

## SOME THOUGHTS ON THE EMERGENT RIGHT TO WATER

In recent years there has been an emergence of a critical scholarship within the social sciences – particularly in the field of political philosophy and law – which has sought to bring to attention, or to forefront, that which is excluded from mainstream discourse or standard narratives. The sense of this scholarship is not merely to observe the point at which law ends and politics begins, or to identify the limits of any linguistic representation (and hence the limits of any hermeneutic endeavour), but to reflect upon the way in which that those peoples, ideas, situations or events which are excluded from the discourse in question, may paradoxically come to represent its *raison d'être*. The first person to employ this idea in the context of human rights, of course, was Hannah Arendt, whose blistering critique of the rights of man was founded upon the idea that the quality of being ‘human’ for such purposes was reduced to a condition of savagery at the point at which the enjoyment of rights became dependent upon membership in a political society – a move which, of course, not only excluded those who were stateless but also, in doing so, rendered more problematic the basis of the emergent political order.<sup>1</sup> Rather than view the stateless in Europe as the hapless minority who were yet to enjoy the protection of human rights, she was to take their position as representative of what it meant to be a human for purposes of claiming or demanding human rights. And in the sense that the business of human rights advocacy remains dependent upon the identification of those who continue to suffer physically, or by dispossession (those who may be killed, and yet not sacrificed to use Agamben’s evocative phrase<sup>2</sup>), her point is surely still a perceptive one.

In line with this contemporaneous concern with the exception, or with the ‘dark-side’ of legal rule, I would like to reflect upon the significance of two ‘absences’ in the emerging debate surrounding the right to water. The first concerns the absence within authoritative texts (particularly the International Covenant on Economic, Social and Cultural Rights) of any express reference to water as a human right. The second concerns the absence, or perhaps ‘set of absences’ within the United Nations Committee on Economic, Social and Cultural Rights’ elucidation of the right to water in its General Comment No. 15 of 2002.<sup>3</sup>

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<sup>1</sup> Arendt H., *The Origins of Totalitarianism* (1968) pp. 267-302

<sup>2</sup> Agamben G., *Homo Sacer: Sovereign Power and Bare Life* (1995)

<sup>3</sup> General Comment No. 15, UN Doc. E/C.12/2002/11.

Before engaging directly with each of these, it may be useful to reflect briefly upon what ‘an absence’ might entail, and the point at which an absence seems to represent an exclusion in the sense articulated by Arendt. In its literal sense, an absence would appear to merely signify ‘being away’ (deriving from the Latin *ab-esse*), but of course the condition of ‘being away’ may speak of several different kinds of experience. One might be as the ‘absence of a friend’ – an absence brought about, perhaps, through loss, accident, or extenuating circumstances – whose characteristic determinant is perhaps a desire for presence, or the recognition that the absence itself constitutes a loss of some kind. This may be called, for present purposes, an ‘inclusionary absence’.<sup>4</sup> Another, contrasting, form of absence might be the ‘absent other’ – an absence of someone or something whose presence is neither desired nor necessary, but whose existence has nevertheless been recognised. The physical dislocation of that which is absent (being away) corresponds here to an emotional, social or political dissociation between that which is present and that which is not. The absence, here, constitutes not a loss, but an affirmation of what is not included, and may be referred to, in that sense, as an ‘exclusionary absence’.<sup>5</sup> A third form of absence is one in which the presence of the person or thing which is ‘not there’ is neither desired nor opposed in the senses of either an inclusionary or exclusionary absence, but results simply from a lack of cognition/recognition. The absence here speaks more of an ‘absence of mind’ in the sense that had some thought been given to the matter, some positive decision to include or exclude might have been made, and that it was only at some later date that the issue of ‘non-presence’ came to assume some prominence. All forms of absence seem to be premised upon the relationship between ‘being’ (in an ontological or epistemological sense) and intention: that which is absent serving to define or constitute that which is not.

How then, might this typology of absence relate to the issues I have raised concerning the right to water?

#### 1. Interpretive Ambivalence: A Human Right to Water?

In recent debates concerning the right to water, much is usually made of the fact that the right to water finds no explicit recognition within any of the major human rights

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<sup>4</sup> Expression of this idea is found in the ‘*ejusdem generis*’ rule.

