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# *Public-Private Partnership in courts : the rise and fall of concessions to supply drinking water in France (1875-1928)*

**Christelle PEZON***

In France, back in the mid-nineteenth century, large cities started to develop water networks, mainly under very long concession contract (99 years). 50 years later, other cities organising their water supply made a different choice: they mainly created in-house services, rather than contract them out. In 1908, a majority of urban water services were run through local *régies*, or municipal organisations (Burel, 1912). In 1938, out of 40 million inhabitants, 25 million people were on safe tap water, and 18 million were supplied by publicly operated water services (Loosdregt, 1990). By that time, the remaining delegation contracts were no longer concessions — with investment and operating costs under concessionaires' responsibility — but rather *affermage* or lease contracts, where the operator only supported operating costs and the local authority the investment costs (Pezon, 2003).

What went wrong with the concession formula in late 19th century, so wrong that French local authorities stopped considering it as an appropriate model to secure a safe water supply? What disqualified concession to comply with local authorities strategies?

The jurisprudence of the *Conseil d'Etat* offers a unique material to understand the concession's failure, and analyse the shift in water supply management that happened in France in the ealrly 20th century. The *Conseil d'Etat* (CE) is the Supreme Administrative Court, and regarding water supply, it is competent for any litigation made on the ground of the delegation contract (concession, lease, etc).[1]

With 78 cases, the 1875-1928 period is the most conflicting period ever in the upper court, opposing public to private partners in the water supply sector. It began with the case of the city of Le Havre which asked the judge to order its concessionaire, *La Compagnie des Eaux du Havre*, to make extra-contractual waterworks, and ended with the last decisions that the CE made on the conflictual termination of the city of Toulon's concession with the *Compagnie Générale des Eaux.*

The importance of the CE decisions lies first on the enforcement power of the institution and also on the scope of the decision. The enforcement power of the CE is almost unlimited and the court has never been contested as the Supreme Administrative Court. Behind the case considered, the decisions are valid for any similar litigation: the *Conseil d'Etat* 'empties' the case. It gives to any public and private partner committed in similar contracts capital information on their rights and duties, their risk-sharing schemes, etc. The CE rules cases. It provides parties with elements on what they should do, according to laws, to the way it interprets laws (its jursiprudence) and to the pecular circumstances of the litigations.

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[1] More generally, the *Conseil d'Etat* is competent for any litigation regarding water supply, except those made on the ground of private contracts e.g. the subscription contracts that the users hold from their water services and the contracts between private water companies and possible subcontractors. These are under the jurisdiction of civil courts, the Supreme Court being in this case the *Cour de Cassation*.

To analyse these 78 concession cases, this paper first exposes the context of the late 19$^{th}$ century and explains why these CE decisions were chosen. Then it categorises the 78 decisions in terms of the nature of conflicts that opposed local authorities to concessionaires : the extension of concessionaires' duties, the decrease of the water tariff applied to households and the termination of concession contracts. Third, the paper demonstrates that while protecting the concessionaires rights, CE decisions disqualified the concession as a contract that could provide a safe access to water for all. In conclusion, it emphasises that concession was set aside because it did not fit the public service provision of water.

# 1. Corpus and context

From 1848 to October 2006, the CE ruled 486 'water' cases. 131 opposed local authorities to their private partners. 100 of these Public-Private Partnership water cases happened between 1875 and 1937, 66 prior to the First World War and 34 between 1919 and 1937. The other cases involved other stakeholders, e.g. households or building owners about tariffs or service quality.

**Figure 1. PPP cases and other opposed parties cases 1848-2006**

From 1875 to 1913, about half of water cases opposed public to private partners (66 vs 143), and more precisely local authorities to concessionaires. These 'concession' cases dealt with a common issue: the conditions to renegociate and/or terminate concession contracts. Such conflicts stopped before the First World War, but 12 post-war *cases* also dealt with pre-war matters. Seven cases referred to pre-war *conflicts* that were only ruled by CE from 4 to 13 years after the first level administrative courts made their decision, whereas the average delay between the first and the last court decision had been 3 years and three months since 1875 (Figure 2). These seven cases will be included in the scope of our analysis.

**Figure 2. Delay between the first administrative court decisions and the Conseil d'Etat decisions (1875-1923)**

The five other cases referred to the conflicts that followed the decisions of the cities of Lyon in 1888, Nantes in 1895, Rouen and Toulon in 1911 to terminate their concession contracts before their endings. These decisions entailed 8 conflicts prior to 1914 and 5 more afterwards, ruled by CE between 1924 and 1928. As these 5 cases also dealt with pre-war issues, they are also included in the scope of our analysis which is then based on 78 CE decisions.

