The Role Of 'Users' Cases In Drinking Water Services Development And Regulation In France: A Historical Perspective

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Abstract

This paper is based on a study of the 53 *Conseil d'Etat* decisions related to conflicts involving the users of drinking water services since the mid 19th century in France. After some discussion on how this historical material might be used, it focuses on two critical periods, and presents evidence of the contribution of the 'users' cases in changing the way water services were developed in the early 20th century and regulated in the late 1980s. In conclusion, it emphasises the effectiveness of litigation in limiting local arrangements that are clearly contrary to users' interests, but also notes the limitations of the *Conseil d'Etat* decisions by comparison with participatory process.

Keywords: participation, courts, privatisation, water services, decision-making, France

INTRODUCTION

Participation of users in drinking water services decisions is a positive concept. It is a practical and democratic way to ensure that water services will develop according to its main stakeholders' interests. When the participatory process is weak or absent, as it was in France prior to 1992, users can only protest against decisions already taken either by the local authorities - responsible for organising the water services - or the operator - public or private - or both.

The strongest disputes take the form of legal protests. In France, when issues are worth it for at least one of the parties, the cases go up to the last appeal court, either the *Conseil d'Etat* for the administrative cases or the *Cour de Cassation* for the civil ones. Regarding water supply, the *Conseil d'Etat* is competent for any litigation except those made on the ground of private contracts, limited to the subscription contracts that the users hold from their water services and the contracts between private water companies and possible subcontractors. Those ones are under the jurisdiction of civil courts.

This paper is based on a study of the 53 *Conseil d'Etat* decisions related to conflicts involving the users of drinking water services ('users' cases) since the development of water networks in the mid 19th century. It first categorises the 53 cases in terms of the opposed parties and the nature of the

disputes, and shows that they mainly occur during the two critical periods – in term of development and regulation - that the water sector in France has gone through in the last 150 years, the beginning of the 20th century and the last 15 years. After some discussion on how this historical material might be used to analyse the role of users in water supply in France, it focuses on each of these two periods and presents evidence of the contribution of the 'users' cases in changing the way water services were developed in the early 20th century and regulated in the late 1980s.

In conclusion, it emphasises the effectiveness of litigation in avoiding or at least limiting local arrangements that are clearly contrary to users' interests, but also notes the limitations of the *Conseil d'Etat* decisions by comparison with participatory process.

1. The voices of users: media and impacts

It took more than a century for France to develop drinking water services nation-wide and supply 98% of the 60 million-population. Like in many developed countries, the development of local water services started in big cities in the second half of the 19th century, then spread in middle and small cities at the beginning of the 20th century, and then finally reached the rural areas - in France, mainly after the Second World War (Goubert, 1987).

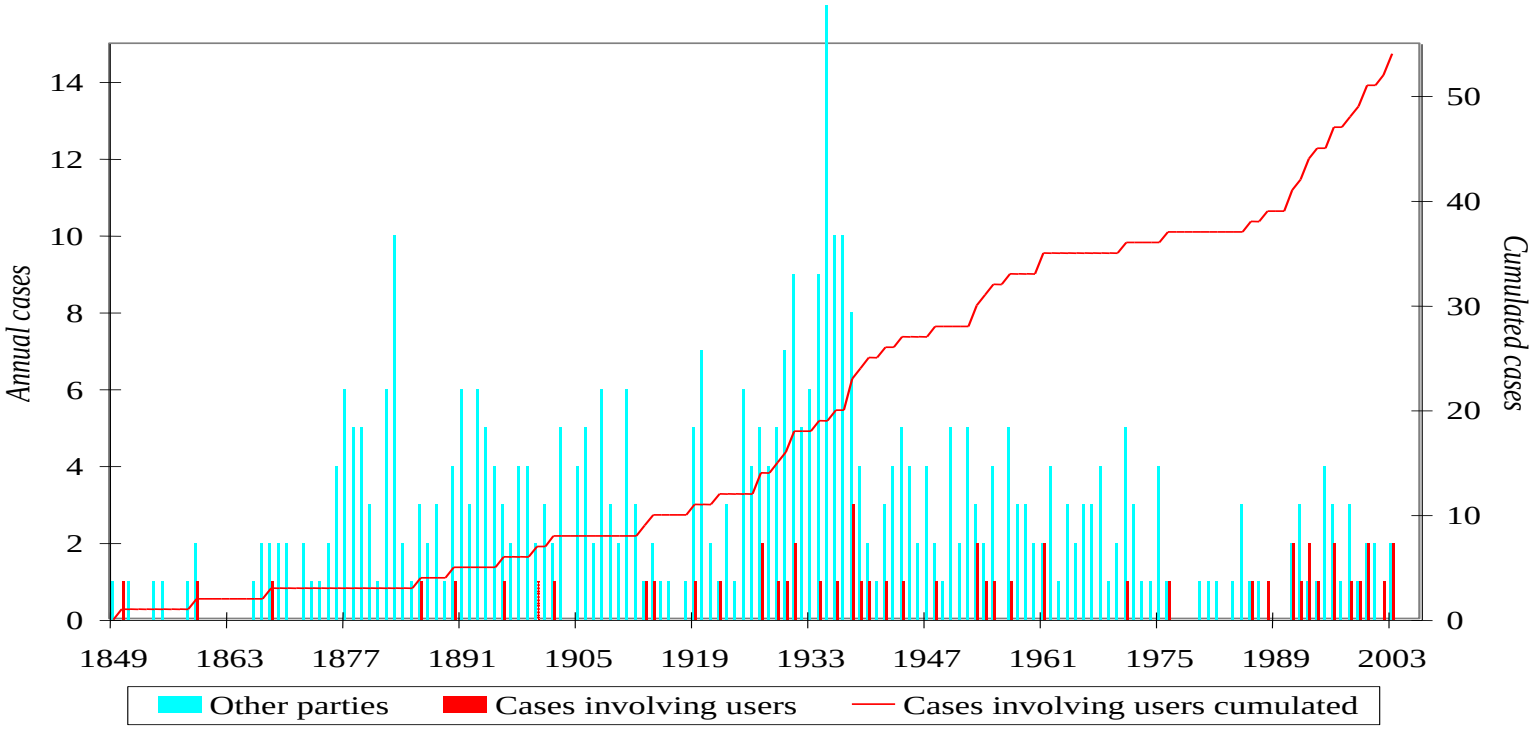
The participation of users at the local level became a legal requirement in 1992[1], in a context of infrastructure renewal and large increases in water rates. Users now have the status of advisers on decisions, to reflect their increasing importance in the financing of water services. But while water rates only partly covered the cost of services, users' participation was not considered necessary.

