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Human Rights and Bioethics: The Universal Declaration of Human Rights and UNESCO Universal Declaration of Bioethics and Human Rights

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HUMAN RIGHTS AND BIOETHICS: 
THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND UNESCO UNIVERSAL 
DECLARATION OF BIOETHICS AND HUMAN RIGHTS

The Honourable Michael Kirby, AC CMG*

I. CELEBRATING GEORGE P. SMITH, II

The honorand of this Journal volume, Professor George P. Smith, II, is not just a scholar and teacher of law and bioethics in the United States of America. He has won many admirers and friends far from his native land. In part, this is because of his prodigious energy, output and whimsy, combined with his unstinting willingness to travel to the far corners of the world to share his reflections on legal and moral questions with expert and lay audiences. He has been a frequent visitor to my own country, Australia. It was on his visit to Sydney in 1982 that we first met. I am proud to have enjoyed his friendship ever since.

At the time of our first encounter, I was still chairing the Australian Law Reform Commission, a federal body established by the Australian Parliament to advise it on reform, modernisation and simplification of the law. One of our first reports had addressed the still tricky issues presented by the transplantation of tissues from the body of one human being to another.¹ I discovered in Professor Smith an identical fascination with the puzzles presented by the interface of law and technology. He too had been


Editor’s Note: Due to the foreign residence of the author, the footnotes of this article do not conform to The Bluebook: A Uniform System of Citation.

¹. AUSTRALIAN LAW REFORM COMMISSION, Human Tissue Transplants (ALRC 7, AGPS, 1976).
involved in the work of law reform, both in New York and Pennsylvania.² Many lawyers find such topics unsatisfying, even uninteresting. However, for George Smith and myself, they represent not only an intellectual challenge at the interface of disciplines,³ but also a source of puzzling practical dilemmas that are not going away any time soon.

For George Smith, as for me, the institutional puzzles presented to the law were as interesting and certainly as important as the moral questions. With dilemmas so controversial and technology so intricate and fast moving, how could we adapt the formal public law-making procedures of a representative democracy so that they could respond to the legal challenges presented by this technology?

Each of us realised that, in the common law tradition, there is never, ultimately, a lacuna in our law. In the end, in default of applicable laws made by the other branches of government, any gaps in the law will be filled by judges, deciding particular cases. Yet each of us knew that this technique of lawmaking had serious defects, given the variable capacity, inclination and interest of judges and the varying availability of helpful evidence and argument in particular cases. In the democratic theory of governance, the necessity for real consultation with the community over controversial moral questions means that resolution by judges, although an essential fallback, is not normally the best way to develop laws having a technological and bioethical content.

Because we found common ground in our basic ideas – including a view we shared that the ultimate foundation for notions of fundamental human rights or bioethical judgments is the love that human beings generally have for one another⁴ – George Smith and I have enjoyed a transnational conversation now lasting more than a quarter of a century. What a time this has been. Not only remarkable developments in science-based technology, prompting new and difficult ethical challenges,⁵ but also important legal developments as a consequence – whether in the legislatures of our

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5. Such as the mapping of the human genome and the development of newborn screening, including pre-implantation genetic diagnosis.
respective countries⁶ or in international and regional bodies fashioning influential statements of principle.⁷

George Smith helped establish this Journal. He taught his students the importance of securing a high reputation for it by "total commitment [to] high standards of professionalism."⁸ By his "unstinting labors"⁹ he has always been looking over a horizon that usually limits the interests of lawyers. He has examined many of the problems that are just around the corner in contemporary science and technology. He has proposed ways in which we should go about solving those problems.¹⁰

It is of the nature of such problems that they are often universal, not purely national, both in the technology that gives rise to them and in the human identity of those who are subject to the response. American scholars and students can therefore be proud of George Smith's engagement with the world, his commitment to universalism, his interest in international law and his voracious appetite for the wisdom in the exploration of legal and bioethical questions elsewhere that may lie beyond the United States. It has to be said that his universalism of intellectual interests is not always a characteristic of all those engaged in bioethics and human rights in the United States.

Australians happen to be accustomed to parochial attitudes on the part of great powers. As children of the erstwhile British Empire, it did not take us long to realise that most people (including most lawyers) in the metropolitan power most relevant to us (the United Kingdom) never had anything like the interest in our views that we had in theirs. That this is also true of the United States is illustrated by the recent report on the screening of newborns, published by the President's Council on Bioethics.¹¹ The bibliography, like the analysis itself, comprises, almost completely, scientific, legal and ethical writings in the United States.¹² Two reports from the United Kingdom,¹³

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⁷. See e.g. UNESCO, Universal Declaration on the Human Genome and Human Rights (1997); UNESCO, International Declaration on Human Genetic Data (2003); UNESCO, Universal Declaration on Bioethics and Human Rights (2005).
⁹. Id. at 2.
¹⁰. O'Brien, supra note 2, at 165, 181.
¹². See id. at 125-150.
and one from the World Health Organisation,\textsuperscript{14} relieve this somewhat restricted landscape in what is, after all, a very common problem in all developed countries. There is no reference in the report of the President’s Council, for example, to excellent recent reports of a New Zealand expert group.\textsuperscript{15} This is so although it was prepared for an advanced society sharing a common language, generally similar legal system, like traditions of scientific and medical excellence, and not dissimilar approaches to moral quandaries. Perhaps it is the nature of great powers in their heyday to be introspective. One cannot read and consider everything. Yet one sometimes suspects that Professor Smith probably does.