During the 1919-1937 period, apart from the 5 above mentioned cases, conflicts mainly dealt with the adjustements of contracts to new macro-economics conditions (social laws, energy prices, inflation). In this second wave of 'PPP water' cases, private partners asked for the enforcement of the *Théorie de l'Imprévision* that CE developed during the First World War in order to protect private partners from the consequence of unforeseen events that deeply inflated their costs (Long et al., 1990). The contracts involved were no longer concessions but either *affermages* – lease contracts – or *régies intéressées* – management contracts (Pezon, 2000).

The concession contract ended with the 19th century as a favourite option for local authority to develop the supply of domestic drinking water by networks. Before 1900, the concession had dominated the French water supply industry. Private companies or entrepreneurs carried out investments in infrastructure and, when stipulated, in filtration plants. In counterpart they obtained a long term territorial monopoly to supply collective water to stand-pipes and private water to households. From the 1850's until the end of the 19th century, the concession was almost the exclusive institutional arrangement chosen by the largest local authorities to develop their water services, rather than organising in-house water service (Copper-Royer, 1896).

But at the turn of the 20th century, cities that were about to create their water services made different decisions: they created in-house water distributions rather than committ themselves in concession contrats. In 1908, more than half of the 500 urban water services were publicly owned and managed (Burel, 1912). Ten years later, two-third of the cities that had more than 5000 inhabitants managed their water services on their own (Monsarrat, 1920), and in 1938, there were 6 times more in-house water services than privately managed ones (Loriferne, 1987).

The cases that opposed public to private partners from 1875 to 1928 referred to conccession contracts agreed upon between the 1850s and the 1880s, with a duration of at least 50 years and more commonly 99 years. The analysis of the 78 cases gives us the opportunity to understand why the concession failed in France.

# 2. The origin of conflicts: is drinking water a profit-oriented service?

Among the 78 cases related to pre-war conflicts, one can identify three different types:

- ✓ In 29 cases, municipalities claim to extend their concessionaires' contractual obligations
- ✓ In 21 cases, municipalities claim to lower the tariff applied to supply households and/or to fasten the development of the 'private' water service;
- ✓ In 24 cases, municipalities claim to terminate the concession contract before its ending. 13 cases deal with the financial conditions of concession termination on which the cities of Nantes, Lyon, Rouen and Toulon are separately and repeatedly opposed to the *Compagnie Générale des Eaux.*

In the first 29 cases, cities are opposed to concessionaires who refuse to make extra-contractual investment either in additional water works or in the improvement of the quality of water.

In 1877, for instance, the city of *Laon* claimed that its concessionaire should serve more streets in order to increase the number of free water delivery points.[2] The city referred to streets that were not mentioned in the contract. In concession contracts, the private partner was committed to finance, build and operate a water network which delivered a given quantity of water at predefined "public" points (fountains, municipal buildings). The design of the facility and the corresponding investment costs were agreed upon during the negotiation stage of the contract. But years after the concession agreement, cities may need additional water facilities (more delivery points or more water delivered at each of them).

2 CE, 9 février 1877, Sieurs Fortin-Hermann et Cie c. Ville de Laon,

Regarding water quality, for instance, the city of *Nantes* complained in 1883 about the water supplied by the *Compagnie Générale des Eaux* to fountains and households, and asked for an improved filtration process.[3] Back in the 19th century, drinking water had to comply with few public health criteria. Its quality was a contractual agreement: partners might define it in terms of the technologies that the concessionaire was committed to invest in and to operate properly (a given filtration process like in Nantes) or in terms of the expected result such as the degree of hydrotrimetrie (like in Aix-les-bains[4]). Specifications mentioned in contracts might be updated long before the contracts ended up. The concessionaire might comply with its contractual duties and, at the same time, people being provided with undrinkable water either at fountains (for free) or at home (at their expense).

During the same period, almost as many cities brought cases to lower the rates charged for the private household service and/or to fasten the development of the 'private' service. For instance the cities of Neuilly S/ Seine, Clichy, Sceaux and Biarritz 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 20 to 30 years before.[5] With the technical improvement in metering, it became feasible since the 1880s 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 in the concession contract. Private companies developed extra-contractual 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 complained against these conditions and argued that the concessionaires should not charge a different rate for the two types of private service.

