

Abstract

The drafting of the Universal Declaration of Human Rights was a crucial step in the recognition of a legal right to health. Although the past 50 years have revealed weaknesses in the Declaration, it has been an important catalyst for social and legal change worldwide and for new thinking about public health. Recently, the struggle against the HIV/AIDS epidemic has taught us that protecting the human rights of those most at risk is, in fact, a most effective means of preventing the spread of HIV. Traditional public health problems, as well as those involving new biotechnologies, must today be addressed with specific attention to human rights.

La rédaction de la Déclaration Universelle des Droits de l'Homme a marqué un tournant dans la reconnaissance du droit à la santé. Bien que les 50 dernières années aient révélé certaines déficiences dans la Déclaration elle a été un catalyseur important de changements sociaux et juridiques à travers le monde et d'un nouveau mode de réflexion sur la santé publique. Depuis peu, la lutte contre l'épidémie du VIH/SIDA nous a enseigné que la protection des droits des personnes les plus menacées constitue en fait la manière la plus efficace de prévenir l'infection par le VIH. En outre nous devons nous attaquer aujourd'hui aux problèmes de santé publique traditionnels et à ceux qui impliquent les nouvelles biotechnologies en tenant compte particulièrement des droits de la personne.

La redacción de la Declaración Universal de los Derechos Humanos fue un paso crucial para el reconocimiento del derecho legal a la salud. A pesar de que en los últimos 50 años, se han evidenciado ciertas carencias en la Declaración, ésta ha constituido un importante catalizador para los cambios sociales y jurídicos ocurridos en el mundo y para un nuevo enfoque sobre salud pública. Recientemente, la lucha contra la epidemia del VIH/SIDA nos ha enseñado que la protección de los derechos humanos de aquéllos que corren mayor riesgo, es, de hecho, el medio más eficaz para evitar que el VIH siga propagándose. En la actualidad, tanto los problemas tradicionales de salud pública, así como aquellos que involucran las nuevas biotecnologías, deben ser abordados prestando particular atención a los derechos humanos.

Articles

THE RIGHT TO HEALTH FIFTY YEARS ON: Still Skeptical?

Michael Kirby

In his closing remarks to the 2nd International Conference on Health and Human Rights, Professor Jonathan Mann, as was his wont, threw down a gauntlet:

What about the future of health and human rights? Two years ago, at the time of the first conference, there was widespread skepticism about health and human rights in the public health community. The phrase itself . . . was usually spoken with an implied question mark at the end, as in "health and human rights?" Today, as a result of considerable work at local, national and international levels . . . the concept of health and human rights is much better accepted and is even assumed, even if its precise content remains to be more fully developed.¹

This is an article about where we have come from: the origins of the legal expression of the human right to health. In the field in which Jonathan Mann worked with such effect, HIV/AIDS, it is an article about the abiding lessons he taught and their ongoing importance. In new issues arising

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This is an abbreviated version of a talk given by Justice Kirby in honor of the 50th anniversary of the Universal Declaration of Human Rights at the Harvard School of Public Health on December 14, 1998. The complete text of the talk, including extensive commentary on the life and legacy of Dr. Jonathan Mann, is available at http://www.fl.asn.au/resources/kirby/papers/19981214_harv.html.

in public health, which are revealing puzzling dilemmas, it asks the question whether real inroads have been made into the “widespread skepticism about health and human rights” that Jonathan Mann described some years ago.

Fifty Years On

There is little point in searching for the origins of the global movement for human rights. We have it on the authority of Isaiah Berlin that the notion of human rights was absent from the legal conceptions of the Romans and the Greeks and missing from the Chinese and all other ancient civilizations, on the basis that you needed an idea of individualism and legalism to give substance to the concept of human rights.² There is no value in exploring national claims to be the origin of the notion of the limited state—whether in England’s Magna Carta of 1215, its Bill of Rights of 1689, the American Declaration of Independence in 1776, or the French Declaration of the Rights of Man and of the Citizen of 1789. Certainly, the last-mentioned was the first document of its kind to have referred to what we would now call social, economic and cultural rights: rights to education, work, property and social protection were reflected in earlier and in later drafts.³ But out of the successive English, French, and American revolutions arose an international movement that is now unstoppable. It bears out Lord Acton’s statement that, ultimately, the “single confused page” of the French Declaration was to have a more lasting impact than all of Napoleon’s armies.⁴

