Power, a corrupt police officer."[49] A struggle ensued, and the police arrested Coleman and later charged him with two counts each of assault and obstruction of justice and one count each of using insulting words and distributing printed matter containing insulting words.[50] The latter two offenses were illegal under Queensland's Vagrants, Gaming and Other Offences Act ("Vagrants Act"), enacted in 1931.[51] The law, though now amended,[52] criminalized the use of "any threatening, abusive, or insulting words to any person"[53] and the publication of "any

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44 *Lange v Australian Broadcasting Corp*, 189 CLR 520, 521 (1997) (Austl).

45 See id at 571.

46 Id at 557–60. See also Austl Const, §§ 7, 24.

47 *Lange*, 189 CLR at 560.

48 *Coleman v Power*, 220 CLR 1, 35 (2004) (Austl).

49 Id at 36 (internal citations omitted).

50 Id.

51 See Vagrants, Gaming and Other Offences Act of 1931, in 9 *The Public Acts of Queensland (Reprint): Classified and Annotated 1828-1936* 705, 717–19 (Butterworth 1936).

52 The Queensland Legislature replaced section 7 of the Vagrants Act with a public nuisance law. See Police Powers and Responsibilities and Other Legislation Amendment Bill 2003, available online at <http://www.legislation.qld.govau/Bills/50PDF/2003/PolPwAmdB03.pdf> (visited Apr 22, 2006).

53 Vagrants Act, § 7(d) in *The Public Acts of Queensland* at 717 (cited in note 51). The original section provided:

> Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could

threatening, abusive, or insulting words" that injure a person's reputation.[54] These provisions likely violated Article 19.

Three years later, the High Court set aside Coleman's conviction for the use of insulting words by a 4-3 majority.[55] Although the court did not invalidate the applicable portion of the Vagrants Act, the majority limited its application to cases in which the insulting words "are used in, or within hearing of, a public place . . . [and] are provocative in the sense that either they are intended . . . or they are reasonably likely to provoke unlawful retaliation."[56]

The majority of justices did not rely on international law in coming to this conclusion, but one justice did, providing an innovative way to think about ICCPR enforcement in representative democracies. In a concurring opinion, Justice Kirby noted that upholding the statute "would arguably diminish fundamental human rights," particularly those prescribed by international law.[57] This nod to international standards marked a departure from *Theophanous*, and though mentioned in arguments in *Lange*,[58] was more extensively discussed in *Coleman*. Citing free speech provisions in the ICCPR, Justice Kirby noted that "[t]his Court has accepted that these considerations inevitably bring to bear on the expression of Australian law the influence of the ICCPR and the principles there stated. . . . [P]olitical expression is clearly protected by Art 19 of the ICCPR."[59] Although the full court relied primarily on the Australian constitution—not the ICCPR—to enforce free speech obligations, Justice Kirby argued: "In time, the present resistance to [using international law to construe statutes] will pass. The principles of human rights and fundamental freedoms, expressed in the ICCPR, preceded their expression in that treaty. They long preceded Australia's adherence to it."[60]

> view or hear . . . (d) Uses any threatening, abusive, or insulting words to any person . . . shall be liable.

54 Id at § 7A(1)(c) at 719. The section provides: "Any person . . . (c) Who delivers or distributes in any manner whatsoever printed matter containing any such words . . . shall be liable."

55 The government did not pursue the allegation of distributing printed materials with insulting words. See *Coleman*, 220 CLR at 79.

56 Id at 74.

57 Id at 87 (Kirby concurring).

58 *Lange*, 189 CLR at 543 ("The court may also draw on international law to influence the common law in this direction, especially Art XIX of the International Covenant on Civil and Political Rights which provides for a freedom of expression, including a freedom to seek, receive, and impart information of all kinds.").

59 *Coleman*, 220 CLR at 92 (Kirby concurring).

60 Id at 94.

IV. LEARNING FROM THE KIRBY CONCURRENCE IN *COLEMAN*: COURTS AS FREE SPEECH GUARANTORS

Although nations face different problems implementing the ICCPR, Australia's growing experience, as articulated by Justice Kirby, offers an important lesson: courts may play an important role in specifically enforcing the right to free speech protected by Article 19. Indeed, the High Court stepped forward to fill an important gap in Australia's political and legal landscape, and in doing so, moved the nation one step closer to ICCPR compliance. Justice Kirby's concurrence, and the gradual evolution of Australia's free speech doctrine, through the line of cases beginning with *Theophanous*, may serve as a model for other countries struggling to comply with their international obligations and guarantee a right fundamental to democracy itself. At the same time, one must be wary of recommending this approach without modification, in particular because the movement succeeded on the back of a judiciary willing to be proactive in interpreting its constitution. Such activism may border on undesirable policymaking, and the High Court has not yet expanded protection to nonpolitical speech, with several justices rejecting Justice Kirby's approach.

