

A conflict of interests - Human rights, civil liberties and water fluoridation.

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Introduction - The ethical controversy over water fluoridation.

The addition of fluorosilicic acid, a highly toxic corrosive poison, as a source of 'fluoride' in drinking water is a highly contentious public health intervention. Around 10% of the English and 70% of the Republic of Ireland's population are supplied with virtually unavoidable public drinking water supplies that are fluoridated, in the hope - almost certainly unwarranted - that their children will have fewer bad teeth. This is unquestionably a clinical intervention, as it constitutes the administration of a substance to members of the public with the express intent to affect their personal health.

Since it is also non-consensual - in Southampton last year 73% of respondents in a poll rejected a proposal to fluoridate the City's water supply - it appears to be in violation of the human rights of the public. Yet in a number of States, including Britain and Ireland, the policy of water fluoridation forms part of the armoury of public health interventions that governments rely on to maintain the health of the people. So the use of this intervention within the code of civil liberties seems to be at odds with its apparent violation of the human rights of members of the public.

The resulting confrontations between anti-fluoridation groups and a very small band of fluoridation advocates within the dental and public health professions have been running for decades. However, recent developments, in which reputable scientific evidence confirms that this practice is neither safe nor effective, are forcing the debate into the Courts.

Up to half of all children in fluoridated areas develop a condition in which the enamel of the teeth becomes discoloured and, in more serious cases, badly discoloured and deformed. The ethical issues raised by what the public recognise as 'mass medication' are becoming of concern to legal practitioners. Those States that do fluoridate their water supplies invariably deny that the practice is medical, and ignore claims that it is in breach of human rights legislation. This study therefore provides a brief review of the main issues that are relevant to legal practitioners working under the European framework of legislation.

Misleading the public - public perceptions of human rights and civil liberties.

Much of the claimed ethical support for fluoridation relies on the use of emotional language to persuade the public and the medical profession of the alleged morality of the practice. Proponents claim that the physiological need for fluoride, especially among socially deprived and disadvantaged children, is such that objections to fluoridation by non-consenting members of the public are, by implication, morally unacceptable. Proponents speak passionately of the distress of infants exposed to traumatic and even life-threatening tooth extractions under general anaesthetics to remove their 'diseased body-parts' (bad teeth), and alleging that many children are permanently damaged and may even die during such operations.

In fact, tooth extractions on children under general anaesthetics in dental surgeries was banned in the UK in November 1999 - too many children were dying during treatment, and incidents of children dying during such operations in hospitals are now extremely rare. This is so even though the UK has a higher referral rate for such operations than most European countries, where less invasive procedures are preferred.

Objections to water fluoridation are often expressed on the grounds that such non-consensual medication violates their human rights. The political and institutional conflicts raised by such enforced medication have been discussed in the past (for example, see Balog (1), Cross and Carton (2), Nuffield Council on Bioethics (3)), and I believe that there are persuasive ethical arguments against this practice. However, as in other aspects of the controversial subject of water fluoridation, the human rights issues have been deliberately obscured by the introduction of irrelevant and in some instances deliberately diversionary arguments.

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One of the most severe obstacles to rational examination of the conflicting ethical views on water fluoridation is the common failure to understand the difference between human rights and civil liberties. This confusion is compounded by the invention of fictitious 'rights', opposition to which is argued to be a 'violation of a child's right to receive the claimed medical benefits of the practice'. This argument forms the foundation of assertions that fluoridation is an ethical public health intervention that are repeatedly forwarded by some promoters of the practice.(4) In my view, this is a parody of the ethical principles with which modern States are expected to comply, and has no foundation in either democratic codes of behaviour or in law.

Prohibition on criminal assault.

Regardless of the specific ethical issues raised by fluoridation, there are robustly established legal prohibitions on actions that cause damage to individuals. Under virtually all criminal codes, non-consensual or unlicensed medical interventions against the individual are regarded as medical assault. In English law such acts have been expressly forbidden since at least 1862, when the administration of any poisonous or noxious substance was proscribed under the Offences Against the Person Act.

