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Access to Water and Militant Uses of the Law

A Case Study in Soweto

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Disclaimer

This study is part of a doctoral thesis on collective action and the militant use of the law, whose principal case study is the Mazibuko trial. The approach proposed here places the trial's instigators, *i.e.* the social movements, in the background, but the related elements of analysis (*e.g.* the conditions of recourse to the law, the motivations of the applicants, the strategies and tactics used, the effects of the law on the movements themselves, etc.) are nonetheless not absent from our research perspective, and can be found elsewhere in our works (Aubriot, 2009; Aubriot, to be published). The doctoral thesis, carried out under the supervision of Sylvy Jaglin (LATTIS, ENPC), and co-financed by Action Against Hunger in the context of a research project and by a CIFRE agreement, has been defended in the second quarter of 2012.

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Introduction

Introduction

“Everyone has the right to have access to sufficient water.”
South African Constitution, Bill of Rights, Article 27

Since the beginning of the 2000s, the right to water fascinates: its nature, its definition and its concrete reach are cause for question. Recently, the last of these questions was recognized internationally in a United Nations General Assembly resolution (July 2010) and another, the Human Rights Council (September 2010), stopping short the debates about its existence or nature (see Box 1). Nevertheless, beyond the purely legal questions surrounding it, numerous questions are being asked about its effectiveness and about social rights, a notion which is meeting with a certain success at present (Herrera, 2009). Indeed, what good is the recognition of a social right of access to water when, for a majority of actors, preoccupations are framed in terms of governance and regulation, or constitute technical and financial challenges? Some of its defenders affirm that the right to water is a tool for access, without clearly stating the outlines.

Box 1 *What is the right to water?*

The right to water was formalized internationally in 2002 by the adoption of General Comment N° 15^[1] by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) which defines it as the right of everyone to “sufficient, safe, acceptable, physically acceptable and affordable water for personal and domestic uses.”^[2] The right to water has also been the subject of numerous political declarations, whether at the latest World Water Forums (Mexico City, 2006 and Istanbul, 2009) or at regional high level meetings (for example: the Non-Aligned Movement Summit, Havana, September 2006; Africa South America Summit, Abuja, November 2006). This link between human rights and the water sector has raised many questions, especially by operational actors doubting its effectiveness. Recently, its recognition by the Human Rights Council ended the controversy: the right to water is a human right, in the same way as other social rights like the right to food or to health. The issue at hand now is implementing it.

[1] General Comment N° 15 was adopted on the 26th of November 2002. It is an interpretation of Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[2] General Comment N° 15 (2002), paragraph 2.

This study aims to verify the hypothesis which states that the actionability of social rights – *i.e.* the possibility to invoke them in the courts – improves their effectiveness, and this in a national context where the right to water is recognized by the Constitution: South Africa, and more specifically the city of Johannesburg.

The Problem in Context

The year 1994 sees the end of the apartheid regime and brings in hopes for political, economic and social renewal in South Africa. Since then, one of the priorities of the new African National Congress (ANC) government has been to eliminate the inequalities of the apartheid era and to generalize access to basic services. Thus, Johannesburg, with a push from the State, undertakes a process of renewing its water policy at the end of the 1990s. In this context, the mission of local authorities is to reconcile three types of “sustainability” imposed by the State: (Plancq-Tournadre, 2006): environmental (resource conservation), financial (financial stability and cost recovery) and social (access for all and affirmation of the right to water in the Constitution).

In order to respond to this triple necessity, the new municipality, which includes numerous townships around residential or commercial districts, launches the project named Operation *Gcin’Amanzi* (OGA, which means “conserve water” in Zulu) in the biggest district of all: Soweto. This project begins in a particular institutional context, the water company being committed to a five-year management contract with a consortium of foreign private actors, a contract seen as a “privatization” by several observers. The cornerstone of the project is the installation of prepaid meters. These sociotechnical tools seem, at least in theory, to permit the reconciliation of three obligations (“sustainabilities”) for the local government: social (free supply of water), economic (bill water at a progressive rate while ensuring its payment) and environmental (regulate consumption).

From the outset, this project has been quite controversial. Many demonstrations staged by several social movements led to a trial in 2006, known today as “the Mazibuko affair.” In their complaint, five Soweto residents, prompted by two militant organizations (the Anti Privatisation Forum – APF – and the Coalition Against Water Privatisation – CAWP), supported by an organization defending human rights, the Center for Applied Legal Studies (CALS) and a renowned constitutional lawyer, attack two aspects of the OGA project: the installation of prepaid meters and the policy of

free water, whose quantity is judged insufficient with respect to the size of households in poor areas such as Soweto. In the trial, the city of Johannesburg, the water company Johannesburg Water (JW) and the Department of Water Affairs and Forestry (DWAF) are sued. The complaint is based on the recognition of the right to water in the Constitution (1996); “it is not a question of having new social rights recognized, but of calling on public authorities to respect and implement those which already have a constitutional value” (Tournadre-Plancq, 2008).