I participate in this tribute to George Smith because he is an American child of the new age of universalism. To some extent, the new age is brought about by American inventions of technology: the internet and telecommunications, satellites and global television and international civil aviation. It is certainly stimulated by the institutions of global government largely fashioned in the United States, founded on Anglo-American governmental and legal concepts, and now directed from its headquarters at the United Nations building in New York.

II. UNITED NATIONS & UNIVERSAL HUMAN RIGHTS

In an outstanding analysis of the interaction between human rights and bioethics,\textsuperscript{16} Professor Smith explained that the modern history of human rights, although influenced by notions that have existed for thousands of years, can be traced directly to events happening during the past three

\textsuperscript{13.} UNITED KINGDOM, HUMAN GENETICS COMMISSION, Profiling the Newborn: A Prospective Gene Technology? A Report From the Joint Working Group of the Human Genetics Commission and the UK National Screening Committee (London, HGC, March 2005); UNITED KINGDOM NATIONAL SCREENING COMMITTEE, The UK National Screening Committee’s Criteria for Appraising the Viability, Effectiveness and Appropriateness of a Screening Programme (March 24, 2003), http://www.nsc.nhs.uk/uk_nsc/uk_nsc_ind.htm.

\textsuperscript{14.} WORLD HEALTH ORGANISATION, EUROPEAN OBSERVATORY ON HEALTH SYSTEMS AND POLICIES, Policy Brief: Screening in Europe by W.W. Holland, S. Stewart & C. Masseria (Geneva, WHO 2006).

\textsuperscript{15.} NEW ZEALAND, LAW FOUNDATION, Choosing Genes for Future Children: Regulating Pre-implantation Genetic Diagnosis 4-5 (Dunedin 2006); NEW ZEALAND, LAW FOUNDATION, Genes, Society and the Future, Vol. III (Dunedin 2009); NEW ZEALAND, LAW FOUNDATION, Findings from the Law Foundation-Sponsored Human Genome Research Project (Dunedin 2009).

centuries when prominent writers began to propound concepts of inalienable rights that controlled the laws that states, state actors and state agents could impose on their people.\footnote{17} Professor Smith proceeded:

[H]uman rights impose no obligations on states themselves; rather, they impose limits on state action. This US view is drawn from the philosophy of the Bill of Rights and rooted in a neo-Lockean conception of the rule of law as “concomitant to a determinate set of legal rules.” In the international human rights community, however, a contrary view is taken – a view which holds to the notion that these rights either obligate state action under certain circumstances or, alternatively, obligate restraint by the state.\footnote{18}

The positivist view of the English common law held that human rights were basically the residue of liberty left over by enacted law and then concerned with civil and political rights. This view was reflected in the Magna Carta of 1215, the Bill of Rights of 1689 (GB) and the American Declaration of Independence of 1776. It was the French Declaration of the Rights of Man and of the Citizen of 1789 that became the first influential document to refer to considerations of social, economic, and cultural rights, specifically the rights to education, work, property ownership, and social protection.\footnote{19}

Whilst the French Declaration was not, at first, greatly influential in the subsequent spread of human rights clauses in national constitutions,\footnote{20} the idea of providing a charter of basic human rights, and of including in it a broader range of rights of an economic, social, or cultural kind, lay in wait for a later time that would be more propitious. That time came in the aftermath of the Second World War, with its devastating inter-continental toll on the lives of people, its revelation of the gross oppression of minorities, its disclosure of systematic genocide, and its termination by nuclear fission – all of which propelled the post-war world into action, for the most part under United States leadership.

\footnote{17} Id. See also R. West, Human Rights, The Rule of Law and American Constitutionalism in PROTECTING HUMAN RIGHTS, INSTRUMENTS AND INSTITUTIONS 93-94 (Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone eds., 2003).
\footnote{18} Smith, supra note 16, referring to West, supra note 17, at 93-95.
\footnote{20} Smith, supra note 16, 1297-98 (citing Retr R. Ludwikowski, Constitutionalism of Human Rights in Post-Soviet States & Latin America: A Comparative Analysis, 33 Georgia Journal of International and Comparative Law 1, 20 (2004)).
The Charter of the United Nations, agreed upon in San Francisco in 1945, included reference to the protection of fundamental human rights as amongst the principal purposes of the new organisation. Originally, it had been expected, or hoped, that the Charter might be accompanied by an international bill of rights, expressing the moral consensus upon which the new organisation would be based. Some delegates, including Dr. H. V. Evatt, the Australian Foreign Minister and a past Justice of the High Court of Australia, proposed to the preparatory meetings the establishment of an international court of human rights, which would ensure that the international bill of rights would be effectively implemented. This proposal, born of Evatt’s background as a judge and lawyer and his idealism, was quietly sidelined. The major powers opposed it. In Australia (whose Constitution of 1901 to this day contains no general charter of fundamental rights), the proposal was condemned as unrealistic.