With respect to the central issue in the fluoridation debate, that of the need for consent to be exposed to this product, this Act does not specify that consent to the administration of such a substance should be regarded as a mitigating factor - giving a person a poisonous substance is quite simply prohibited. The only derogation from this strict ban on poisoning one's neighbour is provided by medicinal law, in which the administration of, in many instances, extremely toxic substances is permissible, but only by qualified and licensed individuals, using closely regulated substances, and under strictly controlled circumstances. The practice of medicine, dentistry and other health interventions is only possible under these exceptions to the general rule that poisoning one's neighbour is wrong.

Almost all forms of 'fluoride' are both 'poisonous and noxious' within the meaning of the Act. Many, including sodium fluoride and sodium silicofluoride (or fluorosilicate), and hydrofluoric acid and its derivatives, that are used to fluoridated municipal water supplies are specifically identified as poisons under the 1972 Poisons List Order and later amendments.

Fluorides are known accumulative toxins, and no formal medical licence for their ingestion has ever been issued by any State. Consequently, pro-fluoridation advocates are vulnerable to potentially serious criminal charges. Attempting to persuade the State that it should administer an unlicensed toxic substance to minors, and even to the entire population, may constitute conspiracy to procure an assault on the public. If any form of physical damage results, then the charge may be more serious.

If, for example, a person were to develop even moderate dental fluorosis, this could result in a charge against an advocate of fluoridation, or a health authority, of conspiring to procure an action to cause actual bodily harm. If any individual were to contract potentially fatal fluoride-induced osteosarcoma or some other serious or life-threatening condition which can be shown to have been caused by early exposure to fluoridated water, then the charge would become causing (or conspiring to procure an action that caused) grievous bodily harm. In the extreme event of a death, a charge of negligent manslaughter would be appropriate.

In practical terms, the charge that an individual conspired with others to procure an assault on the public, or that a water provider actually carried out such an assault by fluoridating a public water supply, could be soundly established in evidence. However, proving to a Court that implementing the practice actually caused a specific individual to develop such adverse effects is more problematic, since the confounding factor of the existence of alternative sources of fluoride now widely available allows Respondents to claim that an Applicant may have consumed highly fluoridated toothpaste in infancy. In this case a Class Action based on a statistically significant increase in the prevalence of known adverse reactions after a new fluoridation scheme might have a better prospect of succeeding.

The difference between human rights and civil liberties

However, when the charge raised is that the practice violates the human rights of individuals, the situation is less well-defined, since the concept of what constitutes a personal 'right' may be challenged by social, commercial or political interests. So it is necessary to be clear on the different status of specific 'rights', and how they relate to 'civil liberties'.

Human rights - protecting the individual

Human rights apply to all individuals, regardless of their social condition. The protection of human rights is enshrined in all national legal frameworks, although some regimes are less inclined to adopt the full range of rights that are recognised by others. But not all rights are equal - all legislation dealing with human rights identifies both absolute and relative (or conditional) rights, and these are treated differently under national codes of civil liberties.

Absolute rights include the prohibition of cruel and inhumane treatment, such as torture and enforced medication. Some Codes prohibit any such treatment whatever, whilst others permit the State or its servants some flexibility in how far they may go, for example in pressurising interviewees in anti-terrorism investigations, before they are deemed to have violated the subject's right not to be mistreated.

The circumstances in which absolute rights may be modified or removed, and the degree of modification that is then permitted, are extremely limited. They depend on the thresholds at which such treatments are considered to become unacceptable, and the definition of this boundary varies in different States and under different conventions and international agreements. Consequently, up to a certain level, oppressive actions that may be regarded as violations of an absolute right in one State may still be considered to be permissible in others.

Conditional (or relative) rights are those that are subject to restriction if their exercise would have an adverse effect on the absolute or relative rights of another individual, or of the population as a whole. In such cases, States have to exercise discretion in order to achieve consensus on what is permissible in order to preserve the rights of the competing interests of the participants..

Civil liberties - modifying human rights for the mutual benefit of the community.