In the middle of the nineteenth century, the European powers, revolted by the excesses of war, began the slow and imperfect process of framing rules of war that would prohibit excess and oblige humane treatment of the wounded.^{5,6} Yet during the last century, and for much of this one, the movement towards human rights was “spasmodic and unorganized.”⁷

It took the triple horrors of the Second World War, the Holocaust, and the flash brighter than a thousands suns at Hiroshima to propel our species and its leaders into action. The story begins in January 1941, when U.S. President Franklin D. Roosevelt sketched his vision for the postwar world.⁸ It would be a world that guaranteed freedom of speech,

of worship, from want and fear. For many Americans who supported these ideals, they were goals to be attained not in a distant millennium but quickly, as an insurance against repeated wars. Roosevelt's aspirations were adopted in August 1941 in the Atlantic Charter.⁹ Britain and the United States left the Charter open to ratification by other nations. The existence of the Charter makes a point, sometimes overlooked, that the Western powers, and not simply the socialist countries, were committed to human welfare as an integral aspect of human rights.¹⁰

In January 1942, the United Nations, being the Allies ranged against the Axis powers, included among their war objectives the preservation of human rights and justice in their own lands as well as in all lands.¹¹ As the tide of the war turned, the United States, the United Kingdom, the Soviet Union, and China met at Dumbarton Oaks in 1944 and agreed to establish an international system for peace and security, one purpose of which would be the protection of human rights.¹² At first it was expected that the Charter of the proposed new world body would itself include a Bill of Rights.¹³ To the great regret of many closely involved in its drafting, the Charter omitted a statement of fundamental rights as a precondition to membership of the United Nations.¹⁴ But it included, as one of the purposes of the new body, the promotion and encouragement of respect for human rights and for fundamental freedoms for all without discrimination.¹⁵ Picking up amendments which, ironically, were proposed by General Smuts of South Africa, the Charter recognized specifically that international peace and security were interdependent with protection of human rights and economic progress.¹⁶

At the San Francisco conference in 1945, President Truman promised that an international Bill of Rights would be drawn up.¹⁷ The General Assembly of the United Nations quickly established a Third Committee on Social, Human and Cultural Affairs, charging it and, in 1946, the Economic and Social Council (ECOSOC) with the question of whether an international instrument should be adopted on that topic and, if so, in what terms.¹⁸ New impetus was given to the idea by the revelations before the International War Crimes Tribunals of the horrors that had been perpetrated by the defeated powers.¹⁹ Among the most gruesome evidence before

these bodies was that of harmful and involuntary experimentation performed by doctors in the name of a distorted notion of public health.²⁰

In January 1947, the Commission on Human Rights, established by ECOSOC, therefore undertook the preparation of a global human rights instrument as its principal task.²¹ Contemporaneous with these developments was the establishment by the United Nations in July 1946 of the World Health Organization (WHO), whose charter came into force in April 1948. Yet for much of its life, WHO was to be relatively isolated from the world movement of human rights law that was going on around it.

It was in September 1947 that Mrs. Roosevelt, the chair of the committee, submitted the draft of the Universal Declaration of Human Rights to the General Assembly and then the Third Committee. It is interesting to observe the debates that surrounded the content of the Universal Declaration. The Chinese delegate declared that the task of the drafters was to reconcile Confucius with Thomas Aquinas.²² Already the Cold War was poisoning the relations of the victorious Allies. The Soviet delegate declared that civil rights were fully practiced in the Soviet Union, and what was needed was the inclusion of socialist proposals—to provide against discrimination, to permit rebellion against autocracy, to ensure self-determination of colonial peoples, to uphold workers' rights to engage in street demonstrations, and to limit the enjoyment of civil rights where necessary to prevent the re-emergence of Fascism.²³