At the time, perhaps it was unrealistic. However, given the creation in the succeeding half-century of regional human rights courts in Europe, the Americas and Africa (especially the European Court of Human Rights), the idea does not now seem so unreasonable. It was simply ahead of its time.

By 1945, it became clear that the requisite negotiations and consensus required for agreement upon an international bill of rights prevented the incorporation of such a document in the Charter. Nevertheless, the idea made progress. By April and May of 1946, the Economic and Social Council of the United Nations regarded itself as “being charge ... under the Charter with the responsibility of promoting universal respect for, and observance, of, human rights and fundamental freedoms.”23 The Council therefore established a Commission on Human Rights. It mandated the Commission to present a “recommendation and report regarding...an international bill of rights.”24 Having received this mandate, the Commission worked on the project for over two years—between January 1947 and December 1948.

21. UNITED NATIONS, Charter of the United Nations, art 1, sec. 3.
24. Id.
III. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The product of the Commission’s labours was the Universal Declaration on Human Rights (UDHR). Eleanor Roosevelt, widow of President Franklin D. Roosevelt, chaired the Commission. A preparatory committee was established to which seventeen nations were elected to send appropriately qualified experts. The elected nations included the five permanent members of the United Nations Security Council and other member countries, including Australia. A Canadian academic, Mr. (later Professor) John P. Humphrey was chosen to be the Director of the Division of Human Rights within the United Nations Secretariat.

As chance would have it, in the 1990s, I served as a Commissioner of the International Commission of Jurists, based in Geneva. John Humphrey, then a Professor-emeritus of McGill University in Montreal, was also a Commissioner. He explained to me the process of drafting the UDHR and the difficulties it had encountered. Notwithstanding the obstacles, the UDHR was adopted and proclaimed by the General Assembly on December 10, 1948. The President of the General Assembly at the time was the chief Australian delegate and long-time supporter of the UDHR, Evatt. He observed that this was:

[t]he first occasion on which the organized community of nations had made a declaration of human rights and fundamental freedoms. That document [is] backed by the body of opinion of the UN as a whole and millions of people, men, women, and children all over the world [will] turn to it for help, guidance and inspiration.

No member state of the United Nations voted against the adoption of the UDHR. At the vote, there were six abstentions. They were from the members of the Soviet Bloc, South Africa and Saudi Arabia. This very high measure of consensus was achieved, in part at least, by the willingness of the experts and the nation states to avoid debates over the basic philosophy of the Declaration, and by restraint in proposing textual amendments or exploring issues that tended to divide the member states when it came to the implementation of the broad language of the successive drafts of the UDHR.

By every measure, the adoption of the UDHR in 1948 was an astonishing achievement, given the potential controversy of some of its contents. Since its adoption, the UDHR has been influential not only in the spread of the ideas of economic, social and cultural rights, for which it provided, and the consequent developments of a network of treaty law, but also in the impact it

25. Id.

had on popular imagination and on national court decisions where local law was silent or ambiguous on an affected topic.\(^{27}\) In the operative provision, contained in the opening words of the UDHR, it was insisted: "that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."\(^{28}\)

The inclusion in the UDHR of references to economic, social and cultural rights gave a strong impetus to the already growing international consensus (particularly amongst less developed countries) that fundamental human rights in the contemporary world included rights to own property;\(^{29}\) to work under reasonable conditions of work;\(^{30}\) to have the protection of social security;\(^{31}\) to enjoy an adequate standard of living\(^ {32}\) and access to education;\(^ {33}\) to freedom of association;\(^ {34}\) and access to basic healthcare.\(^ {35}\)

The adoption of the UDHR thus taught the great power of ideas in international discourse. The provisions of the UDHR, being in the form of a Declaration not a treaty, were not, as such, binding upon the member states of the United Nations. However, the central ideas of the UDHR were incontestably influential in the subsequent development of United Nations treaty law; the emergence of customary international law; and the incorporation of variations on the UDHR language in national constitutions, legislation and common law.\(^ {36}\) By the speed of its adoption and the success of its impact, the UDHR and the United Nations demonstrated that there was a value in attempting to express universal principles of human rights. That endeavour has continued to this day on many fronts. One of the chief of these has been in the activities of the United Nations Economic, Scientific and Cultural Organisation (UNESCO). It is sometimes described as the "think tank" of the United Nations Organisation. The constituting document


\(^{28}\) *Universal Declaration of Human Rights*, preamble.

\(^{29}\) *Universal Declaration of Human Rights*, art. 17.

\(^{30}\) *Universal Declaration of Human Rights*, arts. 23-24.

\(^{31}\) *Universal Declaration of Human Rights*, art. 22.

\(^{32}\) *Universal Declaration of Human Rights*, art. 25.

\(^{33}\) *Universal Declaration of Human Rights*, art. 26.