Civil liberties are not identical to human rights, and differ according to the prevailing moral code of the society. They constitute a set of mutually agreed criteria for behaviour that societies adopt in order to provide an acceptable working framework for co-existence. The way in which a right may be modified by codes of civil liberties depends on whether the right is absolute or conditional.

The right to refuse medication.

An absolute right can only be modified with the express and informed consent of every individual affected by the proposed modification. The balance between the exercise of the individual human rights of one individual that may threaten competing rights of others is illustrated by examining the implications of the first contracting a dangerous communicable disease, but then refusing to accept medication. If the infected person is permitted to exercise his or her right to freedom of movement, this may put others at immediate and severe risk of becoming infected, and even of death.

In such cases the State may order the infected person to be quarantined to protect the public against contagion. This may result in their temporary confinement and loss of their conditional right to liberty, but under the civil rights code this is permissible, since it defends the absolute right of others not to be negligently subjected to avoidable risk of medical damage or death.

The short-term suspension of a conditional right of an individual to liberty is therefore acceptable under codes of civil liberties, because it protects the conditional right of others not to be exposed vicariously to a potentially life-threatening risk. But even then, the infected person's right to refuse medication during quarantine remains absolute - provided they are legally competent to make the decision, the State may not violate an expressed wish not to be treated to cure the condition. The infected person cannot be forcibly medicated, even in the most extreme medical emergency, and that is the case even if they are likely to die as a result. Without their consent, no medical treatment may be administered.

When consent cannot be given by an individual.

In the case of those who are unable to provide informed consent, because they are mentally or physically handicapped to the extent that they are incapable of doing so, there are strict guidelines on the procedures that must be adopted before any such treatment is provided for the benefit of the patient. This includes the requirement to obtain permission from a legal guardian if one exists.

In a number of cases, objections to essential treatment by legal guardians of dangerously ill minors have been overturned by the Courts, on the grounds that the patient would survive if treatment were to be given, and they may agree to accept the treatment at a future date when they will then be deemed to be capable of expressing a legally valid opinion regarding the protection of their own safety and well-being. Such cases are rare, and the general principle that medical treatment may only be given under informed consent is respected by all ethical codes of civil liberties.

The contractual nature of the code of civil liberties.

Codes of civil liberties constitute a formal contract between the State, local communities and individuals. The terms of this contract specify the freedoms and constraints under which the people and State administration agree to live and collaborate in order to enjoy the benefits of the community as a whole. But within this contractual framework, the absolute rights of the individual must always take precedent over the actions and interests of other individuals, and of the State itself.

It is therefore imperative that civil liberties legislation should provide full protection of the absolute rights of the individual, whilst at the same time setting out clearly the conditions under which conditional rights will be regulated by the State for efficient management and the maintenance of civil order. Like all contracts, the terms of this agreement may be modified or removed by mutual consent at any time - for example, civil liberties may be severely restricted in times of public disturbance or war, or during a dangerously virulent epidemic, and relaxed again once hostilities or the risk of cross-infection have ceased.

Water fluoridation as a medicinal intervention.

The relevance of the Jauncey decision

The controversy over the State-mandated administration of 'fluoride' in drinking water provides a graphic illustration of the conflict that can arise when political objectives lose sight of the boundaries between civil liberties and human rights. In attempting to fulfil its duty to provide for the health of the public the State may have to tread a fine line between the exercise of its police powers and the imposition of oppressive actions that transgress the boundary between civil liberties and the human rights of the public that it serves. In the field of public health, that boundary is drawn at the absolute right of the individual to refuse medication, particularly when that right may be reasonably exercised without risk to the safety and rights of other members of the community.

There is no doubt that water fluoridation is medication in law. In 1983 Lord Jauncey ruled that

Section 130 (of the Medicines Act 1968) defines 'medicinal product' and I am satisfied that fluoride in whatever form it is ultimately purchased by the respondents falls within that definition." (5)

In this crucial judgment, Lord Jauncey stipulated that all forms of fluoride, including those included in dental products, must be classified as medicinal products. For this reason, all fluoridated toothpastes are required to hold both a cosmetic product authorisation and a medicinal product licence, since the fluoride is incorporated into these products with the express intent to prevent dental decay.