The High Court, in cloaking free speech in democratic fundamentals, created a clever and innovative method for complying with ICCPR free speech standards without legislation, one that could be effective in any country with an elected representative government. Specifically, the *Lange* court relied heavily on the need for communication on political matters that may affect citizens' impressions and, consequently, their votes; this argument gains inherent strength from its foundation on the basic principles of adequate representation. Moreover, as suggested by Justice Kirby, courts can and do look beyond their nation's founding documents to international law to realize these democratic fundamentals.

Since *Coleman,* Justice Kirby has further expounded on his general view that courts ought to use international law to resolve constitutional and statutory ambiguity.[61] He developed this opinion during a conference that produced the Bangalore Principles. As he explained, "The crucial idea of the Bangalore Principles was that international human rights law might sometimes provide guidance to judges in cases concerning human rights and fundamental freedoms."[62] As advantages to the approach, Justice Kirby noted primarily that texts delineating fundamental rights and freedoms ought to be interpreted by "expert elaborations of the same, or like, provisions in other national

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61 See generally Michael Kirby, *International Law—The Impact on National Constitutions*, 21 Am U Intl L Rev 327 (2005).

62 Id at 335.

constitutions and in international courts and tribunals."[63] Moreover, he argued, comparisons to international law may help a judge choose the best solution,[64] prevent rash judgments,[65] and bolster the development of international law itself.[66]

In the area of free speech, this approach is particularly attractive not only for its innovation, but also for its immunization of political speech from legislative attempts to quash it. In other words, giving courts the duty to enforce international individual rights removes the issue from the legislative sphere. This is particularly salient in countries where judges are guaranteed life tenure and compensation.[67] For example, a federal judge in the United States, guaranteed such protections under the US Constitution,[68] need not worry about the political ramifications of her decisions, to the extent she might be concerned about her career. Thus, given the importance of free speech and other individual guarantees under the ICCPR—laws already on the books—it is sensible that such judges, unaffected by political considerations such as reelection, would carry the responsibility to enforce them.

Furthermore, a judicial approach to free speech guarantees is desirable because it may gradually ease a nation into a position that recognizes Article 19 obligations explicitly. This may be more desirable than a quick legislative approach, which in addition to carrying the political risks already described, might create immediate backlash from opponents. In other words, change can be more palatable in small increments, and courts, not legislators, are more likely to avail themselves of this gradual progression.[69]

Finally, judicial enforcement of the ICCPR may be more desirable when defining free speech guarantees with precision is particularly difficult. Leaving the solution to the legislative process risks imposing a standard that is not only inconsistent with ICCPR guarantees, but perhaps also too rigid. This is already evident from the Committee's seemingly outdated interpretation of "public morals" under Article 19.[70] Unlike legislators, however, the Committee, and

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63 Id at 356–57.

64 Id at 359.

65 Id at 359–60.

66 Id at 360–61.

67 Although the Australian constitution does not grant life tenure to federal judges, it allows removal only for "incapacity" or "proved misbehavior" and requires retirement at age seventy, still isolating them from political pressures. See Austl Const, ch 3, § 72.

68 See US Const, art 3, § 1.

69 For more support for this argument, see Ruth Bader Ginsburg, *Speaking in a Judicial Voice,* 67 NYU L Rev 1185, 1198–1209 (1992).

70 See note 14.

more generally, courts, may change these interpretations as community standards evolve. That is, in the future, the Committee might decide, for example, that censorship of programs involving homosexuality is no longer appropriate under the "public morals" exception.

These advantages point to one pitfall in the Kirby approach: In urging judges to consider international law in domestic controversies, it may allow them too much power, particularly for those judges lacking a democratic pedigree. Several counterarguments exist. First, in many countries, an elected executive, in negotiating treaties, in fact has the power to make such weighty judgments; courts merely enforce these decisions by applying the law. Second, the right to free speech is almost universally accepted, perhaps to the point of being a fundamental right, something that neither legislatures nor courts should ignore. Third, international law may in fact cabin some judicial power by preventing passionate decisions made in the heat of the moment;[71] for example, in the midst of a quasi-war, civil liberties are often at risk under domestic law but hold firm under international law. Fourth, in making decisions judges rely on many sources, not all of which derive from democratic institutions; for example, the public does not elect legal scholars and yet judges frequently cite their work.[72] Thus, concerns about judicial power with respect to such major policy decisions, though valid to some degree, are overstated.