\(^{34}\) *Universal Declaration of Human Rights*, art. 20.

\(^{35}\) *Universal Declaration of Human Rights*, art. 25.

\(^{36}\) Newcrest Mining (WA) Ltd. v. The Commonwealth (1997) 190 CLR 513 at 657-58 ("Interpretative principle") per Kirby J.
of UNESCO declares that "since wars begin in the minds of men, it is in the minds of men that the defences to peace must be constructed."\(^3\)

The appropriateness of UNESCO becoming involved in issues of bioethics was not universally accepted within the other agencies of the United Nations. Because bioethics had conventionally focused its primary concerns about the relationships of healthcare professionals with their patients and the public, the agency of the United Nations most concerned with healthcare issues—the World Health Organisation—was extremely sensitive to any perceived intrusion of UNESCO upon its patch. That concern was to be voiced by the WHO representative, Professor Alex Capron, during the debates described later in this article. Likewise, other agencies of the United Nations, including the Food and Agriculture Organisation (FAO), the World Trade Organisation (WTO) (in relation to intellectual property protections for scientific research), the International Labour Organisation (ILO) (in relation to employment issues) all staked their respective institutional claims. Nevertheless, because of the high relevance of scientific developments for newly-perceived and urgent problems of bioethics and UNESCO’s undoubted responsibility for global scientific concerns, initiatives came to be taken by UNESCO affecting part, at least, of the territory embraced by a traditional view of bioethics.

In approaching the expression of any new international standards concerning bioethics, the institutional challenge for the United Nations was at once apparent. Whereas, traditionally, bioethics had been viewed as largely related to issues of healthcare, the advent of biotechnology had widened the potential focus of such concerns. They could now be seen to embrace broader issues of scientific conduct and environmental responsibility. It was this development, essentially happening in the circles of science and technology, that presented UNESCO both with the opportunity to stake its institutional claim and the need to exhibit sensitivity in avoiding, so far as it could, the territorial imperative that afflicts international institutions like much of humanity.

In discharging its mandate, every agency of the United Nations must act within the principles established by the governing organs, treaty law and other relevant requirements of international law. A large body of international law of arguable relevance to issues of bioethics had already been developed in the decades following the adoption of the Charter and the UDHR. Even when concerned with subject matters distinct from civil and

political rights, such treaty law had substantially been the product of lawyers, legal analysis and legal reasoning. Bioethics, on the other hand, had grown, originally, out of the moral sense, and practical experience, of members of the healthcare professions, often expressed by philosophers and other writers. In this sense, in different cultural traditions, bioethics was often viewed by its practitioners as much more ancient in its organised principles than the relatively recent development of international human rights law.

Apart from the institutional tensions that emerged between the agencies of the United Nations as to which of them should have the lead responsibility for developing international principles to govern disputed issues of bioethics, an even deeper problem soon presented itself. This related to the delineation of the subject matter of bioethics as a classification of human and societal concerns; the identification of the categories of rules and principles deserving of international attention; the specification of the historical sources of those rules and principles; and agreement on the mode of analysis, the type of personnel and expertise and the place of empirical research in the expression of the norms of bioethics to be applied at an international level.

By comparison with the challenge and potential difficulties facing Eleanor Roosevelt, John Humphrey and the others who worked to achieve an acceptable text for the UDHR in 1948, the challenge facing the United Nations in the 1990s, as it was presented by advancing science and technology with many new puzzles, was as great, or possibly greater. The growth of the membership of the United Nations Organisation, with the advent of so many newly independent nation states and the expansion of the corpus of international law, presented problems that even the distinguished drafters of the UDHR did not have to face.

III. WORK OF THE INTERNATIONAL BIOETHICS COMMITTEE

To fulfill the perceived responsibilities of UNESCO in the field of bioethics, an International Bioethics Committee (IBC) was created by UNESCO in 1993. The IBC was assigned a work program and budget for the purpose of discharging the responsibilities of UNESCO in the examination of bioethical questions of international concern. The initiative of setting up the IBC in this way was taken for the stated purpose of ensuring that science should develop for the benefit of humanity, a course that was identified as necessitating "the quest for a restatement of morality ... in harmony with modern knowledge."38 The mushroom cloud

38. J. Huxley, supra note 37, at 41.
over Hiroshima was never far from human consciousness in the world after 1945.

The IBC comprises up to forty-five persons from different countries, disciplines, cultures and backgrounds. The Director-General appointed me to the IBC in 1997. I served on it until December 2005. I was therefore a member of the IBC when it adopted the Universal Declaration on the Human Genome and Human Rights.\textsuperscript{39} Subsequently, in 2003, the IBC adopted the International Declaration on Human Genetic Data.\textsuperscript{40} These instruments were focused on particular areas of genomics and genetics.

Following recommendations of the IBC and their consideration (with some modifications) by the companion body elected from amongst the 191 state members of UNESCO, the Intergovernmental Bioethics Committee (IGBC), the two foregoing Declarations were endorsed by resolutions of the General Conference of UNESCO, the governing body of that UN agency.