It was no easy task to marry the objectives of the Western countries (including my own), to ensure the universal protection of civil rights, with the objectives of the socialist bloc and other countries to reflect concerns about social and economic rights.²⁴ The world was fortunate, fifty years ago, that the chair of the committee was Mrs. Roosevelt. She could draw upon her husband's program of social rights in the United States to find empathy with the notion that such matters should find their way into the Declaration. Many saw it, as perhaps she did herself, as a way of achieving on the global stage FDR's ideals about social equity in the United States.²⁵

The proposal that reference should be made in the Universal Declaration to a right to health was put to the Drafting

Committee by Mr. Amado of Panama. As recorded, this was the way in which he said the matter should be dealt with:

The State has a duty to maintain, or to ensure that there are maintained, comprehensive arrangements for the promotion of health, for the prevention of sickness and accident, and for the provision of medical care and of compensation for loss of livelihood.²⁶

Gradually the idea of including such notions gained acceptance. So it was that on December 10, 1948, the Universal Declaration of Human Rights was adopted by the General Assembly. As finally adopted, the text of the Universal Declaration dealing with health is found in Article 25. It reads:

25.1: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in . . . sickness. . . .

In due course, the aspiration toward an International Bill of Rights was taken further by the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in December 1966. These Covenants moved beyond the expression of ideals and principles to create legal obligations for the States that become parties to them.

The primary treaty provision in relation to the right to health is found in Article 12 of the ICESCR. In addition to specific steps to which the States parties commit themselves, that article contains a general statement:

12.1: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Since the celebration a decade ago of the 40th anniversary of the Universal Declaration, the debate about its impact and its importance has been refocused. The collapse of the Soviet Union has brought within the potential scrutiny of human rights courts and committees a large number of nation-states previously excluded. In Vienna, the World Conference on Human Rights in 1993 emphasized (contrary to

the suggestions of some delegates) the universal character of human rights and also that there was no exception for "Asian values" or for cultural derogations in Africa, Latin America, or elsewhere.²⁷ Those who have studied the record of the drafting of the Universal Declaration now call to notice the large part played in its formulation by delegates from countries in what is now known as the Third World.²⁸

Asian leaders rightly insist on the interdependence of economic, social, and cultural rights with civil and political rights.²⁹ Many Asian commentators point out, fairly, that perceptions of the precise content of human rights change over time. The notion of universal political suffrage did not extend in Western countries to women or to some ethnic minorities until quite recently.³⁰ The recognition of the rights of homosexual and bisexual citizens to be removed from the danger of criminal prosecution for consenting adult sexual conduct is also relatively new.³¹ In this sense, the voyage of discovery that the Universal Declaration initiated is far from complete. With each new decade, new insights are gained and shared.

The Universal Declaration: A Report Card

The last observations invite, fifty years on, a report card on the general achievements of the Universal Declaration. First, let me acknowledge some weaknesses:

1. The Declaration fell short of providing an enforceable Bill of Rights for the United Nations. Although Mr. Gorbachev, at the 40th anniversary, suggested enlarging the jurisdiction of the International Court of Justice to deal with serious human rights infractions, this has not happened.³² The Universal Declaration, as such, does not have the force of a binding treaty. The Charter of the United Nations does not contain a statement of universal goals as the price of membership in the world organization.

2. No actual remedies are provided by the Universal Declaration. There is no right of petition and no entitlement for victims to give content to their aspirations by forcing offenders before a global court or committee.³³ There are no economic sanctions for those who persis-

tently abuse or ignore the obligation, for example, to ensure the right to basic medical care for all.

3. There are still nagging doubts as to whether all of the rights contained in the Declaration can apply in societies with pitifully small resources. Even in those with resources, there remain impediments of culture, politics, and religion that undermine the effectiveness of the concepts that the Declaration expresses.³⁴

4. The Declaration now appears a little out of date in some respects, reflecting as it does the controversies of 1948 rather than 1998. For example, today, at least in many Western countries, the notion that it is necessary to provide for equal social protection for children “whether born in or out of wedlock” is so self-evident that it scarcely needs mention, although this is not the case in every society. In addition, in many Western countries, the “right to marry” incorporated in the Declaration would, in today’s world, invite consideration of marriage or marriage-like relationships for homosexual citizens—an issue upon which the Declaration is totally silent.³⁵

5. The Declaration does not recognize the right of downtrodden people to rise up against tyrannical or neglectful national governments. Doubtless this is because, to be accepted, it needed the vote of not a few such governments.³⁶ Governments that voted for the Declaration and praise its virtues today are often the worst offenders against human rights.