Both before and after 1992, users could always challenge the local conditions of their water supply by complaining to the administrative courts. Among the 486 conflicts that the *Conseil d'Etat* settled from 1848 to October 2006[2], 53 cases concerned users' challenging either the local authority, the public operator (local public company which operates the water supply), the private operator (local or national private company which operates locally the water supply according to a contract) or both the local authority and its private partner.

[1] Loi d'orientation n°92-125 du 6 février 1992 relative à l'administration territoriale de la République.

[2] When a decision of the *Conseil d'Etat* is of particular interest (the conflict is unprecedented or appears in an unprecedented context or it calls for a major explanation and/or interpretation of the rules and the way they should be enforced), it is selected to be published in the annual *Recueil Lebon* which gathers all the decisions that should be considered as pivotal every year. From 1848 to October 2006, 486 decisions have been published in the *Recueil Lebon* serie.

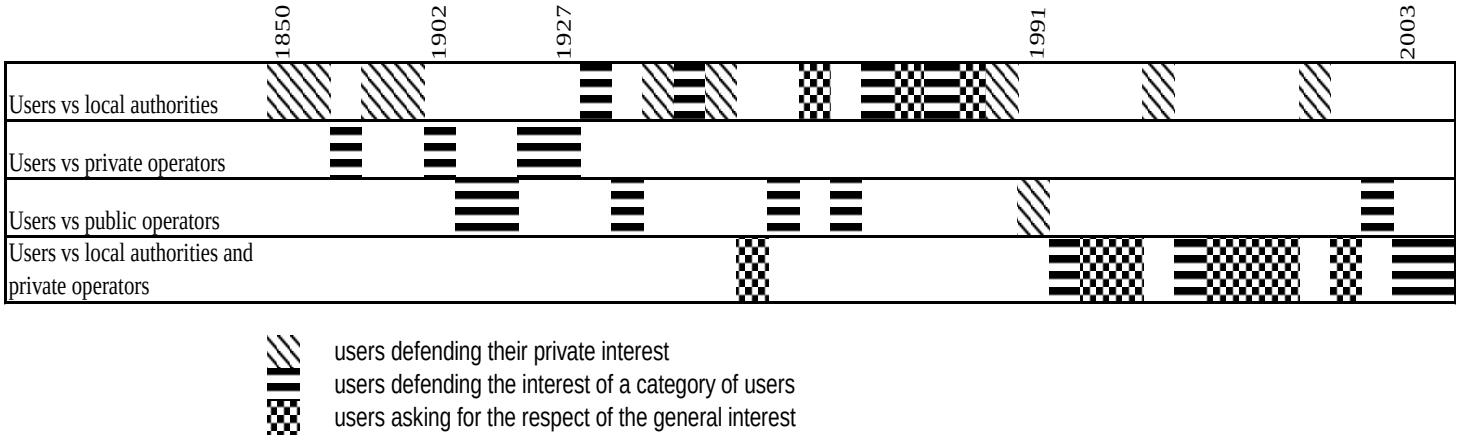
Graph 1. 'Users' Cases and other parties cases (1848 to 2006)



Only 39 of these cases were addressed by the *Conseil d'Etat* which considered itself incompetent to judge 14 other complains based on subscription contracts.[3] Half the 39 relevant cases occur at the beginning or at the end of the 20th century. During the first period (1902-1927), users defend the interest of the category of users they belong to (domestic or industrial) against private or public operators. During the second period (1991-2006) users mainly lodged claims on the ground of public service principles, and mainly against public- private partnerships (PPPs).

[3] In 1886 for instance, the *Conseil d'Etat* declared itself incompetent to decide whether the *commune de Grasse* could set an industrial water rate higher than the domestic rate. Rates were defined in a subscription contract, which was not the concern of the administrative supreme court. CE, 5 février 1886, Sieur Bernard-Escoffier vs commune de Grasse.

Figure 1. The nature of the conflicts involving users from 1848 to 2006

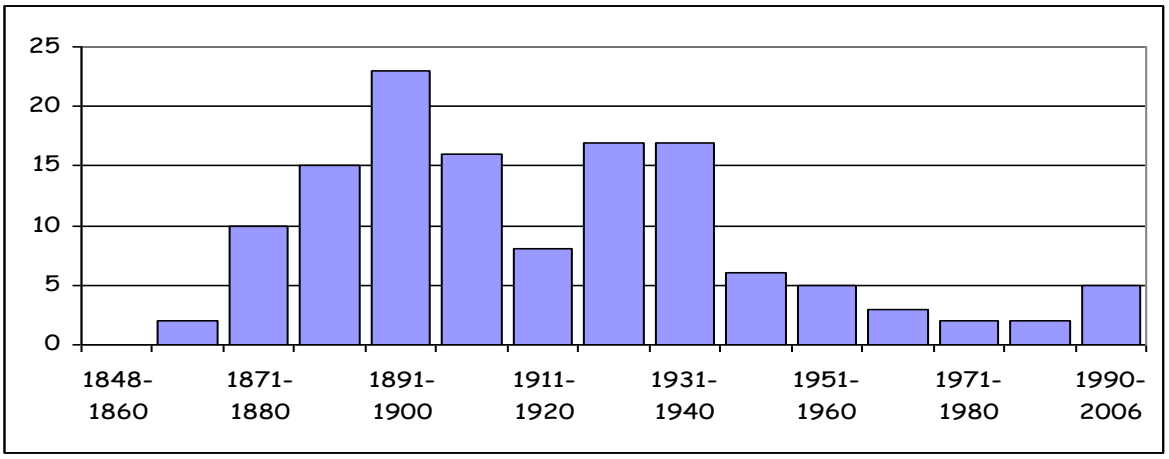


This paper focuses on the cases of these two periods for at least three reasons:

1) they coincide with the two major crisis the regulation of water supply has gone through in 150 years. As each case reports the water service management style (public or private), the users expectations and the opposed party position, the sentence and the rules to which the judge refers to, we have enough elements to analyse what differs from (comply with) the rules, either local practice or users expected service. To appreciate how effective are the users claims we compare the users expectations to the post-crisis rules.

2) The first period follows the most conflicting period ever between local authorities and their private operators. Almost half the 131 cases of such type occurred between 1870 and 1910 (Graph 2.)

Graph 2. Number of cases opposing Local Authority to Private Operator per decade (1848-2006)



3) during the second period, users have become the most common party involved in water services conflicts: 14 of the 39 'users' cases happen in the last 15 years, they represent one third of the 45 CE decisions from 1990 to 2006.