In October 2001 the General Conference of UNESCO took a further step. It invited the Director-General, Mr. Koichiro Matsura, to examine the possibility of developing a new universal instrument on bioethics. Whether such an instrument was feasible was a question submitted to the IBC. It therefore undertook a study of that issue. The IBC concluded that it would be possible to find sufficient common ground amongst the members of UNESCO to develop the proposed instrument, despite the divergent positions that exist upon many bioethical questions. In effect, the IBC considered that consensus could be achieved, in much the same manner as had been done with the UDHR in 1948, by focusing on basic principles and leaving the practicalities of implementation to the nation states.\textsuperscript{41}

The IBC pointed out that some of the applicable principles of bioethics had already been identified in its earlier Declarations. The very universality of scientific and technological advances, the speed of their proliferation, and their indifference to national or jurisdictional borders were factors that the IBC considered afforded an element of urgency for the commencement of work on a Bioethics Declaration. In particular, it was suggested that the


\textsuperscript{40} UNESCO, \textit{International Declaration on Human Genetic Data}, 32nd Sess., Resolution 32C.

dialogue between persons coming from developed and developing countries was important in order to achieve as broad a consistency in national regulation policies relevant to bioethical concerns as was possible.

The IBC’s feasibility report was placed before the General Conference of UNESCO, convened in Paris in October 2003. The President of the French Republic, Mr. J. Chirac, made a strong plea for the adoption of a universal normative framework. He expressed the view that this should preferably be in the form of a binding treaty, so as to guide the progress of the life sciences and to protect the integrity and dignity of human beings everywhere. It was his intervention and the growing unease within some delegations about the potential of scientific and technological developments to undermine important attributes of human dignity that had led to the resolution approving the IBC’s project and endorsing the search for universal norms of bioethics. The project was therefore adopted and communicated to the IBC.

IV. THE UNIVERSAL BIOETHICS DECLARATION

Having accepted the mandate of the Director-General, and working to an extremely tight timetable set by him, the IBC embarked upon the task of preparing the Bioethics Declaration. Given the timetable, no further substantive consideration was given to drafting a binding treaty. The members of the IBC considered that, if such a treaty were to emerge, it would be preferable (as with the International Covenants that followed the adoption of the UDHR in 194842) that there be much more time for consultation, reflection and study of the operation of the Declaration before treaty law could be considered. In a sense, history was repeating itself. As in 1948, it was too early for a binding treaty. But a non-binding declaration would get the ball rolling.

The Chairperson of the IBC, Ms. Michèle Stanton-Jean (Canada), nominated me to chair the drafting group to prepare the proposed declaration. This was approved and the drafting group was constituted. As an international group of experts with diverse backgrounds, the drafting group followed in the footsteps of Mrs. Roosevelt’s experts in 1948. The Secretariat of the IBC was led by Professor Henk ten Have (the Netherlands). The members of the drafting group immediately resolved that they would proceed with their labours in a transparent way. This itself was an innovation for a UN agency. Drafts of the proposed Declaration were

42. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171 (The United States is a party, subject to several reservations, understandings and declarations); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 UNTS 3 (The United States is not a party).
successively published on the UNESCO website. Comments, criticisms and input generally were invited from experts in bioethics, law and other disciplines and from the public worldwide. As the draft Declaration was developed, concurrent consultations also took place between the independent experts of the IBC and the governmental representatives serving on the IGBC, or those who were otherwise present at, or observers during, particular sessions at the drafting group.

The drafting of the text took place between April 2004 and January 2005. The drafting group reported regularly to the plenary meetings of the IBC. It consulted widely with relevant stakeholders. In an attempt to reduce conflicts between the several agencies of the United Nations, an Interagency Committee on Bioethics was established by the UN Secretary-General to facilitate consultations on matters of common concern engaging FAO, ILO, OESO, WHO, WTO and UNESCO. UNESCO was designated as the lead agency for this Interagency Committee. During two of its meetings it discussed successive drafts prepared by the drafting group.

The IBC also consulted with regional experts at meetings held in Buenos Aires and Moscow. Consultations also took place with national bioethics experts in the Netherlands, Iran, Lithuania, Turkey, Korea, Mexico, Indonesia and Portugal. In August 2004, the IBC organised a major public symposium in Paris to which were invited representatives of civil society organisations, different religious bodies and traditions, scientists and other experts.

The final draft prepared by the IBC was later amended in several respects by the IGBC, supplemented in its deliberations by the participation of particular member states which had indicated a special interest in the outcome. The final Declaration, as recommended to the General Conference of UNESCO, was the IBC draft as amended by the IGBC.