After a long legal process (more than three years), which early on ended in favor of the plaintiffs in the High Court and Supreme Court of Appeal decisions in September 2009, the highest court in the country, the Constitutional Court finally rules that the city’s and water company’s policy is justified, and rejects the totality of arguments by the plaintiffs as well as the lower courts. Paradoxically, in spite of the plaintiffs’ loss, the legal process constrains the city and the operator to significantly revise and modify, with considerable social and technical gains, their water access policy towards the urban poor.

Hypotheses and theoretical guidelines

This study concerns the role that the courts of justice, used for militant purposes, can play in the evolution of social policies. Two main questions guide our thinking: to what degree can the courts be an arena for debating social questions, in this case, access to water? To what degree can legal resources be mobilized for the collective good of underprivileged city dwellers? In other words, is the recourse to courts an effective way to make policies evolve in favor of the poor (“pro-poor”)?

This work, in the context of an old debate, proposes to shed new light on the recourse to the law and to the courts as a tool for social change. Indeed, the idea that the recourse to the courts, when undertaken by militant organizations, is a way to change policies has been a widely debated question in the North American literature for several decades, and is seeing some rekindled interest in the francophone literature.

The militant recourse to the law in the context of the fights for civil rights or in the feminist movements, and the effects of the fights of these social movements on legislation, have long been studied. The debate opposes the authors defending the effectiveness of the law (McCann, 1992, 1994) against those who have doubts (Scheingold, 2004; Rosenberg, 1991). Thus, in 1974, Scheingold questioned the real effects of the legal battles of groups such as the National Association for Advancement

of Colored People (NAACP) over the fight to desegregate American schools. In the same vein, Rosenberg, in his reference work *The Hollow Hope (...)* (1991), shows the perverse effects of the recourse to the law. He emphasizes that, in the United States of the 1950s, some judicial victories linked with civil rights gains related to the abolition of segregation in schools or to abortion, can be considered pretenses to the degree that they only created false hopes and a relative demobilization of militants, convinced that their cause had won, but that judicial decisions had not been applied, or even that retroactively they had perverse effects on the cause defended. Conversely, McCann, a more faithful representative of the theory of the mobilization of the law (Legal Mobilization Theory) proposes a more positive view on the opportunities linked to militant uses of the law in his work on pay inequality in the United States. He shows that the law is a political resource which can have significant indirect effects on policies and social movements.

This research trend has four main drawbacks. Firstly, even if today it is becoming more widespread globally, its principal limit is that it remains very concentrated on the United States. The present study, in proposing empirical perspectives emanating from a terrain still largely unexplored in these terms, is original in this respect.

Furthermore, the research trend briefly developed above is highly focused on the struggles for civil rights and policies, and very little on social rights. Our literature review did not enable us to identify work bearing precisely on access to water, and the concentration on this particular sector is the second originality of this work.

Even if the legal differentiation between these two types of rights is outdated today, a certain number of lawyers regret that most studies of the actionability of social rights do not seek to measure the true impact of recourse to the law on the implementation of these rights (Roman, 2010), with the exception of Gloppen's 2008 work, and call for a mobilization of the social sciences on this subject. Thus, Roman (2010), in the introduction to a recent French research program on the justiciability of social rights, states: "While lawyers often challenge the courage of South African judges in insisting upon the distribution of retroviral medicine to HIV positive mothers and young children (aff. TAC Campaign), [...], it is more rare to find analyses on the concrete effects of decisions (with regards to applicants individually as with regards to third parties to the cases), on their impact on the legislation and political programs put in place." Indeed, the South African scientific literature on lawsuits related to social rights – overwhelmingly in the legal domain – is rather dense today, but only rarely proposes to methodically evaluate the effect of legal decisions on the

development of policies, often analyzing only the rulings. Our work, which falls in the domain of the human and social sciences, thus proposes a significant advance in this sense.