<sup>5</sup> Expression of this idea is found in the latin maxim ‘*expressio unius est exclusio alterius*’

instruments – with the exception, perhaps, of article 14(2) of CEDAW. There is no mention, for example, of a human right to water in the Universal Declaration of Human Rights. None either in the International Covenant on Economic, Social and Cultural Rights. Where the latter speaks of right to an adequate standard of living, furthermore, mention is made of ‘adequate food, clothing and housing’, but not of water – an absence which in the present context appears rather startling. Despite the disquieting silence of major human rights agreements on the topic, the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 15 (2002) reaffirmed in explicit terms that which was already implicit in much of its earlier work – namely that there existed under the terms of the UN Covenant, a right of access to adequate drinking water and sanitation as part and parcel of the more general right to an adequate standard of living in article 11.

This creative affirmation did not go entirely unnoticed. In a subsequent debate within the UN Commission on Human Rights in 2003, the Canadian representative (Gregson) took a stand against the UN Committee’s pronouncements. He suggested that:

‘While accepting that governments owed a responsibility to their own people to provide access to a clean drinking water supply and sanitation, it did not agree that there was a “right” to drinking water and sanitation owed between states. The internationalization of a right to water between states was not grounded on any plausible reading of the Covenant on Economic, Social and Cultural Rights and was therefore opposed by his government.’<sup>6</sup>

As far as the Canadian government was concerned, then, the silence of the Covenant on the issue of water was deafening – it could not plausibly be maintained that the Covenant in any way recognised a right to water and the UN Committee’s intimations to that effect were effectively misplaced. Its remarks in that direction, however, were subtle. It merely denied the existence of ‘international’ obligations ‘between states’, rather than the existence of a responsibility on the part of governments to their own people for the provision of clean drinking water. It did not deny, for that purpose, that individuals or communities within Canada or elsewhere might legitimately campaign for the protection of their right to water, but merely denied that this right was afforded international protection under the terms of the UN Covenant. This was not, thus, a trenchant

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<sup>6</sup> Gregson (Canada), UN Doc. E/CN.4/2003/SR.56, p. 10, para. 48.

rejection of the idea of a right to water, but a rejection of its ‘internationalisation’ through a ‘misreading’ of the terms of the Covenant.

On the surface, the Canadian opposition to the position adopted by the UN Committee may be understood as turning upon a rival interpretive strategy. Whereas the UN Committee had clearly taken the view that the ‘right to an adequate standard of living’ could not be fully comprehended without some attention being directed to the issue of access to water, and hence had pursued what might be called a ‘teleological’ or ‘purposive’ approach to interpretation, Canada by contrast, insisted upon a narrow ‘literalist’ construction that denied the existence of any rights or obligations that were not explicitly mentioned in the text itself. To put in terms of the typology of absence described above, whilst Canada saw the absence of a right to water as an ‘exclusionary absence’, the Committee understood it to have resulted from a lack of cognition during the drafting of the Covenant of the potential significance of access to water for purposes of ensuring an adequate standard of living (an absence of mind), which thus could be treated as an essentially ‘inclusionary absence’.

Seen as a debate over the enduring significance of original intent, the debate does not go very far. The absence of evidence from the drafting record (*travaux préparatoires*) as to the significance of the original omission of reference to water in the Covenant, neither confirms nor denies the Canadian position (or indeed that of the Committee). For its part, no doubt, the Committee would insist that, in line with the interpretive strategies of other human rights bodies, the adoption of a ‘teleological’ or ‘evolutive’ approach to interpretation is more a ‘progressive’ or ‘legitimate’ approach to the interpretation of the Covenant, particularly given the Committee’s emphasis upon securing the position of the marginalised or disempowered within society. Canada, for its part, would probably insist that since the Covenant is an international agreement, it is for states parties to construe its terms (not a Committee lacking even quasi-judicial powers) and that respect for the principles of sovereignty and domestic jurisdiction demand that the boundaries of legitimate interpretation be closely construed by reference to what is there in the text, rather than by what is not.

But, of course, such interpretive strategies are heavily context-dependent. To take a separate example, the omission from the Covenant of any clause limiting States

obligations to actions or omissions taken within their respective 'jurisdiction', has given rise to controversy as regards the extent of States' 'international' or 'extraterritorial obligations' under the Covenant.<sup>7</sup> Canada, together with several other Western States, has largely opposed any reading of the Covenant that may indicate the existence of 'transnational' obligations, and has done so on the basis that the omission must be read in light of a background presumption – namely that obligations under treaties of this kind are primarily territorial in character.<sup>8</sup> Its position, in other words, reprises the position adopted by the UN Committee in respect of water – had the drafters of the Covenant realised the significance of the issue they would have inserted a clause (including the right to water/ excluding extraterritoriality) to that effect. The position of the Committee by contrast, has been to emphasise the clauses on international cooperation interspersed within various articles of the Covenant and has employed, in that sense, a largely literal construction of the agreement.