The next sections analyse:

1) how users' claims in early 20th century gave grounds to the local authorities decision to 'move' from private to public management for their water supply

2) how the reform of the water sector in the 1990s addressed users concerns about PPPs, as expressed in the most recent *Conseil d'Etat* law-cases.

2. The development of water public services: the partnership between users and local authorities

Big cities started to undertake waterworks in the middle of the 19th century, under 50 to 99 year concession contracts with private companies (Copper-Royer, 1896). These contracts were a way of financing the "public service" which, at that time, was limited to the water supply to communal fountains. The Concessionaire was committed to building a network that provided a certain quantity of water to a number of fountains and obtained, in return for his investment, first an annual payment from the city equal to 4 to 5% of the value of the investment, during the first 20 to 25 years of the concession contract, and secondly, the exclusive right for 50 to 99 years to offer a "private service" of tap water to the households of the local population (Duroy, 1996). From a technical point of view, the private service was supposed either to extend the primary network of the "public service" or to simply add a connection to it. For this private use, the local authority and the concessionaire agreed on a fixed quantity of water at a given price, and on the general conditions under which the demand for household connections should be addressed (minimal subscription period of 3 years or minimal number of household demands per street for instance). In 1892, household tap water was a reality for less than 130,000 people in France while the cities with water supplied to communal fountains had about 4.5 millions inhabitants (Goubert, 1987).

A. Context

The cases brought by users happened during a very conflicting period that mainly involved local authorities challenging their Concessionaires (table 1).

Table 1. Cases involving Local Authority against Private Operator, and all cases (1848-1910)

	Local Authorities vs Op.	All cases
1848-1860	0	9
1861-1870	2	10
1871-1880	10	29
1881-1890	15	35
1891-1900	23	41
1901-1910	16	43

Local authorities shared similar concerns about the quality of the water supplied, the rate and the development of the private service.

They asked their concessionaires to improve the quality of water, which required them to make extra-contractual investment in treatment stations. The *Conseil d'Etat*'s consistent position was that none of the parties should be forced to accept an extension to the contract, which would induce a lower quality or profitability. In that respect, municipalities claiming the extension of the concessionaires' duties were invited to provide the concessionaires with a compensation scheme in line with the initial one. In 1883, for instance, the city of Nantes complained about the bad quality of the water supplied by the 'Compagnie Générale des Eaux' (CGE) to fountains and private users, and asked for an improved filtration process. The *'Conseil d'Etat'* observed that the filtration process used complied with the 1854 concession contract, which means that the CGE had done its duty and could not be forced to do more at the same price.[4]

The quality of water was of concern for all cities involved in a concession contract at the end of the 19th century. In 1894, the CGE declared that it would not contract any other concession until a solution had been found to this issue.[5] The cities of Nantes and Lyon had already warned the CGE that they would end their concession contracts prematurely because these arrangements could not secure them with a safe water supply. Others whose concession contracts were more than 20 to 25 years old converted their former annual payment into subsidies to help improve the water quality. Others accepted the concessionaires' proposal to extend the duration of the concession contract to compensate for the extra-contractual investments (Pezon, 2000).

At the same time, almost as many cities brought cases to lower the rates charged for the private household service. The city councils asked that users should get a metered subscription at the same price for a fixed quantity of water as the price that the Concession contract had defined for the private household service. With the technical improvement in metering, it became feasible to remove the constraint of a fixed quantity of water supplied for private users, and users were asking to be equipped with a meter in order to allow them to consume as much water as they needed.[6] But this kind of subscription was not envisaged under the concession contract. Private companies fixed the rules: they charged for the sale and the installation of the meters, and also applied a higher rate for water consumption which exceeded the original quantity foreseen in the concession contract for the private service.

Cities challenged these conditions and argued that the concessionaire should not charge a different rate for the two types of private service. In 1888, the *'Conseil d'Etat'* made it very clear: the extra-contractual private service arrangements were a matter for the concessionaire and its private users.[7] The local authorities had no standing to discuss these arrangements, or to undertake legal actions on behalf of private water users. Five years later, in 1893, the *'Conseil d'Etat'* ruled that the meter-type subscription could include the sale and the maintenance of the meter, and a higher rate for extra water consumption.[8] The city of Lorient, which cancelled its contract in 1891 because its concessionaire refused to apply a lower rate, was ordered in 1895 by the *'Conseil d'Etat'* to restore the contract on the ground that private service rules were outside the cities' competence.[9]

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[4] CE, 11 mai 1883, CGE c. Ville de Nantes. Same kind of litigation and same judgements for the cities of Montlhéry, Clichy et Aix-les-Bains (CE, 24 mars 1882, Sieurs Dalifol, Huet et autres c. Ville de Montlhéry; CE, 3 mars 1893, Commune de Clichy c. Compagnie Générale des Eaux; CE, 19 mai 1893, Ville d'Aix-les-Bains c. Compagnie des Travaux Hydrauliques).

[5] CGE, Assemblée Générale Ordinaire du 28 mai 1894.

[6] During the first half of the 19th century, the standard for private water use was 20 liters/capita/day. By the end of the century, it has increased up to 100 liters/capita/day + the water needed to clean the street and fight fires, eg a total of 200 liters/capita/day.

[7] CE, 8 août 1888, Commune de Neuilly S/ Seine c. CGE.

[8] CE, 3 mars 1893, Commune de Clichy c. CGE.

[9] CE, 6 avril 1895, Sieur Deshayes c. Ville de Lorient; CE, 20 novembre 1903, Compagnie des Eaux de Creil.

Lastly, cities wanted their concessionaire to accelerate the development of the private service. At the end of the 19th century, they considered that the objective of public health that they first targeted through the development of free water to fountains would be better served with a massive extension of the 'private service' of tap water to households. As early as 1877, the city of Laon asked in vain for its concessionaire to extend the networks to streets that were not mentioned in the contract.[10] In 1912, the city of Rouen, long disappointed by the quality of the water supplied by the CGE and its profit on the private service[11] protested that the CGE should extend the network by 8km per year, in line with a 1904 decision of the local council, instead of the 2 km/year extension specified in the concession contract.[12] The *'Conseil d'Etat'* ruled that the CGE could not be forced to construct extra waterworks: the company was only bound to provide a 2km per year extension, and could choose whether it wanted to accelerate its works "*dans son intérêt personnel*" [in its own interests]. The city of Rouen terminated its concession contract at the end of the same year. Others cities simply started to subsidise the development of the private service, converting their former annual payment for the collective water supply into a contribution to the investment in the private service extension (Pezon, 2000).