Cities also wanted their concessionaire to fasten the development of the 'private' service. Concession contracts usually prescribed the annual number of network kilometres (in addition to the 'public' network) that the concessionaire was committed to finance, build and operate to develop the 'private service' until the end of the contract, as well as the conditions that households must satisfy to be connected. Concessionaires elected the streets to be serviced according to the number of connection subscriptions made by households who generally had to subscribe for a minimum duration of three years and were offered a fixed and daily quantity of water. Concessionaires might develop the 'private' service faster than the contracts prescribed when, for instance, the connections' demand exceeded their own previsions. The profit of concession contracts was basically rooted in the 'private service', and its development should meet the concessionaires' interets. But cities such as Rouen in 1912, long disappointed by the quality of the water supplied by the *Compagnie Générale des Eaux*[7] protested this time because the Company refused to lay 8km of pipes per year, as the local council had decided in 1904, and only made a 2 km/year extension on the grounds of the concession contract.[8]

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3 CE, 11 mai 1883, CGE c. Ville de Nantes.

4 CE, 19 mai 1893, Ville d'Aix-les-Bains c. Compagnie des Travaux Hydrauliques.

5 CE, 8 août 1888, Commune de Neuilly S/ Seine c. CGE, CE, 3 mars 1893, Commune de Clichy c. CGE, 13 juin 1902, Sinet et commune de Sceaux c. CGE, CE, 20 novembre 1903, Compagnie des Eaux de Creil.

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 CGE, Assemblée Générale Ordinaire du 29 mai 1905, CE, 27 janvier 1911, CGE c. Ville de Rouen.

8 CE, 22 novembre 1912, Ville de Rouen.

Some cities asked and obtained from the first administrative court the termination of their concession contracts (like the city of Monthléry in 1879[9] or the city of Bayonne in 1905[10]). Others, like the city of Lorient in 1891[11], unilaterally declared the termination of their contracts. Their concessionaires brought the cases up to the CE. They claimed that their contracts could not be prematurely terminated without financial compensation, as long as they fulfilled their commitment to supply the expected quantity and quality of water (agreed upon *ex ante*). Should they fall short of their obligations, their contracts may be terminated, but in any other cases, the local authorities must either keep the contract or terminate it in compliance with the contractual clause dedicated to the financial compensation that the concessionaires are entitled to in such cases.

# 3. CE position: under a concession contract, drinking water is a profit-oriented activity

Facing both the cities' and the concessionaires' arguments, the CE stood on a literal interpretation of contracts. The Court implicitly considered that there were no limits to the parties' rationality during the negotiation stage when they agreed upon the capital investment, the quantity and the quality of the water supplied, the 'public' rate as a fraction of the investment made to supply fountains and municipal facilities, the 'private rate' as a fraction of the investment made to supply households, and the contract duration. All these agreements were supposed to remain unchanged until the end of the contract, regardless unforeseen contingencies. CE decisions mandated partners to enforce the contracts they agreed upon decades ago. As the Supreme Court settling conflicts between any public authority and a private body (person or company), CE was first concerned with the protection of private interests from overriding public authorities decisions that might interfere with the economic balance of the original agreements, and curb the contractual duties at the expense of the concessionaires. CE's jurisprudence then covered three major issues:

## a) Amendments should be negotiated by the Parties on the ground of the initial contract *status quo*

The *Conseil d'Etat* never allocated any residual control rights to any party that would extend the scope of the initial contract[12]. If municipalities became unhappy with the contracts they once agreed upon, even long ago, they could only invite their private partners to renegotiate. The concessionaires might or might not be interested in a new negotiation stage. Moreover, municipalities could not force their private partners to accept an extension to the contract, which would reduce its profitability. Concession contracts usually granted concessionaires an annual fee, paid by the public partner, of 4 or 5% of the investment made in the 'public' network (municipal water bill), during 20 to 25 years. Then municipalities which claimed for extra-contractual investments in the public network or in water quality improvement were invited by CE to provide their concessionaires with a compensation scheme on line with the initial one, implicitly denying any economies of scale or of scope.

[9] CE, 24 mars 1882, Sieurs Dalifol, Huet et autres c. commune de Montlhéry.
[10] CE, 26 décembre 1919, Compagnie des Eaux de Bayonne c. ville de Bayonne.
[11] CE, 6 avril 1895, Sieur Deshayes c. ville de Lorient.
[12] In the Economics of Contract, an entity which has the residual right of control can take decisions when neither the contract nor the law has expressly designated the decision maker.

## b) Local authorities had no quality to renegotiate the access to private service

The same rule applied to the development of the 'private' water network. Municipalities could not redefine the access to this service or ask the operator, as Rouen did, to serve streets four times faster than stipulated in the contract, regardless the size of connection request.