6. The Declaration did not foresee the many new problems for human rights that have come along in the past fifty years, such as the rights of people living with HIV/AIDS, the huge problems of health and poverty associated with the world’s great population increase, and the staggering debt burdens of most countries of the Third World.³⁷

7. The mechanisms established to implement the right to health are not only absent from the Declaration; they are distinctly weak in the equivalent provisions of the ICESCR. That right, as expressed, is truly one of an imperfect obligation.

8. The dichotomy between East and West may have been partly resolved in the past decade. The drafters of the Declaration may have included leaders of the world community as it then stood. But, necessarily, this was before decolonization and the huge expansion of the United Nations from 58 member countries in 1948 to more than 180 now. Perhaps the priorities of the 180 might include some that would be distinct from those of the victorious Allies in the rather different world after the Second World War.³⁸

9. The misuse of human rights, including those enshrined in the Universal Declaration, continues when it suits nation-states. The appeal of the Soviet Union to the protection of workers' rights to justify its invasion of Hungary and the appeal of the United States to democratic rights to justify its incursions in Vietnam illustrate the fact that power equations, which all nations recognize, lie all too often in the rhetoric of human rights. In practice, rights can quite easily be neglected.³⁹

10. In the field of health rights, WHO has historically demonstrated an ambivalence about defining health in terms of human rights.⁴⁰

Conceding all the failings and weaknesses of the Universal Declaration, as viewed with the perspective of half a century, it remains a lodestar for humanity after a particularly dark age.⁴¹

So what are its abiding strengths?

1. The Declaration speaks in down-to-earth unexcited language about the aspirations of all the people of the earth. Mrs. Roosevelt has been proved right in her prediction that it would become "the Magna Carta of mankind."⁴²

2. The fact that the Declaration aspires to collect the fundamental human rights of all people is itself a contribution to the unification of humanity. The main point of bringing human rights into the international community is to permit criticism of nation-states when they fall short of the attainment of the established

principles: criticism by members of their own community, criticism by other states, and, ever so cautiously, criticism by the United Nations itself.⁴³

3. One of the great values of the Universal Declaration is its attempt to reconcile different philosophies and the goals of people of different cultures. The need for adherence of the United Nations to these ideals arises from the recognition that they are necessary if the objectives of true peace and security are to be attained.

4. Ideas have power. The Universal Declaration is nothing if not a political instrument.⁴⁴ It has influenced regional human rights conventions and given birth to many special treaties which are binding in international law and which have an increasingly effective network of enforcement mechanisms. It has influenced the postwar constitutions of newly independent nations everywhere. There is a tension between individual human rights and the international legal order as it has hitherto been understood.⁴⁵ But it is a mighty achievement of the past fifty years that the ramparts of that international order have been stormed and human rights are now well and truly established within. The Universal Declaration set in train a movement to establish norms by which the legitimacy of states within the international order may be measured and their protestations judged.

5. The Universal Declaration has given birth to something more. Out of its ideals have grown a vast array of nongovernmental organizations and civil-society bodies committed, in very practical ways, to upholding universal rights at home and abroad. These bodies, in turn, stimulate national governments, regional bodies, and international agencies to respond to cases of abuse, measured against the Universal Declaration, now brought to light by the global media. Within the United Nations, the work of bodies such as WHO and the network of Special Rapporteurs and Special Representatives of the Secretary-General give substance to these aspirations. They constantly do so by reference to the principles of the Universal Declaration and the Covenants that grew from it.

6. During the period immediately following its adoption, the Universal Declaration gave a special stimulus to the movement for decolonization and the end of apartheid. It also gave goals and aspirations for the emerging new nations. Only one nation has ever rejected the Universal Declaration.⁴⁶ All of the rest accept it, at least in words, as a statement of goals to be attained.