B. Users' complaints and expectations

The first of the 5 user-cases was decided in 1902 by the administrative Supreme Court.[13] *Sieur Sinet*, supported by his local authority, *la commune de Sceaux*, claimed he had a right to get a metered subscription at the same price as the fixed-quantity defined in the concession contract. The *'Conseil d'Etat'* decided that the city's claim was not justified, and ruled in favour of the water company. The concession contract envisaged one type of private service, and the company was not obliged to offer a different service to meet users' demands. As long as the company offered the service prescribed by the concession contract, users could not complain about conditions related to services that were not even part of the company's duty.

By the end of the 19th century, the CGE, the biggest French water company since its creation in 1853, had added the option of meter subscriptions in all its local private services. Whether sold or rented, the revenue from metered services provided a profit of 5% a year - at least in its biggest concession, in the Parisian neighbourhood.[14] Ten years later, the Company stated that the revenue of the extra water consumption was a major driver of its overall revenues.[15] Considering that CGE had stopped contracting new concession since 1894, waiting for a sustainable solution to the water quality improvement problem, the growth of its revenues could only come from new metered subscriptions. The position of the *'Conseil d'Etat'* made it possible to follow this strategy.

But at the same time, this case served as a marker to the end of the concession contract development in France. How could such an institutional arrangement be compatible with a general access to safe water, supplied on a continuous basis? The service to private households was about to become the new standard for municipalities, and it could not be generalised as a profit-oriented activity. Whereas the concession was the standard for cities looking at developing a water network during the 19th century, the creation of *Régies [*local municipal service organisations] took over the leading role at the beginning of the 20th century. By the time of the First World War, two third of the cities over 5000 inhabitants operated their water services through a municipal *Régie* (Monsarrat, 1920).

[10] CE, 9 février 1877, Sieurs Fortin-Hermann et Cie c. Ville de Laon,
[11] CGE, Assemblée Générale Ordinaire du 29 mai 1905, CE, 27 janvier 1911, CGE c. Ville de Rouen.
[12] CE, 22 novembre 1912, Ville de Rouen.
[13] CE, 13 juin 1902, Sinet et Commune de Sceaux c. CGE.
[14] CGE, Assemblée Générale ordinaire du 27 mai 1889.
[15] CGE, Assemblée Générale Ordinaire du 16 mai 1898.

The four other cases dealt with access to the 'private' water service. Interestingly, two addressed a publicly managed water service, and two a privately managed service.

The first case was brought by a user who owned a building, who contested two points of the general conditions of the subscription proposed by the City of Nîmes[16]. *Sieur* Laune considered that the city cannot charge him for maintaining his meter. It looked like a new tax that prevents him from having his meter maintained by another entrepreneur. *Sieur* Laune also protested against the financing scheme that the City of Nîmes used to charge the access to private water. Basically, the landlords would have to advance money to the City for the installation of the connection pipe. The City would keep 10% of this amount and reimburse 90% through free water plus an interest rate of 2%. The *'Conseil d'Etat'* judged that as a water provider the City could ask for a fee in return for the service and that this fee could include the maintenance of the meters. Secondly, the Court considered that the city was not allowed to repay a debt in kind. It recognised that these irregularities occured frequently and enjoined the city of Nîmes and others to take out regular loans, that could be easily be repaid by charging the users for their connection.

This case shows that Nîmes was tryng to find a way of financing connections that could be almost free of charge for 'private' users. It also shows that, unlike many cities, the *'Conseil d'Etat'* still considered the 'private service' as potentially profitable for publicly managed water services, as it was for concessions.

In 1922, the publicly managed water service of the city of Narbonne was on the stage.[17] *Sieur* Favatier, the President of the corporation of the built properties in Narbonne protested against the 1910 general conditions of access to the private household service. He contested that the city had the monopoly for the installation of meters and charged for their maintenance. He also protested against the fact that the connection pipe would be installed for free if done by the municipal water service or a local entrepreneur, but at the users expenses in other cases. Lastly, he argued that the city could not rule that landlords were responsible for their tenants' water bills. The *'Conseil d'Etat'* met this last request of *Sieur* Favatier: a municipal regulation could not create such a responsibility. Regarding meters, a city could specify which type of meter should be installed for private service users, but it could not have the monopoly to sell the meters (which Narbonne did not claim, in any case) nor to install them. Like Nîmes, Narbonne could charge for their maintenance. Meters could be used to operate the private service but they not to run the 'public service'. Municipalities could not have a commercial monopoly, becasue as soon as a city made money on this activity, it meant that it could have been done by a private entrepreneur and that the public body breaks *"la liberté du commerce et de l'industrie" [the freedom of trade and industry]*. Regarding the connection pipes, the *'Conseil d'Etat'* ruled that if the users prefer to have their connection installed by an entrepreneur, they could not ask the city to pay them back. The city did not create a commercial monopoly on connection pipe installation because it made it *for free*.

In 1919, the *'Conseil d'Etat'* had to solve a case brought by a person and the President of the corporation of the Landlords in the cities of Enghien and Montmorency, supported by the city of Montmorency[18]. According to the 1874 concession contract, the CGE had the monopoly for the connection works. Users contested this monopoly: they would prefer to have their connection pipe set up by another entrepreneur or by themselves rather than to pay the CGE. The *'Conseil d'Etat'* decided that the city of Montmorency was entitled to give this monopoly to its concessionaire on the ground that it would make it easier to operate the water service. Even though the city had changed its mind, it could not reverse its contractual commitment. Neither could the users.

[16] CE, 26 décembre 1913, Sieur Laune.
[17] CE, 24 mars 1922, Sieur Favatier.
[18] CE, 16 mai 1919, Sieur Besançon et Morin, Ville de Montmorency c. CGE.

From this point, it is clear that concessionaires could (and still can) have a monopoly on the installation of connection pipes and the sale and installation of meters. They make money on these two activities, which were considered by the judge as part of the private water service only. As such, private users have to pay personally their access to the water service, apart from their water bill. On the other hand, the cities were also entitled to develop public and private water services[19] and the *'Conseil d'Etat'* encouraged them to develop the latter as a profit-oriented activity (which they did not), and not to compromise the market opportunities of the private sector by monopolising installation of connection pipe and meter, which they effectively did by doing it for free.

The last of these cases, in 1927, dealt with the respective responsibility of a private user and a water company (CGE again) regarding the damage that a connection pipe leakage or break might cause to third parties[20]. The CGE argued that as private property, the connection pipe is under each user's responsibility, and so was outside the remit of the administrative courts. The *'Conseil d'Etat'* ruled that even though a connection pipe *could* belong to users -when they paid for it -, the connection pipe is a dependence on the water network which belongs to the public domain, and so the *'Conseil d'Etat'* was competent to hear the litigation on the subject. Secondly, even though the CGE contracted out the connection pipes installation, the concession contract gave it the exclusive right to operate and maintain water networks including connection pipes, and so it must bear any damage related to connection pipes, as a concessionaire of a *public service*.