On October 19, 2005, at the UNESCO General Conference, the member states by resolution adopted the Universal Declaration on Bioethics and Human Rights ("Bioethics Declaration"). They did so unanimously, without any contrary votes or recorded abstentions. The resolution was declared carried with acclamation.43

43. The Preliminary Draft Declaration on Universal Norms on Bioethics SHS/EST/CIB-EXTR/05/CONF. 202/2 (Feb 9, 2005) was transmitted with the recommendation that the final document be renamed Universal Declaration on Bioethics and Human Rights. It was by that name that the resolution was approved by the General Conference of UNESCO. See UNESCO Press Release, UNESCO General Conference adopts Universal Declaration on Bioethics and Human Rights (October 19, 2008); see also Smith, supra note 16, at 1311.
V. CONTENTS AND SIGNIFICANCE OF THE DECLARATION

Amongst the many contentious issues considered in the elaboration of the Bioethics Declaration was the scope of bioethics itself. Various propositions were advanced suggesting that the discipline was concerned with (1) medicine and healthcare; (2) access to health services by individuals and populations; and (3) the wider issues of care for the environment and the biosphere. The debates over the focus of bioethics revealed that, in different countries, there were distinct conceptions, definitions and histories of bioethics. The adopted text of the Bioethics Declaration represents a compromise between these differing perspectives. The Declaration addresses "ethical issues relating to medicine, life sciences and associated technologies as applied to human beings, taking into account their social, legal and environmental dimensions."4

The Bioethics Declaration endeavours to provide a "universal framework of principles and procedures to guide States in the formulation of their legislation, policies or other instruments in the field of bioethics."45 Although primarily addressed to member States, the Declaration aims to "guide the actions of individuals, groups, communities, institutions and corporations, public and private."46

The central provisions of the Bioethics Declaration comprise fifteen norms (arts 3-17) which express the basic rules ("principles") that define the obligations and responsibilities of relevant parties in this field. The arrangement of the principles involves a gradual widening of the object being addressed, so that the initial principles relate to the individual human being (human dignity;47 benefit and harm;48 and autonomy and individual responsibility49); other human beings (consent;50 privacy;51 equality;52 human communities non-discrimination53); respect for cultural diversity and

44. Bioethics Declaration, art. 1(1).
45. Bioethics Declaration, art. 2(a).
46. Bioethics Declaration, art. 2(b).
47. Bioethics Declaration, art. 3.
48. Bioethics Declaration, art. 4.
49. Bioethics Declaration, art. 5.
50. Bioethics Declaration, arts. 6-9.
52. Bioethics Declaration, art. 7.
53. Bioethics Declaration, art. 7.
pluralism; all of humanity (solidarity; social responsibility; sharing of benefits); and all living beings and their environment (protecting future generations; and protecting the environment, the biosphere and biodiversity).

The most innovative features of the Bioethics Declaration include:

* The broadening of the focus of bioethics from the human individual to the human community, humanity generally and the total environment.

* The attempted synthesis of topics traditional to [medical] bioethics and concepts obviously derived from the now familiar language of international human rights law, itself substantially an outgrowth of the UDHR of 1948; and

* The introduction of important new ideas, most especially those concerned with notions of universal access to healthcare and notions of social responsibility, not just individual entitlements, in the framing of bioethical principles.

The Bioethics Declaration attaches great importance to the principle of social responsibility and health. It seeks to reorient decision-making in bioethics from a concern with individual subjects only, into one concerned with the human community and, indeed, all living things. Such concerns have obvious urgency for many poorer countries. The principle focuses attention on access to healthcare and essential medicines; access to adequate nutrition and water; and the reduction of poverty and illiteracy as well as improvement of living conditions and of the environment. The Bioethics Declaration expresses, as the foundation for its principles, the interacting considerations of universal human rights and fundamental freedoms as well

55. *Bioethics Declaration*, art. 16.
58. *Bioethics Declaration*, arts. 5, 6, 17.
60. *Bioethics Declaration*, art. 1.
63. *Bioethics Declaration*, art. 1.
64. *Bioethics Declaration*, arts. 18-19.
as a respect for human dignity.\textsuperscript{67} As Professor Smith noted, the concept of "human dignity" is problematic: "[it] is open to abuse and misinterpretation."\textsuperscript{68} In his view, it "oversimplifies complex issues" and can "encourage a form of paternalism, incompatible with the very spirit of self-determination" that lies at the heart of international human rights.\textsuperscript{69}

I accept and share these criticisms of the concept of human dignity. However, whether the essential bedrock of human rights – the reason why we uphold, insist upon and enforce them – is our respect for human dignity or our feeling of love and empathy for human beings and other sentient creatures or some other consideration, this is ultimately an unproductive subject for debate. Those who assert that fundamental human rights pre-exist legal declarations expressing their operation (such as the notion of "inalienable rights" of human beings founded in natural law notions\textsuperscript{70}) or those who see the source of human rights as being legal statements obliging actors to obey their terms, whether in national constitutions or international instruments,\textsuperscript{71} the fact remains that no agency of the United Nations, operating under the Charter, may ignore the binding force of international human rights law.\textsuperscript{72} Whatever may be the privilege of nation states, multinational corporations, civil society organisations and particular individuals to ignore international human rights law, this is not a luxury open to a United Nations agency.\textsuperscript{73} Specifically, it is not open to a body such as UNESCO, or to its IBC, IGBC or General Conference.\textsuperscript{74}

This is why the initiatives taken by UNESCO, on the advice of its IBC (and IGBC) have an element of the inevitable about them. In the context of United Nations agencies, and specifically UNESCO, it was impossible to continue a discourse on bioethics without paying due regard to relevant provisions of international human rights law as it affects bioethical decisions. It is no longer possible to continue in the dialogue of Hippocrates or the other great writers of earlier times concerning the moral duties of healthcare workers. Whatever might be possible in other organisations and activities of life, no United Nations agency can operate outside the principles

\textsuperscript{67} Bioethics Declaration, preamble.