7. The Universal Declaration has also encouraged a culture of human rights. It has stimulated the movement for gender equality, multicultural diversity, an end to sexual oppression, the defense of the environment and the attainment of the self-determination of peoples.⁴⁷

Health, Human Rights, and HIV/AIDS

There is no mention of health and medical care in the Magna Carta. It cannot be found in the text of the American Declaration of Independence, the French Declaration, or any of the other earlier efforts to expound the rights that inhere in humanity because of its human qualities. The Universal Declaration of Human Rights was a critical point of departure in the development of notions of human rights, indeed of what human rights are.⁴⁸ It is difficult, therefore, to overstate the importance of that departure from conventional wisdom and legal orthodoxy. But to be converted into action it needed change agents.

It is an old aphorism that human rights matter most when they are hardest to accord. So it is with the right to health. In the past, when human rights impinged on public health, they were usually discussed as a legal concept in terms of the right of public health authorities, acting for the state, to depart from the human rights of individuals in the name of the public health of the whole community. Terrible abuses of individual human rights have occurred in the name of the protection of public health. Only in recent times has it been appreciated that such derogations are subject to at least three controlling requirements: (1) that they be provided and controlled by law; (2) that such law should be compatible with the requirements of a democratic society; and (3) that, to the fullest extent possible, it should accord respect to the human

rights of the individuals affected.

When the HIV/AIDS epidemic came along, it would have been easy for the international community, and nation-states, to have slipped into the traditional mode of responding to the epidemic, to the great disadvantage of the human rights of those infected. In many countries, to a greater or lesser degree, that has happened. In the face of public pressure, there is a temptation to respond to a fearful new problem with ineffective and oppressive legal regulation.

It was while serving on the Global Commission on AIDS that I learned from Jonathan Mann, June Osborn, and others the importance of the AIDS paradox. It took epidemiologists and public health experts to teach me, a lawyer, certain fundamental realities about human rights when it came to HIV/AIDS. The AIDS paradox teaches that the most effective way of preventing the spread of the virus responsible for AIDS is by protecting the human rights of those most at risk. It is a paradox because it runs counter to the traditional responses to epidemics in public health. It contradicts the instinctive feelings of most citizens. It challenges the assumptions and instant reactions of most political leaders and aspirants. Yet explaining the paradox rationally is quite simple. Given the absence of effective vaccines and (for most people) effective medicines, the only means of reducing the spread of the epidemic is by the sharing of information and by the achievement of behavior modification in those principally at risk. Anyone in my profession can tell you that behavior modification, particularly in matters important to a person's identity and pleasure, is extremely difficult to achieve by law, certainly over a prolonged period. Alienated homosexual and bisexual citizens, drug users, so-called "promiscuous" people, and sex workers were already outside the range of many public health messages in most countries when HIV/AIDS came along.

Led by Dr. Mann, WHO set about the task of spreading the message about the coincidence of human rights and public health objectives. But it was not easy. Deeply entrenched resistance arose. There was religious antagonism to the education of children in schools, and in the media, about sexual behavior. There were legal and social prohibitions on homosexuals, injecting drug users, and sex workers. Condoms in

suitable quantities and at affordable prices were unavailable even if legally obtainable. Women, often at greatest risk, were disempowered and unable to protect themselves effectively from infection. The political commitment to taking radical steps necessary to save lives was missing. Turning this situation around was a Herculean challenge. Courts in every land are now confronted by the legal fallout of the HIV/AIDS epidemic and by the second epidemic of discrimination that has followed close in its wake.^{49,50} But the biggest battle against the spread of the virus and of intractable discrimination remains to be fought in the developing world. I saw this most clearly in my work in Cambodia. Large but relatively discreet public signs giving information about AIDS and the use of condoms were removed by elected politicians in response to puritanical civic protests. A well-policed area outside Phnom Penh long used for brothels was closed, ostensibly to prevent the spread of HIV. Foreign sex workers were peremptorily deported. I endeavored to explain to Cambodian officials the ineffectiveness of these responses and the urgency of answering the epidemic with informed programs of education, antidiscrimination, and condom distribution. Sometimes my words were heeded. More often they were not.