It is clear, in that respect, that different modes of interpretation do not neatly align themselves by reference to 'conservative' or 'progressive' traditions in thought. A desire to conserve the *status quo* may involve occasionally reading an instrument such as the Covenant in a 'teleological' or 'evolutive' manner, just as a desire to transform or change social relations may involve reading it 'literally'. Governments are as unlikely to insist upon one particular mode of interpretation being the only or definitive means by which the Covenant is to be construed, as the Committee is to insist upon another. No mode of interpretation is, as such, 'innately' better than another from whichever perspective one may stand. What thus becomes far more important in discussions on matters such as the right to water, is the background presumptions or imaginings that inform the adoption of a particular interpretive strategy – presumptions which may, at their various extremes, result in protagonists speaking on different wavelengths, or past, rather than to, each other.

The background presumption as articulated by Canada in the quotation above, appears to be one in which the Covenant is to be understood above all else, as an inter-state agreement that affords a degree of international legal protection to a particular category

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<sup>7</sup> See generally, Skogly S. and Gibney M., 'Transnational Human Rights Obligations', 24 *Human Rights Quarterly* (2002) 781; Coomans F., 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Coomans F. and Kamminga M. *Extraterritorial Application of Human Rights Treaties* (2004) 183, p. 185

<sup>8</sup> Report of Open-ended Working Group, UN Doc. E/CN.4/2005/52, para. 76

of human rights. That it may omit to mention something which might justifiably be called a 'human right' is neither here nor there, and its invocation of 'individual rights' is relevant only so far as it may impinge upon the scope of one State's obligations to another. As far as the Committee is concerned, however, the Covenant seems to be viewed in quite a different light. Far from merely being an agreement which incidentally refers to human rights, it is, together with the ICCPR, one of the central pillars of the international communities' human rights project. An absence or omission from the Covenant of a matter such as water is thus far more critical in the sense that it puts in question the basis of the project as a whole. That, for the Committee, it should seek to promote the right to an adequate standard of living, but yet ignore the problem of lack of access to water, is tantamount to excluding from the Covenant those in whose name the Covenant was drafted. Just as Arendt's stateless were excluded from the enjoyment of human rights when the latter were conflated with the rights of citizens, so also those without access to water would become excluded from enjoying the right to an adequate standard of living, through the conflation of the latter with access to food, clothing and housing, but little else. Thus whilst the Canadian government took it to be implausible to locate a right to water within the terms of the Covenant, it was also evidently implausible for the Committee to ignore the issue when engaging with States in discussions under the reporting system.

Even if it would have been hard for the Committee to disentangle the right to an adequate standard of living from the question of access to water, it might still be objected (as, on occasion, has been the case) that the Covenant gives no recognition to a 'freestanding' right to water. Access to water seems to represent, on this score, an interest to be protected, but not a right as such. The closest analogy to this kind of thinking may be represented by the argument, in the context of the European Convention on Human Rights, that the European Court occasionally deals with issues related to housing or employment and does so not as 'rights', but only as legally protected interests. One does not, thus, have a right to housing under the European Convention, but only a right to the protection of one's interest in housing as part and parcel of the protection of one's home, or one's private or family life under article 8: there is no substantive entitlement to housing, merely an incidental guarantee that one's existing legal entitlements or interests should not be arbitrarily interfered with. As a description of the European Court's approach to the issue of housing under the

European Convention of Human Rights, this is plausibly accurate enough, but it doesn't fully engage either with the question whether it would be inappropriate to speak of the Court, in such circumstances, incidentally protecting an aspect of the right to housing, or as to whether it might not also be appropriate for the Court to engage more fully with questions concerning the adequacy of housing as part and parcel of a concern to promote the right to family life.

Further to this, it is to be observed that the European Court itself has not been entirely unwilling to insist upon the existence of what may be called 'subordinate' rights as part of its interpretive elaboration of more general rights. In the celebrated *Golder case*, for example, the Court discussed the question whether the right to a fair trial in article 6 of the European Convention should be read as guaranteeing, in addition, a right of access even in absence of any explicit reference to the latter. It suggested that:

'It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.'<sup>9</sup>

It concluded, therefore, that:

'the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the *Wemhoff* judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.'<sup>10</sup>

Whilst the majority decision in *Golder* was not without its critics, it is evident that the point of discussion concerned the perceived extension of the Convention obligations, rather than, and more narrowly, the question whether it would be appropriate to speak of the guarantees that were indisputably associated with the right to a fair trial (such as a trial within a reasonable time, or a trial before an independent and impartial tribunal) in

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<sup>9</sup> *Golder v. United Kingdom*, Judgment, Series A, No. 18 (1975) para. 35.