Moreover, Justice Kirby's approach is limited by its seeming inability to extend constitutional protection to nonpolitical expression.[73] Admittedly, political speech, above all other types, should be protected; many countries could not have achieved independence and forged social progress without it. At the same time, freedom of all speech is an important international goal, as evidenced by ICCPR Article 19 and the conscious decision of its drafters to protect nonpolitical speech.[74] Furthermore, many countries have recognized the need for speech on nonpolitical topics ranging from art to commerce. For example, the South African Constitutional Court, in invalidating a law prohibiting all establishments with liquor licenses from allowing anyone to perform obscene acts or appear nude, noted the importance in construing its own free speech provision broadly: "The right to freedom of expression is

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71 Kirby, 21 Am U Intl L Rev at 359–60 (cited in note 61).

72 Id at 353.

73 The Australian justices recently confirmed this when the High Court found that advertising regulations did not violate the nation's constitution. The justices cited their concern for "the system of responsible and representative government set up by the Constitution, not a general freedom of communication of the kind protected by the First Amendment to the United States Constitution." *APLA Ltd v Legal Services Commissioner (NSW)*, 219 ALR 403, ¶ 27 (2005) (Austl), citing *Coleman v Power*, 209 ALR 182, 206 (2004) (Austl).

74 See note 9.

integral to democracy, to human development and to human life itself."[75] Similarly, in invalidating a zoning ordinance regulating the posting of advertisements, the Canadian Supreme Court advocated protection of commercial speech: "The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information."[76] Finally, consider the recent exposure of accounting scandals at major US corporations, which led to public outcry and discourse on the nature of large businesses and their responsibilities,[77] speech undoubtedly protected by the First Amendment of the country's constitution.

Despite this analysis, the criticism that courts may not be able to enforce guarantees for nonpolitical speech may be overstated, particularly if courts rationally recognize the inherent ambiguity of a political speech-only standard and look instead to the ICCPR. In other words, defining political speech is a difficult task, and when considering different examples, most speech will be political in some way. For example, if a court were confronted with the accounting scandals, it would almost certainly have to protect the ensuing public commentary—which, although seemingly commercial, would likely affect voters' decisions in elections and referenda.

One final caution must be noted: In nations in which the judiciary feels greater pressure to exercise restraint, either because of tradition or political pressure, using the courts to enforce Article 19 will be less successful. The Australian High Court took a controversial approach by reading a personal guarantee of free speech into a constitution that provides no explicit personal guarantees whatsoever. In the ICCPR and subsequent legislation of individual countries, the free speech guarantees have been express. Moreover, in countries with courts unwilling to look beyond the text in construing constitutions or to international law, the approach will not be helpful.[78]

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75 *Phillips v Director of Public Prosecutions*, 2003 (4) BCLR 357, 2003 SACLR LEXIS 11, 26 (CC 2003) (S Africa).

76 *Guignard v City of Saint-Hyacinthe*, 2002 SCR 472, 483 (2002) (Canada).

77 See, for example, Christine Dunn, *Managers Campaign for Corporate Reforms; After Scandals, Some Demand Greater Disclosure*, Wash Post H4 (July 7, 2002) (citing scandals at Enron, Tyco, and WorldCom).

78 More general counterarguments to this approach have been articulated. For a defense, see Kirby, 21 Am U Intl L Rev at 346–56 (cited in note 61).

V. CONCLUSION

In sum, a judicial approach to defining and enforcing the ICCPR's free speech obligations, as exemplified by the Australian experience, and in particular the views of Justice Kirby, may be an important tool for countries with representative governments and courts willing to bear the risk of deviating from the text of their constitutions and rely on international law. Despite Australia's inability thus far to protect nonpolitical words, practical considerations—namely the ambiguity of the standard—indicate that courts will not always find this to be the case. Furthermore, the Australian cases themselves demonstrate that even in places where efforts to legislate free speech have died in political battles, it is possible to use the courts as a powerful tool in explicitly recognizing free speech rights. Indeed, Justice Kirby's approach specifically indicates that a judicial solution to the free speech problem may be the most desirable kind because it immunizes the issue from political pressure, implements change in palatable and gradual increments, adequately defines amorphous individual rights, and above all, safeguards free speech guarantees in the founding documents of nations and in the ICCPR.