This case is of great importance. It meant that the connection pipe, as part of the service provided, did not need to be paid for by users in order to access the private household water service. The responsibility lays with the company as the concessionaire of a public service. Did that mean that the private household service was now considered as included in the public water service ? Indeed it did. The 1934 case in which the *Société Française de Distribution d'eau* challenged the municipality of *Arnouvilles-les-Gonesse,* spelled out the components of a water public service[21]. The *'Conseil d'Etat'* stated that household connecting pipes clearly belonged to the public service. This position reflected a reality: by the end of the 1930s, 32 million people were supplied with safe tap water, including 7 million by water companies (Loriferne, 1987, Loosdregt, 1990). Although the non profitability of water *Régies* was pretty well known, and worried the central State because it put local finance at risk (Baudant, 1980), household water as a public service, as a non-profit oriented activity, had become a reality for all in urban areas in less than 30 years.

Apart from this statement, the 1927 *'Conseil d'Etat'* decision is surprising. The inclination of the *'Conseil d'Etat'* was rather to take a literal interpretation of the concession contract. By allocating the responsibility for the damages caused by connection pipes to water companies, the Court made them carry extra-contractual expenses. But in the late 1920s, the concessionaires themselves were no longer interested in a literal interpretation of their 19th century concession contracts, signed up in a 0% inflation period, and which contemplate fixed water rates for 50 to 99 years. The inflation that started during the First World War drove the concession system to bankruptcy, and called for the *'Conseil d'Etat'* to reconsider its position. It developed the *'Théorie de l'Imprévision' [theory of unforeseen circumstances]*, according to which the economic balance of the contract should be preserved in case of events that none of the parties could foresee at the beginning of the contract. One such example was the fact that the price of coal was 7.5 times higher after the First World War than before it. Another example was the effect of the 1919 social laws, which translated into an increase in Labour costs. The *'Conseil d'Etat'* applied this jurisprudence by requiring the municipalities to respect the economic balance of their concession contracts. Water companies had

[19] Back to that time, the development of energy public services was strictly forbidden to local authorities.
[20] CE, 21 janvier 1927, CGE c. Dame Veuve Berluque.
[21] CE, 24 janvier 1934, Société Française de Distribution d'eau.

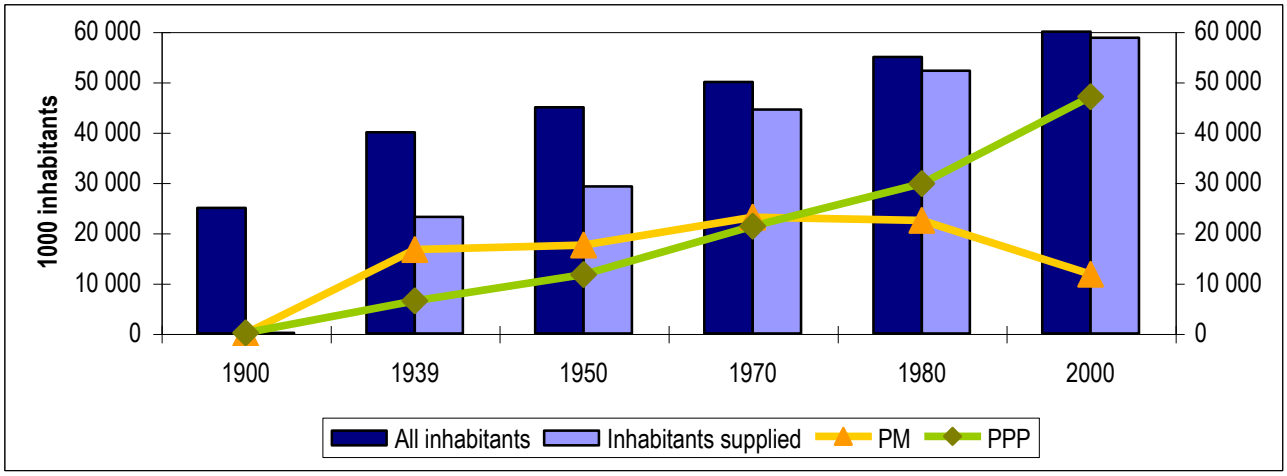
to negotiate their *effective* operating deficits with the municipalities, which could either adjust water rates to cover the actual costs of the companies, or subsidise them. The municipalities were thus now the key decision makers in price setting. This was a long way from the 1907 situation, where the water company could refuse to make extra waterworks at a lower rate of profit than the contractual works. The principle applied had changed from price cap to cost-of-service regulation (Pezon, 2003).

The costs no longer needed to be completely defined *ex ante*, and so their variation opened up the negotiation of water rates. This did not affect the cost of investments so much as operating costs, as the municipalities discharged their so-called concessionaires from the duty of financing investment, and limited their responsibility to the operation of the water service under *affermage* or lease contracts. Urban local authorities financed the development of the public service themselves, under the very favourable condition of high inflation.

3. The users vs the public- private partnerships regulation

Since the late 1980s, 98% of the French population has been connected to drinking water networks. In term of population covered, private management of water services overtook public management in the early 1970s and by 1980 50% of local authorities were involved in a public-private partnership.

Graph 2. Public management and public-private partnership for the provision of tap water in France (1900-2000)



There were very few users' court cases in the period from 1950 to the mid-1980s, when the *affermage* or the lease contract became the new standard for developing water services in rural and peri-urban water services (Pezon, 2003). The key factors behind this successful development of private management of water supply in France during this period are discussed elsewhere (Pezon, 2006)

In contrast, the more recent period (1991-2006) is characterised by a high number of conflicts (45). The law-cases involving water users (14) are very different from those analysed in the previous period, in respect of both the opposed parties and the nature of the litigation.

