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## **A short review on the ‘Phiri Water Rights’**

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# A SHORT REVIEW ON THE 'PHIRI WATER RIGHTS'

GANESWARSAHOO

## **Introduction:**

"Water is a very good servant, but it is a cruel master." - C.G.D. Roberts, *Adrift in America*, 1891

Nothing is free in this free world. As public good is concerned, water is often termed as a 'common good' instead of a public good. In economics, water is an economic good and not a free good. To a layman, water is his/her basic human right and it cannot be deprived at any cost. This paper reviews some debates regarding rights to water in Phiri in the post-apartheid South Africa. In this brief review, I find on one side, the international trends towards cost-recovery and commercialization of water through privatization, or corporatization, or governmental policy, and other hand, the struggles of poor households to this social injustice. The main debate heads towards two synonymous words 'sustainable development' (social welfare without negative impact on future generations) and 'social justice' (social welfare at current age). The main theme of this water battle is the installation of prepaid water meters that lead to the constitutional challenge of the basic human right of the masses.

## **Water as constitutional right:**

"The Republic of South Africa is one sovereign, democratic state, founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms' ...Everyone has the right to have access to...sufficient water'.

- Constitution of the Republic of South Africa, 1996

"The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses" (CESCR 2002: para. 2).

Right to water access states as human rights and freedoms, constitutional protection, and the water service act (WSA) defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene' <sup>1</sup>. The 'free basic water' policy guarantees a free minimum quantity of water to each household irrespective of wealth and number of persons comprising it, i.e., 25 liters of water per day.

## **Water rights and Social conflicts in Phiri:**

The commercialization of water at local level in Phiri completely exhausted the basic service to the common people. The condition of water supply was worsening with water privatization that leads to negative effects to common interests. As FBW system (6kltrs per household) was unable to provide sufficient water to large household (16 persons per household), many households remained without water for up to two weeks at a month as they cannot afford to purchase beyond FBW. In 2001, the allocation of FBW was not possible as Phiri, one of the poorest townships

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1. Id at section 1 (iii), Department of Water Affairs and Forestry (DWAF), Guide to the National Water Act, 15 [hereafter Guide to the NWA], South Africa.

2. See South Africa, DWAF, Free Basic Water Implementation Strategy Document (2001).

suburbs had an un-metered water supply and billing was made in 'deemed consumption' system regardless of how much water was actually consumed. Johannesburg water (Pty) Ltd. began installation of prepaid water meter in February 2004. Due to negative impacts, many residents refused to install prepaid meters and were left un-metered as before. By the end of 2004, most of Phiri households were forced to accept either prepaid meters or standpipes.

The main conflict was with the installation of prepayment water meter. With prepayment water meter, the water supply was automatically stopped once it reached the FBW quota and the households have to purchase water token to use additional water, which poor people or households with no income lead to an unhygienic living condition without water.

### **Institutional Approach: Obstacle to Water Rights**

The reason behind the poor water policy and neglected human basic need is 'institutional approach' to water. Though international donors and institutions like the World Bank and International Monetary Fund (IMF) have been actively promoted water with practice of economic approaches, but, the South African water frameworks include both human rights approaches and provision of FBW. The basic elements behind this institutional approach to water are as follow:

#### **a. Cost Recovery:**

As we know, water is a natural resource but it is an economic good. Access to water should be approached with cost- recovery policy, which means the full cost of operation, maintenance and investment of water utilities should be financed through water users' charges<sup>3</sup>. There should be balanced between the social cost of natural resource consumption, and operating and managing cost of the natural resources to be delivered to the end-users. It is noted that accessibility to water facility is contingent upon ability to pay.

Under 'Sustainable Development' approach, to protect the natural resources (water pollution) and to control (save) its consumption, it should be priced. The regulation on water tariffs must provide necessary subsidies to poor people to avail this facility.

#### **b. Privatization:**

After cost recovery policy, Privatization is another obstacle to water rights. The rapid tendency of involvement of private sectors through 'corporatization' or through other 'direct privatization mechanism' lead water more commercialized. It is believed that privatization (though it is operated by local government) can lead to competition and hence the quality of water and its efficiency in water supply and can help in combating water crisis.