<sup>10</sup> *Ibid*, para. 36.

terms of rights. It was probably perceived – and this has obvious repercussions as regards the claim that the right to water is not ‘freestanding’ – that, so far as there existed certain obligations to provide access, there was no real sense in denying its recognition as a right.

## 2. The Politics of an Absence: The UN Committee’s General Comment

If the UN Committee had taken an unusual step in issuing a General Comment upon a topic for which there was no obvious textual referent, the way it approached the right to water, was by no means out of line with its established practice. As with several of its earlier General Comments, the Committee employed a standard methodology. This began with an elaboration of the legal basis of the right (articles 11 and 12 of the Covenant), moved through an account of its ‘normative content’ (encompassing both freedoms and entitlements, and concerned with the availability, quality and accessibility of water), the obligations assumed by States (both national and international, positive and negative), and illustrative violations (through acts of commission or omission), to a discussion of measures to be adopted for purposes of implementation and finally obligations assumed by ‘other actors’ such as UN agencies.

Without going into these elements in detail, there are several features of the Committee’s approach to this issue (and indeed most other issues) that are worth highlighting. First, and foremost, the Committee places greatest emphasis upon what it calls the most vulnerable and disadvantaged sectors of society – this informs its approach, for example, with respect to the identification of ‘minimum core obligations’,<sup>11</sup> its emphasis upon targeted strategies<sup>12</sup> and its concern with both formal and informal forms of discrimination.<sup>13</sup> Secondly, the Committee places considerable emphasis upon juridification. It is particularly concerned, in that regard, with the establishment of legislative and/or regulatory frameworks governing access to water,<sup>14</sup> and looks for any such entitlements as may arise to be underpinned by legal remedies.<sup>15</sup> Thirdly, and in line with the above two points, the Committee places greatest emphasis upon the role and responsibilities of governments, as distinct from other agencies whether public or private, in the realisation of rights under the Covenant. This is not to say that it does not engage

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<sup>11</sup> General Comment No. 15, *supra*, n. , paras. 37-8.

<sup>12</sup> *Ibid*, paras. 13, 15, 16.

<sup>13</sup> *Ibid*, paras. 14.

<sup>14</sup> *Ibid*, paras. 23, 24, 26, 50.

<sup>15</sup> *Ibid*, paras. 55-58.



at all with obligations of other actors, merely that such obligations assume a peripheral character.<sup>16</sup>

That the Committee has chosen to emphasise these three general points in its general comment on the right to water is clearly to imprint discussion of the latter with a certain ambience: the issue is one of governmental regulation, legal reform and judicial remedies, rather than, and by contrast, detailed policy formulation, project coordination or watercourse management. Alongside the points it does emphasise, therefore, there are various points or issues which gain relatively less attention. Three examples may suffice. First of all are environmental factors. Although the Committee does speak about environmental hygiene, the need to monitor aquatic eco-systems, and the obligation on States to control pollution of water-systems and assess ‘the impact of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity’,<sup>17</sup> it clearly does not engage with the full range of causal issues such as population growth, industrialisation, urbanisation, or the undermining of traditional methods of water management. Nor, indeed, does the Committee demand anything specifically of states in that regard.

Secondly, the Committee does not engage in any serious way with the formulation of water policy, or concern itself with water management issues. As part of its typology of obligations, the Committee identifies the obligation to ‘fulfil’ the right to water as comprising three elements: to facilitate, promote and provide. In its subsequent description, however, the focus is largely upon the creation of a process of decision-making, the maintenance of a system of regulation and the elaboration of a check-list for policy-makers. It remains clearly neutral as to whether the delivery of water is through public provision or private provision and we remain unclear as to the place from which resources for investment/ improvement of infrastructure may come. How should a government seek to extend water provision to rural areas? To what extent might it legitimately impose charges on consumption? How might a government design a regulatory scheme that provides room both for inducements for private investment and for public guarantees?

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<sup>16</sup> Cf. *ibid*, para. 60.

<sup>17</sup> *Ibid*, para. 28.