Table 2. Users' cases, opposed parties and nature of conflicts (1991-2006)

Users	Date	Opposed parties	Litigation (date of the first sentence)
M. Bachelet	14 janvier 1991	Commune de Baigneaux	Water rates and the equality of public service users (1985)
Mme Carrère	*24 mai 1991*	*Commune de Sollies-Toucas*	*Users contribution in extension waterworks (1987)*
Association des Usagers de l'Eau de Peyreleveau et autres	*10 janvier 1992*	*Commune de Peyreleveau*	*Users contribution in extension waterworks (1988)*
M. Lechat	*23 juillet 1993*	*Ville de Saint-Denis de la Réunion & CGE*	*Selection process of a private operator (1992)*
M. Charpentier	27 juin 1994	Syndicat intercommunal du Goelo	Connection to the water network (1987)
Syndicat de copropriété principal "Les nouveaux horizons"	*10 juin 1996*	*Syndicat intercommunal de la région d'Yvelines & CISE*	*Enforcement of a better delegation contract and reclaim for financial loss (1991)*
Mmes Badiou, Bost, Gamper, Sauvignet, Ms. Bertrand, Charlat, Chomat, Gaillard, Laforie, Malecot, Sanguedolce, Sauvignet, Vericel, Ferrara, Gagnaire, Maître Buhl et la SA Tartary	*30 septembre 1996*	*Ville de Saint-Etienne & Société Stéphanoise des Eaux*	*Cancellation of contractual clauses related to water pricing and reclaim for financial loss (1993)*
M. Porelli	*14 janvier 1998*	*Commune de Port-Saint-Louis du Rhône & SEERC*	*Selection process of a private operator (1994)*
M. Hecq, M. Sauzet	*9 avril 1999*	*Commune de Bandol*	*Water service profit affectation (1994)*
Agence des foyers et résidences hotelières privées	23 juin 2000	Maire de la Courneuve & préfet de Seine-Saint-Denis	Water supply shortcut (1992)
M. Comparat	*29 décembre 2000*	*Société des Eaux de Grenoble*	*Delegation contract termination (2000)*
Section de la commune de Montquaix et autres	30 décembre 2002	Commune de Quaix-en-Chartreuse	Price structure and the equality of public service users (2001)
François Bompard et autres	*17 octobre 2003*	*Commune de Venelles & SAUR*	*Over-tax = over-charge ? (1996)*
Syndicat des copropriétaires de la résidence Atlantis et autres syndicats	*17 octobre 2003*	*SIVOM de l'unité touristique Leucate-Le Barcarès & Société auxiliaire L-LB*	*Price structure and the equality of public service users (1999)*

privately managed services – publicly managed service

All but three of these cases are originally brought by users against local authorities engaged in public-private partnerships. In contrast to what happened at the beginning of the 20th century, users are not trying to control the rules in the same direction as local authorities. In this later period, local authorities are on the same side as private operators, sharing the same view of a profit-oriented water service. The users are protesting against the decision to privatise, or the conditions of privatisation of their water services, or contesting the basis of the water rate or the rate structure of the services.

A. Context

This period comes after the 1982-1983 decentralisation laws, which affected the water services in two ways: first, by removing restrictions on the delegation contracts which the local authorities could make with water companies, which had previously been standardised at national level since 1947; secondly, by making it mandatory to cover the water services expenses from users' bills, and not from local or national taxes. However, this new rule could not be enforced before 1986, as water rates were either frozen or capped – depending on their management style – by the State according to the national anti-inflation policy, from 1977 to 1985 (*Ministère de l'Agriculture*, 1991).

From 1986 to 1992, a lot of the old urban *régies* disappeared. The cities of Paris, Lyon, Toulouse, Saint-Etienne, Grenoble and others, with a combined total of 8 millions inhabitants, decided to privatise the management of their water services. Since that brief period, 75% of the French population is now supplied with drinking water by privately managed services.

B. Users protest about the privatisation of their services management

In four cases users were protesting against the local authorities on the ground that the driving force of the local authorities decisions to delegate the water service may not be the interest of users. Two cases dealt with renewed delegation contracts, and two cases with newly delegated water services.

In 1996, a landlords' organisation, the *Syndicat de Copropriété Principal "Les Nouveaux Horizons"* asks the *Conseil d'Etat* to award damages against an inter-municipal water service, the *Syndicat Intercommunal de la Région d'Yvelines* (SIRY), after it refused in 1980 to implement the new standard contract which should have replaced the old 1951 standard contract when more favourable to local authorities or to users.[22] In 1987, the *Conseil d'Etat* had already given a judgement in favour of the Landlords organisation: SIRY should have implemented the 1980 contract, even for two years, until the decentralisation laws, after which it would have been allowed to negotiate a different contract.[23] After this first judgement, the Landlords organisation then claimed from SIRY compensation for the loss arising from the difference between what it actually paid and what it would have paid under the 1980 contract, even after 1982. The SIRY refused, and the Landlords organisation went back to the *Conseil d'Etat* which ruled that the consequence of the original refusal by SIRY to change its contract must be taken into account, even after the 1982 law. Nobody could consider that the SIRY and its operator would have changed their contract after 1982 back to what it was before 1980, so SIRY must pay for the consequence of its first opposition to comply with the new regulation, and the loss was at least 100000 francs (€15000).

In 1993, a member of the local council of the city of *Saint-Denis de La Réunion* asked for the cancellation of the 1990 decision to renew the lease contract to the CGE. This particular user argued that the city had broken the 1990 EU Procurement Directive on public tendering by renewing its contract with the historical operator instead of organising a competitive process. He also objected to the length of the contract, 20 years, compared to the traditional length of 12 years for a lease contract. The *Conseil d'Etat* ruled that the EU Directive did not apply to the way a public service operator obtains a delegation contract, and that even if the normal length of a lease contract was 12 years, this was not legally binding since the decentralisation laws.

This case is symptomatic of the pre-Sapin law period.[24] From 1990 to 1993, lots of contracts were signed, either renewed before their term expired, or new contracts with local authorities that used to manage in-house water services. This seems to have been the case in *Saint-Denis de la Réunion*: one of the user's arguments was that the 1990 contract was awarded before the term of the previous one expired. It was clearly the case in 1993 in *Port-Saint-Louis du Rhône* when the local council decided to privatise the management of the water service, just before the enforcement of the Sapin law. In 1998, a user asked for the cancellation of the *Port-Saint-Louis du Rhône*'s decision. In April 1993, the Sapin law was passed, under which the local authority should have organised a bidding process in order to get competitive proposals. But the *Conseil d'Etat* noted that according to the article 47 of the Sapin Law, no bidding process was required if the local authority had selected its operator before the 29th January and if the 'selected' operator had already committed funds on preliminary works or studies. As a consequence, the contract of *Port-Saint-Louis du Rhône* could not be cancelled. On the other hand, the *Conseil d'Etat* accepted the user's argument in relation to the 'contribution' that the operator was committed to give to the local authority, which consisted of an 'entry fee' to operate the service (4 millions francs or €610 000) and an annual fee of 500 000 Francs (€76 000). The Sapin law (art.40) specified that the delegation contract must contain no

[22] CE, 10 juin 1996, Syndicat de co-propriété principal 'Les nouveaux horizons'.
[23] CE, 29 avril 1987, Commune d'Elancourt.
[24] Loi n°93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques.

clause by which the operator takes over expenses that have nothing to do with the substance of the contract, and so any contribution should be precisely justified in the contract. In 1995, the Mazeaud law strictly prohibited any kind of 'contribution'.[25] In this case, the *Conseil d'Etat* considered that the contribution was not justified, and cancelled it.