#### **c. Economic Approach to Water:**

The economic approach to water is another obstacle to water access. It consists of both demand and supply in terms of money. Limitation and disconnection are said to be logical in case of non-payment by the users, though this approach is declared illegal by many countries. As it may be a -

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3. See, e.g., Paragraph 6.5.3, White Paper on Water Policy South Africa, Government of South Africa (1997)

condition to disconnect or limit but it must not go beyond the essential condition that ‘*under no circumstances shall an individual be deprived of the minimum essential level of water*<sup>4</sup>’.

As application of a policy of cost-recovery, prepaid meter is a convenient tool for water providers, but it becomes a hurdle for the poor. As prepaid meter requires to pay before use and disconnect immediately in case of non-payment.

### **Judicial Decision: A Constitutional Requirement**

The basic right has been challenged with court from time to time. Some judicial decisions are as follow:

*(i) The hearing, of 2-4 December 2007: A case of human rights vs. commercialization-*

The plight of poor people against the loss of constitutional right and the legal battle to restore it has been challenged before the Johannesburg high court. In response to the case, the city stipulated that, the municipality has the right to “finance the affairs of the municipality by charging fees for services”<sup>5</sup>.

The court found that the FBW was insufficient to meet the basic requirement of the households in Phiri and reached at a conclusion, that it is completely violating Constitutional Right. As per WHO, FBW of 20lcd carries a low standard of living<sup>6</sup>.

The judgment based on a ‘rights-as-transformation model’<sup>7</sup> further clarified that prepayment of water meter should be outlawed and to be installed at no cost and a general campaign should be raised to free the debt account of poor people. The court, finally, brought awareness by bringing a justice to the poor people and ordered the city to implement the FBW from 20 ltrs to 50 ltrs is a restoration of constitutional right that can aid the poor people to avail this basic human right, which cannot be forbidden at any cost.

*(ii) The hearing, of 2 September 2009: Installation of Prepayment water meter-*

The recent hearing on prepayment water meter disappointed all poor people of Phiri as the judgment ordered that ‘the installation of the meters was neither unfair nor discriminatory’. The constitutional court of South Africa concluded that it is not appropriate for a court to give a quantified content to what constitutes “sufficient water” because this is a matter best addressed in the first place by the government<sup>8</sup>.

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4. See Paragraph 56, General Comment 15, of WSA, South Africa.

5. See section 4(1)(c)(i) of the Local Government Municipal Systems Act

6. According to the World Health Organization (WHO 2003: 3), access to water of around 20lcd carries with it a “high level of health concern” and is insufficient to cover “laundry/bathing unless carried out at source”.

7. Dugard, Dr. Jackie (2008), The Phiri water case (Mazibuko and Others v City of Johannesburg and Others): Can human rights traverse the commercialization of water in South Africa? Centre for Applied Legal Studies (CALS), University of the Witwatersrand, Johannesburg.

8. <http://www.constitutionalcourt.org.za/site/Mazibuko.htm>

## **Conclusion:**

It is said that 'water is life'. The people of Phiri against the water battle to restore its rights are finally dissatisfied with the injustice made to them by the constitutional court. The state should be loyal and made all provision to ensure that, a basic right cannot be deprived and it should be provided to its citizen. The Phiri water case is not a case of only Phiri, but it is a battle against the unlawful, unreasonable, unfair and in breach of their constitutional right to sufficient water of a society. The government of South Africa should make provision of FBW at sufficient level and a reform on water right should be entrenched at constitutional level. Both the National government and the local government should solve this serious obstacle to the poor people to aid them to access water facility at all level. The government should apply conservative fiscal policy in order to address the international organizations and should not deprive essential public service like water right. The government should formulate water policy that should quantify a minimum amount of water, should be provided to people at no cost. As concerned to the institutional approach to water rights, the government should consider it taking the large benefits to the poorer segments of the population. It should be taken into account that, pressure on restriction of drinking water lead to health problems as people will drink and use free polluted river water forcefully.

The right to water should not be constrained in order to achieve 'sustainable development'. The government should find an alternative solution to economic development and water should be free to the public as a basic right. The constitution must not be ruled out and all provisions should be carried out to ensure that all basic rights are fulfilled to the public.

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4. Gowlland-Gualtieri, Alix (2007), *South Africa's water law and policy framework implications for the right to water*. *International Environmental Law Research Centre*, International Environment House, Chemin de Ballexert 7, 1219 Châtelaine, Geneva, Switzerland.
5. International Water Law Project, <http://www.internationalwaterlaw.org/>
6. World Water Council, <http://www.worldwatercouncil.org/>