I reported on this and other aspects of the human rights issues of health to the United Nations Commission on Human Rights and to the General Assembly. This is the only real sanction available to the Special Rapporteurs and Special Representatives working in the field of human rights. No country wishes to be damned before the international community for infractions of such rights. We have come this far. But there are no armies to enforce United Nations human rights principles in the field of health or anywhere else. Persuasion, by logic and by example, is the weapon we have. In the face of an urgent public health crisis such as HIV/AIDS, the urgency and importance of obtaining effective responses is usually not equaled by the appreciation of the need for immediate action or the conviction that the advice given is right.⁵¹

The Right to Health: Future Issues

I am now a member of the International Bioethics Committee of UNESCO and the Ethics Committee of the Human

Genome Organization. This field, too, contains human rights dimensions, reflected in the Universal Declaration on the Human Genome and Human Rights adopted by the General Conference of UNESCO in November 1997.⁵² In addition to a general consideration of the need to uphold the inherent dignity and the equal and inalienable rights of all members of the human family, which runs through the earlier Universal Declaration as well, the recent Declaration dealing with the human genome confronts the many and complex problems posed by genomic science to public health and to human rights.⁵³ The issues range from the protection of patient rights to privacy and confidentiality to the possible impact of genetic knowledge upon conceptions of criminal culpability.⁵⁴ They extend from questions of interference with (or, if that is a loaded word, alteration of) genes in a patient, or in a germline that has the potential to alter the genetic makeup of the human subject, to the vexed question of whether genetic discoveries should be subject to patent protection.⁵⁵ They certainly include the controversial question of cloning, which the UNESCO Declaration asserts to be incompatible with human dignity.⁵⁶

As I reflect upon the debates on bioethical concerns which have successively arisen in the past 25 years, considering those that involved artificial insemination by husband (AIH), artificial insemination by donor (AID), human tissue transplants (HTT), and in vitro fertilization (IVF), I can only conclude that the issues for human rights presented by advances in genetics and in technology relevant to medical care have become more complex with each succeeding year.

Of course, there remain for consideration good old-fashioned concerns about human rights and public health. In those places that do not provide for statutory rights of access to clinical records, should judge-made law afford such rights?⁵⁷ Addressing the realities of local hospitals and doctors' offices in the relationship with the patient, some commentators suggest that the "idea that patients have rights sits uncomfortably within the general shape of . . . healthcare law" in most parts of the world.⁵⁸ For many indigenous people in developed countries, and most ordinary patients in the Third World, notions of fundamental rights in the context of health care may seem to be rhetoric rather than reality. Nonetheless, re-

porting obligations to the United Nations, the inquisitive investigations of international relief and human rights agencies, troublesome nongovernmental organizations at home, and the political process itself can help to turn serious deprivations of the fundamental right to health into the subjects of political action. This has certainly happened in Australia in the context of the health of Aboriginal people, in particular Aboriginal women and children.⁵⁹

In some areas of public health, attitudes must change drastically before human rights will be accorded. It was only in 1989 that homosexuality was finally deleted from the international classification of diseases.⁶⁰ When we reflect upon such errors of the past, we are bound to ask, what are the errors that remain today? I suspect that history will say that the way we have dealt with drug dependence and drug use by proceedings in courtrooms rather than as problems of public health has involved a number of most serious departures from fundamental human rights. Not the least of these is the program of prison building which exists in the United States and other countries that have followed its lead in this regard, in conjunction with the huge numbers of young people, often from minority groups, undergoing incarceration in the largely ineffective effort we have adopted to deal with the problem.

Virtually every society is grappling with the issues of euthanasia or assisted suicide.⁶¹ In Australia, a piece of legislation of the Northern Territory was, exceptionally, disallowed by the Federal Parliament because the procedures for physician-assisted suicide were considered unacceptable. Other legislation along the same lines may yet ensue. For some patients, the ultimate human right is that of controlling the end of their existence, in particular if they face unrelieved pain and loss of human dignity.