In 1992, the *Association des Usagers de l'Eau de Peyreleau* protested against the decision by the *Commune de Peyreleau* to join a privately managed inter-municipal water service. This reorganisation made it possible to extend the municipal water network to a small village located on the *Commune de Peyreleau* territory, where the mayor and one other member of the municipal council lived. The users organisation considered that these decisions increased the water rates, and should be cancelled because they were taken in the private interest of two local decision makers, during a municipal meeting where only half of the local council were present. They asked the judge to conclude that public management was preferable to delegation. The *Conseil d'Etat* ruled that the quorum of the local council was reached and that the future connections of the mayor and another member of the municipal council were not enough to establish that the mayor's decision was made in his own interest. The *Conseil d'Etat* rejected the users complaint, and argued that an administrative court is not competent to rule on the management style selected by a local authority. Since the decentralisation laws, this decision no longer needed to be approved by the local representative of the State, the *préfet*, and strictly belonged to the inter-municipal or the municipal councils.

The users' suspicion of local decision makers was fuelled by political scandals. In 1996, the administrative Court of Lyon ruled that the mayor of the city of Grenoble had been bribed to award a private concession of the water and wastewater services in 1989. This affair deeply affected the reputation of water companies, and also made users very suspicious of any delegation decision. In Grenoble, it was a special user who first denounced the conditions of the delegation decision, Raymond Avrillier, a Green municipal councillor. In 2000, the *Conseil d'Etat* was addressed by another user from Grenoble, M. Comparat, who contested the conditions of the termination of the concession contracts.[26] Instead of negotiating the premature end of the contract for 86,2 millions francs (€13 million), the city should have asked the administrative judge to cancel the contract without compensation. The *Conseil d'Etat* ruled that in terminating the contracts, the city had the choice between negotiating their premature end (which it did in 1999), or cancelling the contracts in compliance with the cancellation contractual clauses, according which the operator was entitled to get 282 million francs (€43 million), or asking the administrative judge to cancel the contracts without compensation, on the ground of corruption. The *Conseil d'Etat* considered that the city could have had to pay a higher fee than the negotiated compensation if it had taken the matter to the court, and so rejected the user's claim.

C. Users contest the rate basis

The users also contested what they pay for through their bills. As we have already noticed in the *Port-Saint-Louis du Rhône* case, the rates should not be used to cover expenses that have no connection with the delegation contract. During the 1991-2006 period, three cases dealt directly with the basis of water rates.

In 1996, 16 individual users and one industrial consumer asked the *Conseil d'Etat* to cancel the rate clauses of the concession contract signed in 1991 between the city of Saint-Etienne and the *Société Stéphanoise des Eaux* (SSE), a joint company of the two French majors.[27] The city had selected the

[25] Loi n°95-127 du 8 février 1995 relative aux marchés publics et aux délégations de service public.
[26] CE, 29 décembre 2000, M. Comparat.
[27] CE, 3à septembre 1999, Société Stéphanoise des Eaux et ville de Saint-Etienne.

operator on the ground of its financial contribution to the city budget, and accepted that the company could recover this through the water rates. The *Conseil d'Etat* ruled that the rate was thus constructed to cover charges that are not related to the water service, namely a contribution to the general budget of the City of Saint-Etienne, and cancelled the rate clauses of the concession contract: however, it ruled that it could not, as an administrative court, order the publication of its decision in newspaper.

This judgment did not mean that the general budget of a local authority could never benefit from the water services profits. In 1999, the *Conseil d'Etat* decided that the city of Bandol was entitled to transfer the 1989 benefit of its delegated water service, 2,4 M francs (€ 366000), to its general budget in 1990.[28] A local authority could decide such a transfer unless the water service accounts show a cumulative loss, or it needs short term investment. In other words, a city cannot build its water rate in order to fund its general budget systematically, but if a water profit is made, and neither an operating loss nor an investment shortfall follows, the city may benefit from a transfer of the surplus. So the *Conseil d'Etat* did not uphold the users' complaint that, less than four years after its decision, the city of Bandol renewed its lease contract and asked its operator to invest 5 M francs (€762 K) to extend and improve the water network.

D. Users contest the rate structure

In four cases, users contested the rate structure or the way the local authorities intended to recover their water services fixed costs. They highlight the difference between urban and rural areas, and also underline the difficulties for tourist areas in sharing the water costs between their permanent and their non permanent inhabitants. In urban areas, the amount of the contribution an operator was ready to give to a local authority seems to have been the main criteria for the decision to privatise the management of water services before the Sapin Law. In rural areas, where water services have always been heavily subsidised, the full cost recovery principle is rarely implemented, and the public-private partners look for ways to cover costs without increasing water rates.

For instance, *Mme Carrère* was judged to be right to refuse to pay 10000 francs (€1500) for the extension waterworks that the *Commune de Sollies-Toucas* and its private partner, *SADE*, demanded from her.[29] The partners planned to invest 2,28 M francs to extend the water network inside the commune territory, and decided in 1985 to charge each new connected household 10000 francs for these extension works, apart from the fee for their connection pipe. The *Conseil d'Etat* argued that water networks belong to the public domain and are infrastructure of general interest. As such, they must not be charged on an individual basis but allocated between all the water users through water rates.

In early 1988, the principle of full cost recovery was amended in order to avoid massive water price increases, in particular in rural areas. Local authorities may now subsidise their water services (either publicly or privately managed) when huge investments are needed, which would otherwise induce high rate increases if passed through them.[30] This temporary measure was later on translated into a permanent one, but for rural areas only. The new accounting instruction prepared by the State administration in 1991 (the so-called M49), requiring all water services to comply with the full cost recovery principle was finally enforced in 1995, but it distinguishes between urban water services, and water services in communes with less than 3000 inhabitants, which may continue to subsidise the investment of their water and wastewater services.

[28] CE, 9 avril 1999, Commune de Bandol.

[29] CE, 24 mai 1991, Mme Carrère.

[30] Loi n°88-13 du 5 janvier 1988 d'amélioration de la Décentralisation, article 14.