In a more recent hearing before the European Court of Justice (ECJ) (6) the Court reinforced earlier decisions of the Court on the application of medicinal law to ingestible products. The Court ruled that there is an absolute requirement that any drink that has, or is promoted as having, medicinal properties must be regulated as a medicinal product.(7) In European law, food includes drinks, including water, and the 2005 ruling specifically identifies '***near-water drinks with added minerals***' as 'functional drinks'. Since the ruling applies to 'drinks' and not to specific forms of their presentation and marketing - for example as bottled products - it applies equally to bottled water and to the 'water for human consumption' that is provided through the local water distribution network to homes and business premises.

The requirement for informed consent to medication by fluoridation.

Lord Jauncey's ruling that fluoride is a medicinal substance leads to the conclusion that fluoridated drinking water may only be supplied in compliance with the restrictions that are placed on the manufacture and supply of all other medicinal products. But as a medicine, its administration is absolutely subject to the free and informed consent of every member of the public at risk from consuming it.

This applies even to the preparation of foods. Water is widely used in preparing and processing food products, and may even be deliberately added to the product in order to improve its texture of a product - some processed meats, including chicken and ham, may contain appreciable proportions of added water. In the *Warenertriebs and Orthica* ruling the ECJ specifically declared that any food prepared with a 'functional drink' - including 'near-water drinks with added minerals' - must be licensed as a medicinal product. Fluoridated water is precisely such a 'functional drink'.

As the Court stated, such products may only be exported to the European Community if they are accompanied by a relevant medicinal product licence. This would enable consumers to exercise their right to make an informed choice of whether to accept and consume the product, as a medicine and not as a food. In fact, wherever it is proposed to fluoridate entire public water supplies there is always strong public resistance to the proposal on the grounds that since it is effectively unavoidable, its supply constitutes compulsory medication.

The refusal of States such as the UK and the Republic of Ireland to recognise Lord Jauncey's landmark ruling that fluoridated water is a medicinal product violates the principle of mandatory consent for medication, and is susceptible to challenge under the medicines legislation. Precisely such a challenge is in process the UK now. Legal Aid has been awarded to a Southampton resident, Mrs Geraldine Milner, to challenge the interpretation by the local Strategic Health Authority (SHA) of the provisions of the *Water Fluoridation (Consultation)(England) Regulations 2005*.

During the recent public consultation over the proposed fluoridation of the City's water supply, the SHA published extremely biased information - criticised in Parliament by Earl Baldwin as propaganda - and dismissed overwhelming public opposition to the proposal. The SHA suggested that the public was not sufficiently informed to hold a valid opinion, and that the SHA itself was better qualified to assess the medicinal evidence on the issue.

A request for Judicial Review to examine whether the SHA acted in compliance with Parliament's expectations when the Bill was being debated (8), and indeed, whether the Regulations actually reflect Parliament's wishes regarding the conduct and application of such consultations, has been rejected. Although an Appeal is to be made, the SHA has now defiantly announced that it will confirm its instruction to Southern Water to proceed with the fluoridation of Southampton's water supply..

The application of the European Convention on Human Rights to fluoridation

Virtually all current codes designed to protect the rights of the individual are derived from the Nuremberg Code of 1948, devised to ensure that the non-consensual medical experimentation atrocities carried out by the Nazi regime in Germany should not be permitted to reemerge in modern societies (9)

Relative v. absolute rights in the European Court.

The British Government denies that fluoridation is in breach of the Human Rights Convention, relying on a ruling by the European Commission of Human Rights in the only historic case relating directly to water fluoridation. In *Jehl-Doberer v Switzerland*(10), the Petitioner asserted that fluoridation violated his right to privacy under Article 8 of the Convention, but this petition was rejected. The Court ruled that Article 8 confers only a conditional right, and is subject to modification if the action benefits public health. Since the weight of evidence submitted by the State convinced the Commission that fluoridation does confer such benefits, the argument for the presumed medical advantage to the general public took precedent over the claimed violation of the Petitioner's right to privacy. However, the Court's decision that an action that benefits an individual's health and can be imposed in spite of that person's objection is a serious challenge to the principle that a medicinal intervention is absolutely subject to consent, and will inevitably be challenged in the future, now that the Southampton project appears to liable to go ahead, setting a precedent for the planned fluoridation of a projected additional 20 million people in the UK.