Moreover, municipalities had no quality to interfere with the commercial relationship between concessionaire and households. As long as the concessionaires offered the private service prescribed in concession contracts (a fixed quantity of daily water for an annual bill equal to 10% of the waterworks), they might also sell additional services to meet households demand. These extra-contractual private service arrangements were not the business of the municipalities. They had no quality to discuss these arrangements or either to undertake legal actions on behalf of private water users in order to obtain more favourable conditions.[13] Concessionaires were acknowledged the right to offer meter-type subscription which included the sale and a fee to maintain the meter, and a higher rate for extra water consumption.[14]

To some extent, CE recalled municipalities that the concessionaires' profit chiefly originated in the 'private' service revenue. It is an activity that concessionaires had the exclusive right to develop on a monopoly base, as a compensation to their commitment to supply municipalities with 'public' water. For municipalities, 'public' water came first when they negotiated their initial contracts. It included the service of municipal buildings (administration but also hospitals and schools) and stand-pipes. Concession contracts allowed municipalities to be supplied without raising the capital, by paying an annual water bill on their general budget. Concessionaires expected to recover their investment in the 'public' network after 20 to 25 years, and even longer if costs overran during the construction stage. Then municipal water bills were no longer due, and concessions profitability only relied on the private service revenue. This in fact meant that the private service should cover the cost of the capital (debt) during the first 20 to 25 years of concession contracts, and both the capital and its interests afterwards, not mentioning the operating costs.

## c) The CE set restrictions to contract termination

It should be noticed that a municipality was not entitled to terminate the concession contract on its own, even though it had become obvious that the concessionaire lost the ability to operate the contract. Only the judge may formally take such a decision, based on consideration and evidence that the concessionaire had stopped fulfilling his contractual duties, and more precisely had stopped operating the water service, either public or private. This is the unique situation which entailed a systematic contract termination without any guarantee for the concessionaire to recover the amount invested, even partially. After a concessionaire stopped to operate, a municipality might decide:

- ✓ to build a new facility. In that case, the concessionaire lost his initial investment;
- ✓ to buy the existing facility back. The concessionaire got the proceeds of the sale, after bargaining with the municipality;
- ✓ to auction the facility. The concessionaire got the proceeds of the auction.

In all other cases, a municipality could not terminate a concession contract without substantial financial loss, as defined contractually. According to the 8 cases dealing with the conflicting termination of the contracts of Lyon, Nantes, Rouen and Toulon, municipalities owed their

[13] CE, 8 août 1888, Commune de Neuilly S/ Seine c. CGE.
[14] CE, 3 mars 1893, Commune de Clichy c. CGE.

former partner the capital not yet depreciated, as well as the profit the *Compagnie Générale des Eaux* would have made until the end of the contracts, based on the ten last years average profit made on each concession.

# 4. The consequence of CE decisions on water supply management

In the end, CE decisions contributed to disqualify the concession as the contract under which municipalities could develop water networks and provide safe water to all. At the beginning of the 20th century, the dozens of middle and small size cities which progressively considered the supply of networked water as the norm became convinced that a concession contract could not secure them against unsafe and short water distribution, at a reasonable price.

In one to two generations, there were tremendous scientific and technical innovations. Hygienists made it clear that water supply was a top public health issue (Murard & Zylberman, 1996) and engineers started to implement treatment processes successfully both on spring and surface water (Pezon, 2000). Network extension and safe tap water supply became technically feasible and strongly supported by health professionals. This contributed to change the way politicians envisioned what a water service should be. Improving health implied a generalised access to the former 'private' service rather than free collective water. Local authorities stopped considering the 'private' water as a profit oriented service but rather as a health first oriented service. Public water supply management symbolised the vocation of water public service to provide safe water for all.

The 1884 Municipal Law granted local authorities the administrative authority upon their territory[15]. This law also made the 36000 municipalities – inherited from *Ancien Régime* – the first political authority in France to be elected on a one man one vote basis (Morgand, 1952). In a situation where few people got a 'private' access to water, the political benefit for promoting a large access to water explained why local politicians wanted to increase the connection rates without delay. In 1892, tap water is a reality for less than 130,000 people in France while the cities supplied with 'public' water, most of which were committed in a concession contract, totalled about 4,5 million inhabitants (Goubert, 1987). In Lyon, for instance, the *Compagnie Générale des Eaux* had only 16000 clients after 30 years of concession (Villard, 1885). In Paris, the water carriers had almost vanished, swept away by the facility of tap water, but who, apart from those who could buy water from vendors, could afford tap water ?