Regarding the way water services should recover their fixed costs, an interesting case was decided in 1991.[31] One user, *Mr* Bachelet, complained against the *commune de Baigneaux,* which decided in 1985 to charge a special rate to users who owned a private swimming-pool. Water rates already depended on the number of people per household and on the garden size, and they would now also depend on the possession of a swimming-pool. *Mr* Bachelet was the only owner of a swimming-pool in the village, and argued that the commune was in breach of the principle of the equality of users by deciding on this new charge. The *Conseil d'Etat* ruled that the equality of users principle must be understood as equality for users who face similar conditions. *Mr* Bachelet's needs differed from the others because of the swimming pool, and besides, the *Commune de Baigneaux* decision had a general scope, even though there was so far only one private swimming pool in the village.

Mr Bachelet should have waited until 1994, becasue in 1992 a new water law prescribed a specific rate structure for any water service, which prohibits the kind of rates applied by Baigneaux.[32] Municipalities had two years to set up rates that depended on the volume of water consumed, and which can also include a fixed part, when the fixed charge of the water service or the characteristics of the connection pipe require it. This rule prohibits rate structures that are not at least partially based on the effective volume of water consumed. Many municipalities like Baigneaux had to stop charging according to criteria such as the number of inhabitants and had to invest in meters to measure the volume of water consumed.

In 2002, the *Conseil d'Etat* explained to the *commune de Quaix-en-Chartreuse* that its water *régie* could not charge a fixed price for users who created obstacles to the reading of their meters, even though the estimated consumption is in line with the overall average consumption.[33] On the other hand, the inter-municipal water service of the very touristic communes of Leucate and Le Barcarès were entitled to construct water rates with a fixed part which depended on the number of apartments supplied by each connection pipe.[34] On the ground of the equality of users principle, several Landlords organisations claimed that each user should pay the same fixed part. But the *Conseil d'Etat* accepted that the characteristics of the connection pipe include the number of apartments per building, and this ruling allows many water services to share the cost of water services fairly with tourists who may be 2 to 10 times as numerous as the permanent population.

Looking at contemporary users litigation, there is a strong relation between the nature of the conflicts brought to the *Conseil d'Etat* and the new regulations enforced under the 1992, 1993 and 1995 laws. The 1992 law created a local space where users can discuss with local decision makers the main options for the water services management. In 1993, the Sapin law stopped the automatic renewal of contracts and prevented local authorities from selecting their operator according to the maximisation of the rent and entry fees. The Sapin law also made it mandatory for local authorities to justify to their users' representatives their decision on the type of water services management. In urban areas, the 1993 law has been quite effective: although 90% of the contracts are still renewed with the historical operator, they are concluded with an average decrease of 15% in water rates (Pezon C., Bonnet F., 2006). In rural areas, the lack of competition has led to the less impressive figure of an average 8% reduction in water rates.

While the allocation of fixed costs among users may be a source of further conflicts in rural and/or tourist areas, the 1988 law and the limited scope of the M49 accounting instruction have protected rural areas from facing large rate increase which could have led to legal conflicts.

[31] CE, 14 janvier 1991, M. Bachelet.
[32] Loi n°92-3 du 3 janvier 1992 sur l'eau, article 13-II.
[33] CE, 30 décembre 2002, Commune de Quaix-en-Chartreuse.
[34] CE, 17 octobre 2003, Syndicat des Copropriétaires de la Résidence "Atlantis" et autres.

CONCLUSION

Over 150 years, few 'users' cases have gone to the *Conseil d'Etat*. They represent about 8% of all the water services related cases, and are mainly concentrated during crisis periods. Few of them happened in early 20th century, but enough to support the municipal socialism movement in developing water supply on their own rather than by concession contracts. At the end of the 20th century, users were in a much worse position when challenging both the public and the private partners. But repeated 'users' cases disclose how far the political decision on water rate or management style could be from users' interest, and call for a radical reform of the system.

The *Conseil d'Etat* resolves conflicts. It does not remove the need for users participation in the decision process, in order to prevent conflicts. Court cases take a long time (5 years in average over the period) and legal administrative procedures are an unfamiliar world for many users. In many recent cases, the *Conseil d'Etat* decisions began with procedural statements which concluded that some or many of the users arguments would be set aside because they were not introduced properly in the procedure. There is another limit of the *Conseil d'Etat* procedures compared with a participatory system : the financial compensation that users may obtain on the ground of a *Conseil d'Etat* decision only benefit the users who brought the case, and those they represent: so for example, any user of SIRY except those who brought the case in 1996 will not receive any compensation for his loss unless he formally asks for it.

Interestingly, there have been more users' cases than ever since users were invited to be part of the decision making process through local users' committees in 1992. Does this inflation in users' cases mark a failure of the participatory process ? Considering how new is a local participatory approach for a centralised and top-down decision making country like France, no definite failure should yet be reported, even though many, and probably most, of the local users' committees still never meet. We should rather conclude that the growth in users' cases shows that users' participation is gaining momentum.

REFERENCES

Baudant A., 1980, Pont-à-Mousson (1918-1939), stratégies industrielles d'une dynastie lorraine, Thèse de doctorat en histoire, publications de la Sorbonne, Paris.

Copper-Royer E., 1896, Des sociétés de distribution d'eau, Thèse de doctorat en droit, A. Pedone editeur, Paris.

Duroy S., 1996, La distribution d'eau potable en France, contribution à l'étude d'un service public local, Thèse en droit, Librairie Générale de Droit et de Jurisprudence, Paris.

Goubert J.P., 1987, La conquête de l'eau, Hachette, Paris.

Loosdregt H.B., 1990, Services publics locaux, l'exemple de l'eau, Actualité juridique – Droit administratif, vol.11, 20 novembre.

Loriferne H., 1987, 40 ans de politique de l'eau en France, Economica, Paris.

Ministère de l'Agriculture, 1991, Consommation domestique et prix de l'eau – Evolution en France de 1975 à 1990.

Monsarrat G., 1920, Contrats et concessions des communes et des établissements communaux de bienfaisance, Bibliothèque municipale et rurale, Paris.

Pezon C., 2000, Le service d'eau potable en France de 1850 à 1995, Thèse en Sciences de Gestion, Presses du Cerem, Paris.

Pezon C., 2003, Water supply regulation in France from 1848 to 2001 : a jurisprudence based analysis, Communication to the Annual Conference of the International Society for New Institutional Economics, September 11-13, Budapest, Hungary.

Pezon C., 2006, The French Public Private Partnership model: genesis and key factors of success, UNESCO Water Science Division, Technical Documents in Hydrology, Urban Water Conflicts.

Pezon C., Bonnet F., 2006, Déroulement des procédures de délégation des services publics d'eau et d'assainissement, procédures 2004, édition ENGREF,