The 'threshold' for unacceptable behaviour

Jehl-Doberer's choice of grounds for the petition was perhaps unfortunate, since a stronger case could have been made had he relied instead on Article 3 of the Human Rights Convention, which establishes an absolute right from which there can be no 'derogation' (exemption). This states that

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'

However, a supporting verdict on this ground could still not have been guaranteed, because the point at which a non-consensual medical intervention becomes sufficiently serious for it to constitute a violation in excess of that threshold is not clearly defined. Many administrations attempt to preserve an element of flexibility in the rigour with which such legislation is actually implemented.

Some national courts do not automatically regard any treatment or intervention for which consent has been withheld as being in violation of Article 3 of the Convention. For an action to be regarded as constituting inhuman or degrading behaviour it must exceed a rather ill-defined and arbitrary 'threshold'. The level of this threshold may vary according to the State's perception of the necessity for such oppressive action, and is therefore often a matter of political expediency rather than of absolute morality. Under some administrations, security services routinely use robust means of interrogation of terrorism suspects to obtain intelligence under draconian anti-terrorism legislation.

The British Government has in the past tried unsuccessfully to obtain 'derogation' (exemption) from Article 3 of the Human Rights Convention, apparently in an effort to prevent its treatment of suspected terrorists from being condemned under the Convention. Against such a competing background of covert State-imposed violence, the threshold at which an Article 3 violation is triggered has therefore been set at a very high level by the Courts, and relatively minor infringements are dismissed as not constituting cruel and inhuman treatment.

Fluoridation is one such example. State advocates of the practice repeatedly deny that water fluoridation causes any significant adverse effects on consumers, and that it is entirely beneficial and without risk. This is reflected by the repeated rejection of complaints from members of the public against this form of non-consensual and unlicensed medication to the medicines regulator, the Medicines and Healthcare Products Regulatory Authority (MHRA).

The Agency invariably rejects all such complaints, on the spurious ground that fluoridation is not medication (despite the Jauncy ruling) and that therefore no offence is committed. Until this perverse approach is overthrown the prospect of a successful challenge in the Courts under the English Human Rights Act appears to be poor.

Does the Article 3 prohibition on cruel and inhuman treatment apply to a community?

However, it is my personal view that the summary dismissal of complaints that fluoridation violates the Article 3 right of individuals has largely diverted public attention away from the original reason for the establishment of this prohibition. All modern international Conventions and related agreements designed to protect human rights originate from the Nuremberg Code, so it should be born in mind that the atrocities that stimulated the formulation of that Code were not solely directed at individuals, but to entire ethnic communities.

Whilst the human rights of individuals are now extensively codified into law, there is an ethical imperative that the same level of protection must be accorded to human communities and to society as a whole. If a State imposes an intervention on a community that is likely to result in severe damage to any member of that community, or to a general increase in chronic medical damage to a significant proportion of its members, then that intervention may be held to exceed the triggering threshold for an Article 3 violation.

It may also be in breach of legislation designed to prevent discrimination against ethnic minorities. For example, African, Asian and Native Australian people appear to suffer from a disproportionately greater degree of dental fluorosis than ethnic white communities subjected to fluoridated water supplies. I have therefore briefly examined the application of Article 3 of the Convention on Human Rights to the effects of fluoride exposure at the community level in the following paragraphs.

The ecology of fluoride poisoning.

Medical ecology is a branch of science that investigates the connection between ecological functions and human health, particularly at the population level, and it is here that the known adverse, and in some cases lethal, effects of fluoride exposure within large populations become relevant. The development of widespread dental fluorosis in a fluoridated community invariably results from exposure to drinking water containing the supposedly 'optimal' concentration of 1mg F/litre.