Conclusions

Many commentators have referred to the need for greater involvement of WHO in the implementation of the right to health reflected in Article 25 of the Universal Declaration and Article 12 of the ICESCR.⁶² A representative of WHO told the participants in a meeting organized by the Committee on the ICESCR in 1993 that it was only after the mid-

1970s that WHO started to acknowledge the importance of socioeconomic circumstances in general health conditions.⁶³ This drew the comment that WHO has been historically ambivalent about defining health in terms of a human right. Unlike the International Labor Organization, WHO has “not yet taken the initiative to formulate international binding standards articulating the obligations of States in the area of health.”⁶⁴ Why should this be? It is probably because of the conservatism of the public health tradition, the suspicion that most health care workers have of lawyers, and a degree of caution and scepticism that is the residue of a professional attraction to a different and more paternalistic principle, sometimes described by the phrase “Nanny knows best.”

The Preamble of the Constitution of WHO idealistically declares intrinsic and inherent values:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.⁶⁵

The Preamble also stresses the responsibility of States for “the promotion and protection of health” and of governments for “the provision of adequate health and social measures.” The constitutional formulae are there, reinforced by the terms of the Universal Declaration and the ICESCR. The experience should also be there after the involvement of WHO in the AIDS epidemic, the imperative need that this occasioned for inter-agency dialogue, including in the field of human rights, and the acceptance by all leaders in that field of the essential interconnections between human rights and public health. Jonathan Mann acknowledged the pressing problems of today but was also indefatigably hopeful:

We share a confidence in the future—and in our ability to contribute—each in our own way and yet together to the healing of the world. Martin Luther King, perhaps the greatest American of this century, said “The arc of history is long, but it bends towards justice. . . .” This is our modesty, also our boldness, also our inspiration—and together we form a multitude.⁶⁶

As Jonathan Mann knew, noble sentiments are not enough. We must be active for reform. Out there in the world ordinary people yearn for rights—including the right to health. There are oppressors, autocrats, and apathetic, antagonistic, and indifferent officials. Look at what Mrs. Roosevelt and her colleagues set in train. Look at what, fifty years later, Jonathan Mann inaugurated. With a sense of impatience and idealism, with modesty and boldness, we should go and do likewise.

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26. UN Doc. E/CN.4/AC.2/SR.8, p. 11, cited in B. Ramcharan, “The Universality of Human Rights,” *International Committee of Jurists: The Review* 1994, 53: 110.
27. D. P. Kumaraswamy, “The Universal Declaration of Human Rights,” *International Committee of Jurists: The Review* 1994, 53: 120–22.
28. Ramcharan (see note 26), p. 106.
29. The Bangkok Declaration is described in Kumaraswamy (see note 27), p. 120.
30. Cf. Justice Thurgood Marshall: “The Government they devised was defective from the start, requiring several amendments, a civil war and a momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.” T. Marshall, “Reflections on the Bicentennial of the United States Constitution,” *Harvard Law Review* 1987, 101(1): 2. See also E. Dumbutshena, “Human Rights in the 21st Century,” in: *Commonwealth Law Conference, Conference Papers* (Auckland, 1990), p. 603.
31. Cf. *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994).
32. *Reform* [annual journal of the Australian Law Reform Commission] 1989: 38.
33. Lippman (see note 5), p. 513.
34. Marks (see note 2), p. 513.
35. Universal Declaration of Human Rights, G.A. Res. 217A (III), UN GAOR, Res. 71, UN Doc. A/810 (1948), art. 16.1 and 25.2.
36. Cassese (see note 8), p. 47.
37. Dumbutshena (see note 30), p. 604.
38. Dumbutshena (see note 30), p. 605.
39. Waters (see note 19), p. 34.
40. Hendriks, “The Right to Health,” *European Journal of Health Law* 1994, 1: 194.
41. Cassese (see note 8), p. 47.
42. Cassese (see note 8), p. 46.
43. Dumbutshena (see note 30), p. 609.
44. B. Graefrath, “Universal Declaration of Human Rights: 1988,” *GDR Committee for Human Rights Bulletin* 1988, 14(3): 167.
45. H. Lauterpacht, *An International Bill of Rights of Man* (1945), p. 54, cited in Marks (note 2), p. 512.
46. Iran.
47. Ramcharan (see note 26), p. 115.
48. Steiner and Alston (see note 18), p. 121.
49. For example, *IW v. City of Perth*, *Commonwealth Law Reports* 1997, 191(1) (HCt Aust).
50. B. Watt, “The Legal Protection of HIV+ Healthcare Workers and the

Human Rights Jurisprudence of the European Court of Justice," *European Human Rights Law Review* 1998: 301.