Finally, in the literature on the mobilization of the law, very little attention is paid to defeats, which can nonetheless be at the origin of reforms and social change (Nejaime, 2011). More generally, the scientific debates briefly summarized above highlight the difficulty of evaluating the impact of judicial decisions concerning policies: a stunning victory in justice may not lead to major changes, and a defeat can set off a noteworthy political and social evolution. Our work proposes an illustration through the study of the Mazibuko affair and what we will call “small victories” in justice. We will thus show how a court defeat has nonetheless brought about meaningful change in the social policy on water by interpreting reactions by the city and the operator following the legal process (accounting for the poor, adopting social measures, developing technical solutions, etc.).

Methodology

The argument will be developed based on data collected during three field surveys carried out in Johannesburg between June 2009 and December 2010.^[3] During the surveys, we mobilized the classic qualitative social science survey tools: semi-directive interviews of the sector (see the list of interviews in Appendix 1), observations, field visits and organization of household focus groups. This collection of primary data was accompanied by the collection of secondary data corresponding to an in-depth review of the relevant academic and gray literature.

Intended audience

This document, whose reach is beyond the borders of South Africa, is aimed at two audiences.

Firstly, researchers interested in the problems of the militant use of the law will find an empirical perspective and a new analysis, based on original field research. Dynamically, the study also provides information on the recent trend, both in South Africa and elsewhere in the world, of the use of courts by militant groups seeking to

[3] The first field survey lasted for seven weeks, the second for three weeks, and the last one for six weeks.

accelerate change in social policy (housing, health, access to basic services such as water or electricity). Although growing robustly, this movement remains quite unstudied.

Secondly, actors in the water sector, notably those working in South countries, intrigued by the right to water, will find a useful illustration to understand its potential effects and decide on the effectiveness of the actionability of the right to water as in social rights more generally. Beyond this, the Mazibuko affair was very rapidly exported and debated internationally: it was the first time that a trial related to the right to water was brought before the Constitutional Court, testing its boundaries and definition. This document will thus be useful for the many observers who have been attentively following this process, examining the possible court injunctions on the definition of this social right, and the potential repercussions of the legal decisions on water policies in Johannesburg and South Africa more generally.

Outline of the document

In a first part, we will present the research landscape and its specificities. We will then return to the national and local water management context, and then will detail the contours of the *Gcin'Amanzi* project. In a second, more analytical part, we will set out the conditions of the emergence of the trial and the arguments exchanged during the legal process. Then, we will show the impact of the trial on the city's approach, notably for the technical and social aspects. Finally, we will take a critical look at the conception of local participation and of communication implemented by the city and the operator in order to ensure the success of the resumption of the *Gcin'Amanzi* project in 2011.

Part One

1. From beginnings to doubts about the *Gcin'Amanzi* project

1.1. A priority water sector on the political agenda since the advent of democracy

1.1.1. A progressive constitution which recognizes the right to water

The year 1994 saw the end of the apartheid regime and the emergence of the hope for political, social and economic renewal in South Africa. From that time on, one of the priorities of the new South African government (led by the African National Congress, ANC) has been to wipe out the inequalities resulting from apartheid and to provide general access to basic services. In this context, social rights have a prominent place on the political scene. Indeed, the rights to housing, food, health, social security, education and water are protected by the Bill of Rights. The ideas of social justice, equality and respect of fundamental rights are omnipresent in the Constitution, which has become the symbol of an important turning point for the nation. The “founding provisions” of Article 1 state this new ambition: “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.” Indeed, the Constitution has played and continues to play a particular role in South Africa: it was the cornerstone of the democratic transition and the way to avoid a confrontation among different stakeholders, or, stated differently, to supplant political breakdown (Philippe, 2005; Vircoulon, 2004). Thus, the so-called “South African miracle” rests largely on its Constitution as a reforming tool in which social rights, symbolizing the will to transform society, play a particular role.

The South African Constitution includes the question of access to water in mentioning in its Article 27 that: “1.b. Everyone has the right to have access to sufficient water,^[4]” and that: “2. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.” The water sector is therefore designed on the basis of this reference to human rights.

[4] Bill of Rights, South African Constitution, Section 27.

Still, the inequalities inherited from apartheid and the social, economic and political realities in the country jeopardize the democratic and constitutional promises. Indeed, the Constitution's ambition is great, proposing a total break with the situation of the preceding regime: to the degree that apartheid was marked by lawlessness, segregation and social differentiation, the 1996 Constitution aims at an egalitarian society in which everyone's fundamental rights are realized in the same way. The new South African government is therefore attempting to answer this challenge based on the Constitution and in thoroughly reforming water policies at the national and local levels.