Whilst the evidence for the claimed reduction in dental caries in fluoridated water areas is poor, proof of the inevitable development of an entirely different form of dental disease - dental fluorosis - is irrefutable. Those children disfigured by moderate or severe fluorosis suffer from the the social disadvantage and psychological trauma of this disfigurement in their early years. Subsequently they have to undergo repeated corrective treatment that can only be carried out on adult dentition. As a prominent Canadian dental expert noted

The correction of this permanent disfigurement involves crowns, laminates, bonding, and bleaching. The physical, psychological, emotional, and financial costs of the repeated trauma necessary to correct this condition far exceeds any projected benefit that fluoridation can possibly produce. This is truly a case where the treatment is worse than the problem. (11)

But in some cases, serious and even life-threatening medical conditions may develop in specific small cohorts of a large population, and the occurrence of some of the more life-threatening medical consequences of fluoridation is becoming increasingly well documented.(12) Medical data from populations exposed to fluoride emphasise the extent to which the rights of communities need to be recognised in order to protect them against interventions that have the capacity to cause severe and debilitating effects in individual members of the community.

Data from medical ecology are therefore cogent to arguments on the application of human rights legislation to communities, rather than solely to the review of their relevance to individuals. Whilst many of the medical effects of fluoride poisoning have alternative causes that make interpretation difficult, the following example provides evidence of the extent of the pathological effects that can arise within an entire population as the result of ingesting natural fluoride. In this case the usual confounding factor - ingesting fluoride from modern-day sources such as commercial dental products and industrial chemicals - is entirely absent, and the effects are only due to the absorption of fluoride from the natural drinking water supply.

Evidence of harm - fluorosis in the people of the Dilmun Culture.

Palaeopathology is a branch of forensic medicine that examines the diseases of ancient civilisations, especially through the examination of skeletal remains exposed by archaeological excavations. The Bahrain Museum has extensive collections of human remains from the Dilmun Culture, populations of people living in this part of the Persian Gulf from around 5,000 BC. These bones provide graphic evidence of the damage that water containing even the 'recommended optimal concentration' of fluoride can cause at the population level.

For seven thousand years the inhabitants of what is now Bahrain have been drinking water from wells and springs fed from an aquifer containing around 1.3mgF/l. This is slightly less than the maximum permissible concentration of fluoride (1.5mgF/l) established in the European drinking water quality legislation. The main additional dietary sources of fluoride intake were tea and fish, although the agrarian communities had less access to fish than the coastal fishing communities. Crucially for our examination, no fluoridated dental products were available at that time. Since the absorption of calcium fluoride from food is relatively limited (13,14), drinking water was by far the most significant source of bioavailable fluoride for this community.

If the claims of fluoridation proponents are to be believed, the Dilmun people should have had excellent teeth, with very low levels of caries. Yet the archaeological evidence reveals that the population had an extremely high incidence of dental caries. During the Islamic Period up to 80% of adult teeth were carious, whilst amongst children aged 3 to 6 years, 17% of deciduous teeth were carious (15). At the same time, the prevalence of dental fluorosis was around 50%, with up to 20% of the population experiencing moderate or severe fluorosis. Even marked skeletal fluorosis was fairly common, with manual labourers being particularly prone to this debilitating condition. (16)

Since the prevention of caries in children is the principle objective of water fluoridation, the evidence of the high prevalence of dental fluorosis in children in this historical sequence of Bahraini populations confirms the significant medical risks that this practice presents to both children and adults. At the same time, it demonstrates that the recommended 'optimal concentration' of fluoride in the drinking water did not prevent the very high prevalence of dental caries in this population.

Exceeding the threshold for an Article 3 violation within a population.

It is clear from the Bahraini evidence that environmental contamination by fluoride, even at the supposedly 'safe and effective' concentration of 1mgF/l in water and in the absence of significant alternative sources of fluoride, is capable of exerting a significant adverse effect on individual members of exposed populations. Recent detailed analysis of medical statistics has convincingly revealed that some ethnic sub-groups are at particularly high risk or are unusually vulnerable to the development of very serious and potentially fatal diseases.