\textsuperscript{68} Smith, supra note 16, at 1312.

\textsuperscript{69} Id. (citing Deryck Beyleveld & Roger Brownsword, Human Dignity, Human Rights and Human Genetics, 61 The Modern Law Review 661, 662.)

\textsuperscript{70} Id. at 1297-98.

\textsuperscript{71} Id.


\textsuperscript{73} See Id.

\textsuperscript{74} See Id.
of international human rights law, as that law impinges upon their activities and upon the statements of principle that they endorse.

This was why there was an element of urgency in procuring a Bioethics Declaration that would, on behalf of the international community, endeavour to reconcile the old learning of health care professionals (mostly led by medical experts) and the new learning of international human rights law (mostly expressed by international lawyers). The greatest achievement of the Bioethics Declaration of UNESCO is that it attempts this reconciliation.

There are further achievements that need to be noted. They include the harmonisation of the traditional discourse about bioethics with the modern discourse about universal human rights, at a time when such harmonisation had become particularly important. As Professor Thomas Faunce of the Australian National University has written: “The question of whether bioethics represents an independent, normative discourse from international human rights, enjoying its own unique more relationship-oriented, non-rational and nuanced approach to norms, a distinctive history, institutional structures and continuing valuable functions, has hardly been debated, let alone resolved.”

Professor Faunce had earlier expressed the opinion that medical ethics (a subset of bioethics) might eventually be subsumed within the discourse of international human rights. Other writers tending in the same direction include George Annas and our own George Smith. When new intellectual paradigms appear (such as the international law of human rights) it is natural that there will at first be resistance and hostility in specialised professional circles. After all, it is not only medical practitioners and professional bioethicists who fear a ‘takeover’ of their established discipline by lawyers. Amongst lawyers, including very distinguished lawyers (both in the United States and in Australia) the decisions of important courts contain

79. See e.g. Roper v. Simmons, 543 U.S. 551, 622 (2005) per Scalia J (dissenting).
antagonistic and unfriendly writing concerning the perceived intrusions of international law into the municipal legal system – particularly in the area of constitutional law. 81

Professor Faunce explains, convincingly in my view, why the harmonisation of bioethics with international human rights law, attempted in the Bioethics Declaration, is both timely and inevitable:

One of the main disadvantages of bioethics... is that it is at risk of becoming an irrelevant normative discourse in the great social justice debates concerning access to essential medicines taking place in global fora such as the World Trade Organisation (WTO). In that context, it is international human rights that have made the strongest inroads (for example, through the Doha Declaration) in creating standards on access to essential medicines. 82 Without instruments such as the [Bioethics Declaration], and in particular its ‘social responsibility’ principle, bioethics may be less able to metaphorically ‘get its foot in the door’ concerning many of the great public health debates associated with the process of corporate globalisation. 83

In consequence of this view, which I also hold, Professor Faunce gives an affirmative welcome to the “social responsibility” principle. He foresees the role of international civil society organisation in promoting the high global principle of universal access to affordable, essential medicines. 84 He suggests that it is extremely important that the Bioethics Declaration makes it clear that its principles apply to corporations, as much as to natural persons and states. 85 It is worth reproducing the social responsibility principle of the Bioethics Declaration. It was hard fought over by the


82. See WORLD TRADE ORGANISATION MINISTERIAL CONFERENCE, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DC/2 (November 20, 2001).

83. Faunce, supra note 75, at 17.

84. Id.

85. Bioethics Declaration, art. 2.
Drafting group, the IBC and the IGBC. It is, perhaps, the most important principle added of the declaration. The social responsibility principle of the Bioethics Declaration reads:

**Article 14 Social Responsibility and Health**

(a) The promotion of health and social development for their people is a critical purpose of government that all sectors of society share.

(b) Taking into account that the enjoyment of the highest obtainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition, progress in science and technology should advance:

(i) access to quality healthcare and essential medicines, including especially for the health of women and children, because health is essential to life itself and must be considered as a social and human good;

(ii) access to adequate nutrition and water;

(iii) improvement of living conditions and the environment;

(iv) elimination of the marginalisation and exclusion of persons on the basis of any grounds; and

(v) reduction of poverty and illiteracy. 86

Having been expressed in the Bioethics Declaration and endorsed by UNESCO, these ideas are now abroad in the world to influence thinking and promote action in the way the UDHR has done these past sixty years.