Conversely to what happened with other networked services (like gas and electricity), local authorities could get involved in water supply before legal changes enabled them to manage directly industrial and risky activities[16]. Local authorities were always acknowledged the right to organise their water supply by themselves (Duroy, 1996). Even the strongest opponents to *municipal socialism* considered that water supply was not concerned by the restrictions that must contain public undertakings in order to protect '*la liberté du commerce et de l'industrie*' (Mimin, 1911). CE itself, which always made a restrictive interpretation of the 1884 law regarding the involvement of municipalities in industrial matters[17], never set limitations on municipal water supply; central government shared the same position (Duroy, 1996). These elements outlined that the shift in water supply management in early 20th century was rooted

[15] Loi du 5 avril 1884 sur l'organisation municipale, art. 61.
[16] Décret du 8 octobre 1917 which enabled municipalities to supply electricity to households. In 1915, municipalities were acknowledged the right to organise urban transport.
[17] Avis du Conseil d'Etat du 2 août 1894.

in a political change of what local authorities considered as a public water service. A modern public service must provide each household with safe and unrestricted water. Local authorities financed the development of water networks on their general budget and facilitated the access of households to water (frequent no connection fee policies).

What about local authorities that were committed in concession contracts still having decades to go in early 20th century? A few local authorities bought their concessionaires' operating rights back through very lengthy and conflicting processes (13 to 25 years of procedure). The position of the *Conseil d'Etat* concerning the financial settlement, clearly in favour of concessionaires, prevented most municipalities from engaging a buyback action.

Apart from the short list of cities that terminated their concession contracts before they ended, others, whose concession contracts were more than 20 to 25 years old, converted their former annual bill into subsidies to improve the water quality and/or to develop the 'private' service, including it *de facto* within the scope of the public water service. The increasing contribution of municipalities into water supply investment slowly turned concession contracts into *affermage* or lease contracts (Pezon, 2000).

# Conclusion

Under the concession formula, both partners shared the vision that private connections and water came as a compensation for the provision of public and collective water. From that point of view, a concessionaire's profit was subjected to the satisfaction of primary needs, as defined by local authorities to comply with their public health and fire protection duties. The so-called 'public' service was free for users (paid by local tax-payers) whereas the 'private' service was entirely financed by users (network extension, connection, meter). Through this arrangement, local authorities cross-subsidized those who could not afford a private service from those who could (previously satisfied by water carriers).

This smart contractual arrangement collapsed in early 20th century when local authorities tried to make the former 'private' service into the new core of their water policy. The *Conseil d'Etat* jurisprudence emphasised how hard local authorities tried to implement new policies within the concession framework and why such a contract was so inadapted to generalise the access to water for all.

Local authorities and concessionaires finally stopped engaging in contracts. In 1894, the *Compagnie Générale des Eaux* reported that it stopped to contract until a solution had been found to the water quality issue.[18] It would wait until 1913. Meanwhile, the biggest French water company added the option of meter subscriptions in all its local private services. The revenue from metered services provided a profit of 5% a year - at least in its biggest concession, in the Parisian suburbs.[19] In 1898, the Company stated that the revenue of the extra water consumption was a major driver of its overall revenues.[20] Without improving much the connection rate, the concessionaire made more money by increasing the unit profit rate on each household connected to the private service (Pezon, 2007). Water concession was stuck in a vicious circle where the operators' practices were more and more unreconcilable with local authorities' perception of what a water service should be.

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[18] CGE, Assemblée Générale Ordinaire du 28 mai 1894.
[19] CGE, Assemblée Générale ordinaire du 27 mai 1889.
[20] CGE, Assemblée Générale Ordinaire du 16 mai 1898.

Public partners finally disentangled from their concession contracts either by buying back their concessionaires' contractual rights or by defining a new partnership that only left their concessionaires the responsibility for the operation of the redefined public service. Local authorities would then largely impose a water tariff system which was accepted by the population.

To conclude, two lessons from this French experience in water concessions:

- compared to other developed countries, where private water companies collapsed in the early 20th century, France has always combined public and private management for local water services. Water companies survived to the concession fall as operators or sub-contractors for public water services. They would gain momentum soon after the State implemented a new regulatory framework in the early 1950ies, and promote *affermage* contracts (public financing and private operation).
- Neither in France, nor in other developed countries, domestic water has been developed on the ground of the full cost recovery principle. In particular, the concession contract failed to do so. For today developing countries, the international community acknowledges that the water service cannot be charged investment costs up front, and limits its financial requirement to the recovery of the operating costs. More research need to be done in order to adjust the financing mechanisms to the development process entailed by an improved access to water

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