Thirdly, and perhaps most understandably, the Committee does not engage with what might be called the ‘politics of water’ – such as may be found in debates over the ‘commodification’ of water, water privatisation, or trade. It is largely unclear as to what position the Committee adopts on the question of privatisation (or the variants thereof). Are there forms of privatisation that run counter to the obligations under the Covenant? Is the notion of a right to water inconsistent with it being regarded as a tradeable commodity? What we do find, here, is a demand for regulation. Thus, in paragraph 24 the Committee comments that: ‘[w]here water services... are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water... [through] an effective regulatory system’. This finds its parallel in the Committee’s discussion of the obligations of international agencies involving themselves in water projects, which concludes with the rather weak (and perhaps even tautologous) assertion that ‘the incorporation of human rights law and principles in the programmes and policies by international organizations will greatly facilitate implementation of the right to water’.<sup>18</sup>

The central feature of the Committee’s approach, in this respect, is its evacuation of the domain of policy (or ‘politics’) that sits between the obligation of States, on the one hand, to manage water provisioning in an abstract sense, and the right of individuals, on the other, to adequate access to water of adequate quality. Its main role, as has been consistently articulated, is to concern itself with outcomes, and questions of due process, rather than the substantive process of policy formulation. Thus, it may engage itself with cases in which a government persists in maintaining discriminatory policies, or stands back in cases in which it should clearly intervene, but the Committee resists the temptation, for example, to decide in advance, that certain policies were inappropriate or inadequate in the circumstances, or further than that, simply contrary to the terms of the Covenant.

There are three evident considerations, here, that inform the Committee’s approach. The first is that it is not a technical committee: it does not have the expertise – whether in the form of economists, agronomists, nutritionists, or policy specialists – in order to engage with prescriptive policy-making in many of the fields over which it exercises some

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<sup>18</sup> Ibid, para. 60.

competence. Secondly, even if the Committee did have the necessary expertise, the formulation of general policies of universal application would simply be inappropriate in a context in which lack of access to water arises from multiple and varied sources. Thirdly, and perhaps most consciously, the Committee is probably aware that, were it to involve itself in such issues, it might be seen to impinge rather too heavily into the sphere of domestic politics. These are matters of 'sovereign competence' or 'domestic jurisdiction' in which a supervisory human rights Committee should not intervene.

The obvious difficulty, of course, is that for all the unwillingness of the Committee to engage with politics or operational policy decision-making, that is not such as to prevent other significant actors from doing so. It has not prevented, for example, the World Bank from embracing or encouraging the privatisation of water provisioning – in line with the Washington, or post-Washington consensus - even if it is somewhat more cautious, in that respect, today. Nor has it prevented the emergence of a small coterie of multinational water service providers taking larger and larger control over the delivery of water throughout the globe and in the process encouraging, through various international agencies, further privatisation as a way of dealing with the growing water crisis. There is in other words a politics going on here, and one that is neither strictly domestic, nor one that is necessarily neutral as regards an individual's access to water.

A curiosity, of course, is that whilst the Committee is keen to resist engaging with the process of privatisation - by reason of the 'political' nature of the choice – those actors engaged in its promotion, tend not to see it as a political issue at all. For the World Bank, the underlying politics (and by politics I mean rival accounts as to the basis for the distribution of social resources) is heavily shrouded in a veil of management techniques or economic rationality, or simply and more commonly displaced by its appeal to a neo-Gramscian fiction of 'state consent': governments, of course, don't have to accept a loan with the prescribed conditions, it's simply a question of choice. Apart from the fact that this argument can be run in the opposite direction (if the politics of privatisation has been displaced in virtue of a State's consent to an international loan agreement, so also it might be thought to have been displaced by its commitment to economic and social rights) it is also clear that this division of labour between law and politics is problematic.

The point I am making is a mercifully simple one. It is not that privatisation *per se* is wrong, or that the terms of the Covenant commit States to the adoption of a particular

kind of government, but simply that a blanket refusal to engage with the policies and politics of water distribution and management is not to make the Committee's approach any less 'political', and that by leaving the matter to other agencies, the Committee may actually contribute to the further marginalisation of its main constituency (the poor and dispossessed). In his book *Denial and Acknowledgement*, Stanley Cohen speaks of bystanders as engaging in a politics of denial, in cases in which they seek to rationalise their inactivity by either pointing to a diffusion of responsibility, or by justifying that inaction by reference to an 'inability to conceive of any form of effective intervention' (pp. 32-5). One might consider, in that respect, that the refusal of the Committee to engage more directly with the on-going project of privatisation – on the basis that it does not have the responsibility for doing so, or lacks the capacity to do so effectively - may either be an indication that it is largely unconcerned as to the effects of the commodification of water resources, or that it, perhaps, believes that it is only through privatisation that sufficient economic resources may be marshalled in order to deal with the problem. As neither seems to be a plausible explanation, one may sense that the Committee may be legislating for its own absence – or excluding its own competence – in the very area in which the discussion of water rights is most acute and in which the Committee's voice is perhaps most needed.