It is therefore statistically inevitable that some individuals in any substantial population will suffer severe pain, and some may even develop fatal conditions such as osteosarcoma (bone cancer), as the direct result of deliberate fluoridation by the use of chemicals that are far more bioavailable than naturally occurring fluoride. So at the population level, fluoridation causes both a widespread incidence of chronic disease and a far more severe reaction in some individuals within the population. For the latter at least, this response may be evoked by treatment that exceeds the triggering threshold level recognised by British Courts.

Consequently, I believe that fluoridation does appear to violate the Article 3 prohibition on cruel and inhuman treatment at the population level, even though the identity of the most vulnerable individuals who would be affected cannot be predicted in advance. The mere inevitability that there will always be some member of the community who will be severely affected, regardless of any highly questionable politically-imposed threshold level is, in my view, enough to challenge the imposition of fluoridation under the Human Rights Convention.

The Council of Europe's 'Convention on Human Rights and Biomedicine'

Internationally, there are numerous ethical codes that proscribe medication without consent. One such is the Council of Europe's ***European Convention on Human Rights and Biomedicine*** ('Biomedicine Convention') (17), which has been described as ***the first legally binding international biomedical law and ethics document to uphold human dignity as a fundamental concept and to provide a legal framework for societies with different sociocultural and philosophical backgrounds*** (18)

Article 5 of the Biomedicine Convention states that

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time.

This prohibition on non-consensual medical intervention applies to any such action, regardless of the severity of the effect that it may have on the recipient. It even covers both the administration of a placebo and any attempt to merely diagnose a medical condition without the express consent of the recipient. As such, there is no 'threshold' level below which violation is deemed not to have occurred.

Although this is consistent with many institutional Medical Codes of Practice, this absolute level of protection is not reflected in the British Government's perception of its need to respect personal integrity in the field of terrorist interrogation. Perhaps predictably, the UK has refused to sign the Biomedicine Convention, whilst France has refused to ratify it, and proponents have taken this as proof that there is no ethical obstacle to fluoridation.

The UNESCO Universal Declaration on Bioethics and Human Rights

However, UNESCO's *Universal Declaration on Bioethics and Human Rights* ('The Declaration') challenges the refusal of these States to endorse the Biomedicine convention. The Declaration, which came into force 'by acclaim' in 2005¹, requires all Member States of UNESCO to recognise the provisions of the Biomedicine Convention in their domestic law, and states:

¹ (Note: Amongst those States that fluoridate water supplies, the UK was a Member between 1946 and 1985, and rejoined in 1997, Australia and New Zealand have been Members since 1946, the USA rejoined in 2003; Israel joined 1949, Ireland joined 1961)

Recognising that moral sensitivity and ethical reflection should be an integral part of the process of scientific and technological developments and that bioethics should play a predominant role in the choices that need to be made concerning issues arising from such developments. . . this Declaration is to be understood in a manner consistent with domestic and international law in conformity with human rights law (emphasis added)

On the specific issue of consent, the Declaration states

Article 6 – Consent

1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice. (19)

This is virtually identical to the objective set out in Article 5 of the Biomedicine Convention. In an Editorial in the European Journal of Health Law, the international expert Prof. Herman Nys, commented

the European Court of Human Rights has already referred to the European Convention (on Human Rights and Biomedicine) as a standard in cases where Member States of the Council of Europe were involved that did not ratify (France) or not even sign it (the United Kingdom). In Glass v. United Kingdom the Court remarked “that it does not consider the regulatory framework in place in the United Kingdom is in any way inconsistent with the standards laid down in the Bioethics and Human Rights Convention in the area of consent” . . . According to Elaine Gadd, this was an important step as it is now probable that in relevant cases those consent standards will be applied to Member States who have not ratified the European Convention on Human Rights and Biomedicine itself. (20) (emphasis added)

Unlike the rulings of the European Court of Justice, those of the European Court of Human Rights are not automatically enforceable in EU Member States. Similarly, there is no automatic requirement for the UNESCO Declaration to be enforced in Member States of UNESCO.