51. M. D. Kirby, "HIV: Why is Governance so Critical?" in: UNDP, *The Convergence of Government and HIV: Aspects Critical for an Effective Response* (Manila, 1997), p. 23.

52. Universal Declaration on the Human Genome and Human Rights, UNESCO, adopted at the General Conference 11 November 1997.

53. D. Beyeveld and R. Brownsword, "Human Dignity, Human Rights and Human Genetics," *Modern Law Review* 1998, 61: 663.

54. O. O'Neill, "Insurance and Genetics: The Current State of Play," *Modern Law Review* 1998, 61: 716.

55. A. Pottage, "The Inscription of Life in Law: Genes, Patents and Biopolitics," *Modern Law Review* 1998, 61: 740.

56. The Genome Declaration provides in Article 11 that "Practises which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted. States and competent international organisations are invited to cooperate in identifying such practises and in taking, at national or international level, the measures necessary to ensure that the principles set out in this *Declaration* are respected." Cf. United States National Bioethics Advisory Commission, *Cloning Human Beings*, 1997.

57. *Breen v. Williams*, *Commonwealth Law Reports* 1996, 186: 71 (HCT Aust). Cf. *Breen v. Williams*, *New South Wales Law Review* 1994, 35: 522 (New South Wales Court of Appeals).

58. D. Morgan, "Health Rights, Ethics and Justice: The Opportunity Costs of Rhetoric," in: S. McLean (ed), *Contemporary Issues in Law, Medicine and Ethics* (Dartmouth, NH: Dartmouth University Press, 1996), p. 19.

59. A. de Jonge, "Aboriginal Women's Health and Australia's International Human Rights Obligations," in: R. Piotrowicz (ed), *Proceedings of the 49th Annual Conference of the Australasian Law Teachers' Association* (Hobart, 1994), p. 235.

60. World Health Organization, *International Statistical Classification of Diseases and Related Health Problems: Mental and Behavioural Disorders*, 9th ed. (1978), p. 40. Contrast the report of the Working Group on Sexual Orientation and Human Rights in *Human Rights Tribune* 1998, 5:

31. The Working Group took part in the meeting of representatives of nongovernmental organizations in Ottawa, Canada, in June 1998 to mark the fifth anniversary of the Vienna World Conference on Human Rights and the 50th anniversary of the UDHR.

61. *Washington v. Glucksberg*, 117 S Ct 2258 at 2263 (1997). See C. L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court," unpublished paper, September 1998, Tulsa, citing from *Rodriguez v. British Columbia (Attorney-General)* 107 DLR (4th) 342 (1993).

62. See, e.g., M. Battista, "An Enforceable Human Right to Health," in: *Papers of São Paulo Conference on the Law of the World* (São Paulo, 1981). See also V. A. Leary, "Implications of a Right to Health," in: K. E. Mahoney and P. Mahoney, *Human Rights in the Twenty-first Century: A Global Challenge* (Dordrecht: Martinus Nijhoff, 1993), pp. 491-93. The author states that WHO has "shown little interest in defining the content of a

right to health as an international human right. The Organization undertakes little normative activity and has not been greatly interested in the normative activity of other Organizations with regard to health issues. It has also given little attention to human rights issues, apparently regarding them as unduly political and not within the technical mandate of the Organization." GPA and the International Code on Breast Milk Substitutes are cited as exceptions.

63. Mr. Flasche, cited in Hendriks (see note 40), p. 194.

64. Mr. Flasche, cited in Hendriks (see note 40), p. 194.

65. Preamble, Constitution of the World Health Organization, adopted by the International Health Conference, New York, 19 June–22 July 1946, and signed on 22 July 1946 by the representatives of 61 States.

66. Mann (see note 1), p. 120.