**VI. Evaluation: A Step Forward**

What has all of the foregoing to do with contemporary health law and policy, the focus of this Journal as of so much of the recent writings of Professor George Smith? Are the provisions of the Bioethics Declaration not simply vague ‘motherhood’ statements, prepared with inadequate time and consultation, hotly debated by delegates in underground rooms in Paris, and then neatly filed and forgotten on the shelves of libraries and international agencies? Why should lawyers, particularly lawyers in the largely self-sufficient jurisdictions of the United States, be the slightest

86. Bioethics Declaration, art. 14.
concerned about a non-binding declaration of a United Nations agency, expressed in often vague language of imperfect obligation?

There are several answers to these questions. Municipal law today incontestably operates in an ever-widening context of international law. Legal policy and principles expressed, even in a non-binding declaration by the governing body of a United Nations agency, can influence the international discourse and stimulate the evolution of customary international law. Although it was formulated in a resolution of the General Assembly, created by the Charter, and not by a specialised agency such as UNESCO, the UDHR of 1948 has undoubtedly informed the reasoning of judges in the intervening years, both in international and national courts and bodies.

In deciding proceedings before them, virtually all judges of the High Court of Australia have, at some time during recent decades, referred to a principle expressed in the UDHR. They have done so in explaining the context and in expressing the local principle for the resolution of a particular case.\(^87\) I have done so many times myself.\(^88\) This does not mean that, as such, the principles of the UDHR bind the judge or state the content of a legal rule in the way a municipal rule would. It simply means that, by


offering a general principle, accepted by an organ of the international community, the judge is afforded a mooring, or bearings, for an approach to the case in hand.

Particularly in the more transparent mode of discursive reasoning observed in common law courts, judges will sometimes refer to international statements of general principle in order to explain the particular context for the case for decision. It is in this way that contextual propinquity can sometimes spill over into the judge’s explanation and verbalisation of the solution to the local problem. This does not happen every day. Some judges will never refer to such sources. Some will never read such materials. Others who do will never mention it in their reasoning.89

However, the reality of the last decade or so, in the United States, Australia, and most other countries of the Anglo-American legal tradition, is that judges are increasingly better informed about happenings in international law and policy. If they are not, lawyers appearing before them may draw international developments to their attention, to set the legal scene as it were. Just as international telecommunications, transport, and trade profoundly affect the world we live in, so international ideas and law (even ‘soft’ non-binding ‘law’) are sometimes useful to a judge in finding and explaining the content of municipal law. Texts, such as the Bioethics Declaration, are now available to influence enacted municipal law, national and international policy-making, the advocacy of international civil society organisations, the arguments of scholars, and the rhetoric of the world’s globalised media.90 Anyone who contests these developments is not living in the modern world.

There are defects in the contents, structure and drafting of the Bioethics Declaration. Some of these might have been corrected had the IBC, and its drafting group, enjoyed more time than was allowed to them. In effect, the IBC was required to perform its mandate in less than half the time that it took in 1948 to adopt the UDHR. Meanwhile, the participating states had greatly increased, the United Nations itself was more diverse, the interests at stake were more disparate, and John Humphrey was not there to work his magic.

Many more changes to the text prepared by the expert members of the IBC were made to the Bioethics Declaration than had happened with the two


90. See Bioethics Declaration.
earlier declarations of UNESCO on this subject. 91 Certainly, more objections were raised on behalf of member states than occurred with John Humphrey's draft of the UDHR in 1948. The text of the Bioethics Declaration lacks the pristine simplicity, brevity, and conceptual clarity of the UDHR. In this respect, the text was in a better state when it was delivered by the IBC to the IGBC.

It was the IGBC, for example, that added to the text of the draft Bioethics Declaration an entire new article dealing with the special case of "Persons without the capacity to consent." 92 Descending to this level of particularity and detail, whilst appropriate to a subordinate text or commentary, was not, in my view, appropriate to a universal declaration such as that on bioethics. The special cases and exceptions could, and should, have been foreshadowed by a short formula, not the introduction of a long, detailed article. Moreover, the original IBC draft reflected the view of the experts that, in contemporary society, notions of "free and informed consent" should be expanded to respond to recent bioethical debates about the participation of the medical subject in decisions—in an idea that travels beyond notions of one-off patient consent or refusal. 93

For all that, the Bioethics Declaration remains an important advance for the international community. This is particularly so because the world today faces vigorous debates over the rights of every human being to "the highest attainable standard of health." 94 Such issues are acute and urgent in relation to the rights of indigent persons in sub-Saharan Africa who are infected with HIV/AIDS. That is where such issues have been most vigorously debated in recent years. However, the principle is also applicable to other health conditions and to the healthcare systems of developed countries, including the United States. The recognition, in an international instrument, even one that is non-binding and in need of further refinement, that such access is an aspect of contemporary and universal human rights, is a step in the right direction.

Ultimately, I take this to have been the conclusion reached by Professor George Smith when the Bioethics Declaration was first adopted. 95 I agree with him. For his contributions to this subject, to debates over the right to

91. See UNESCO, The Universal Declaration on the Human Genome and Human Rights; UNESCO, International Declaration on Genetic Data.
92. Bioethics Declaration, art. 7.
95. Smith, supra note 4, at 740.
health, healthcare and health protection and to bioethics and law generally, he is truly a legal scholar in harmony with the challenges of the twenty-first century.