But it is Nys's view that the principle of the primacy of the individual with respect to informed consent that is included in the Biomedicine Convention will now have to be written into the national legislation of all Member States of UNESCO. By implication, failure to do so would be regarded as refusal to comply with the objectives of UNESCO itself, and might result in dismissal of Members who refuse to endorse the Declaration in full. This applies equally for all non-EU Member States of UNESCO, including Australia, New Zealand and the USA, and almost certainly affects all other States where fluoridation is still practised.

In the past the British Government has argued that, since it does not recognise either the Biomedicine Convention or the EU Charter of Fundamental Rights, it is entitled to exercise its own discretion in deciding whether or not fluoridation is in breach of human rights legislation. This UNESCO Declaration poses a strong challenge to this attempted opt-out - in conjunction with the Jauncey ruling, it unequivocally establishes that fluoridation, as a form of enforced medication, must now be subject to regulation under the human rights law.

The need to apply the Precautionary Principle

Whilst this personal view has not been tested in the Courts, this approach suggests that, at the very least, the practice of fluoridation must be proscribed, and that the Precautionary Principle must be invoked, since the outcome for at least some members of the population can be reliably predicted to be extremely dangerous. In this respect, any properly registered and licensed medicine that causes such widespread and unnecessary side-effects should immediately be withdrawn from the market. In distributing this medicine without a mandatory product marketing authorisation, in itself a serious offence, it appears that the UK and Irish regulators of medicinal products are either incapable of enforcing the medicines legislation, or else they are deliberately ignoring their statutory duties for entirely unacceptable political reasons.

Since the adverse medical outcomes of imposing water fluoridation on large populations are reliably predictable, health professionals of all types who recommend its adoption and implementation may be exposed to personal liability for the consequences to those who develop unacceptable and otherwise avoidable damaging side effects. This is unlikely to be covered by either personal or corporate Professional Indemnity Insurance, without which no medical, dental or healthcare practitioner is allowed to practice.

Conclusions

1. In dealing with human rights challenges to water fluoridation it is essential recognise the hierarchy of personal rights and liberties that exists under the existing legislation.
2. Absolute rights must be recognised at all times, whereas conditional rights may be at least temporarily suspended where failure to do so may violate an absolute right of another person.
3. Civil liberties constitute a mutually accepted contractual Code of Practice for harmonious co-existence within communities, but the absolute rights of individuals within that society must take precedence.
4. Individuals have the absolute right not to be subject to cruel and inhuman treatment, as set out in Article 3 of the European Convention on Human Rights.
5. This prohibition could be evaded by the imposition by a States of a 'threshold' level of oppressive behaviour, below which no violations is deemed to have occurred.
6. The Codes of Human Rights derived from the Nuremberg Code must apply to both individuals and to communities.
7. The protection afforded to individuals by Article 3 of the European Convention on Human Rights also applies to the right to protection of the entire community where most or all persons are at risk from a non-consensual medicinal intervention.
8. In any large fluoridated population, some individual will inevitably be so severely affected by this intervention that the practice constitutes 'cruel and inhuman treatment' exceeding the triggering threshold for an Article 3 violation under the Human Rights Convention.
9. Article 5 of the Council of Europe's European Convention on Human Rights and Biomedicine prohibits any medical intervention, however trivial, without full and informed consent by the recipient.
10. The UK has declined to sign this Convention, and claims not to be bound by the principle set out in Article 5 of the Biomedicine Convention..
11. Article 6 of UNESCO's Universal Declaration on Bioethics and Human Rights endorses the principle set out in Article 5 of the Biomedicine Convention.
12. It requires all Member States to comply with the strict interpretation of the prohibition on any such intervention. The Convention does not recognise any arbitrary 'threshold' level below which violation does not occur.
13. Since the UK is a Member of UNESCO, its refusal to endorse the Biomedicine Convention is inconsistent with its status as a signatory of the UNESCO Declaration.
14. All other Member States of UNESCO currently fluoridating their water supplies are obliged to recognise and adhere to this principle and, in the absence of consent from every member of their societies, to abandon the practice of water fluoridation.

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