1.1.2. Water sector reforms at the national level

Indeed, upstream and parallel to this major constitutional evolution, a certain number of public policies and tools were put in place to ensure the realization of this new social right, notable for poor citizens. Already in 1994, stress was placed on basic services and on water and sanitation. In terms of the extension of the coverage of services, the challenge is huge: in 1994, the number of people lacking drinking water was estimated at 13 million (DWAF). A profound sectoral reform is under way; it has meant, *inter alia*, massive investment in the decade ending in 2004: the DWAF estimates that an additional 13.6 million people gained access to water and 6.9 million to sanitation at a total cost of 14.8 billion rands (ZAR).

The State is undertaking a certain number of reforms with the goal of implementing a framework aimed at realizing the right to water for all (Muller, 2008; see Box 2).

Box 2 Water sector reforms undertaken as of 1994

- 1994: creation of the DWAF to ensure the management of the sector at the national level. It is responsible for the development of the general water policy, the regulation of the water service providers, technical support for local governments and information on sector performance.
- 1994: adoption of the Water Supply and Sanitation Policy by DWAF.
- 1997: adoption of the Water Services Act, which delegates the power to manage services to municipalities. It recognizes in Section 3(1) that "everyone has a right of access to basic water supply and basic sanitation." The notion of "basic water supply" is defined by two norms: a) the minimum volume of water is 25 liters per person per day, and b) each water point must be located at a maximum distance of 200 meters from each household.





- 1998: adoption of the National Water Act, which replaces the Water Act of 1956 and abolishes private ownership of water.
- 2000: adoption of the Municipal Systems Act (Act n° 32), which protects poor people by establishing cost controls on essential services. The rates must cover operating costs and maintenance while giving access to all at a reasonable price for a minimum amount of water.
- 2001: adoption of the white paper on the revision of the Water Services Act (1997); the white paper introduces the definition of a free minimum amount of water for all (6 m³). The measure must be put in place within two years by cities and financing must in part be covered by the Equitable Share (see Box 3).
- 2001: adoption, in June, of the document entitled Regulation relating to compulsory national standards and measures to conserve water, which also refers to the minimum of 25 liters per person per day.

Box 3 gives some indications related to the financing of water services.

Box 3 *Financing mechanisms of water services*

At city level, the financing of water services is ensured through billing (the rate is set by the city). Then, two types of national subsidies supplement the budget:

- the Municipal Infrastructure Grant serves to finance infrastructure investments. This is a conditional subsidy whose amount is set in accordance with the investment program.
- the Equitable Share serves to finance operating costs. This is an unconditional subsidy whose amount is calculated in accordance with the number of households earning less than 1 100 ZAR per month (i.e. destitute) at the level of the concerned municipality.

It should be noted that these subsidies are not exclusively destined for the water sector, and that the other essential services (energy, transport, etc.) are competing for these resources.

At the time of the campaign for the first local democratic elections, in 2000, the ANC declares: *“ANC-led local government will provide all residents with a free basic amount of water, electricity and other municipal services, so as to help the poor. Those who use more than the basic amounts will pay for the extra they use.”*

This political announcement has two goals: (i) to silence the critics of the “liberal” turn taken by the ANC, on the eve of important local elections on the political calendar; (ii) to limit significant disconnections suffered by poor households following large price increases, the consequences of new rate policies (Blanchon, 2005). This declaration also follows a serious cholera outbreak in Kwazulu Natal province, and very quickly leads to the government’s adoption of the Free Basic Water Policy (FBW) which consists in supplying all households with 6 m³ of free water per month (the standard adopted in the context of this reform is calculated on the basis of 25 liters per person per day, for households of 8 people on average). The FBW appears as a compliance measure and a concrete translation of the social law contained in the Constitution, even if its implementation is not trouble-free.

The FBW is finally adopted in 2001 and its implementation is delegated to local authorities. The local elections of 2000 lead to the delegation of basic services (water, sanitation and electricity) to newly created local governments with newly elected officials. Several technical options are possible for the implementation of the FBW, one of which is the installation of prepaid meters. The financing of the reform must occur thanks to national subsidies. In reality, the delegation of service management at the local level comes with many problems^[5]: delayed service improvement; problems financing the infrastructure; absence of implementation or sufficient implementation of the FBW; inappropriate rate structures, development of punitive measures for households which are unable to pay (disconnections or supply restrictions); etc.

Therefore, the “social turning point in water policy” (Vircoulon, 2003) is strongly criticized for three main reasons:

- a lack of targeting of the poor (Blanc and Ghesquière, 2006) since, in most cases, all households, regardless of income, have the right to 6 m³ free. Furthermore, certain swaths of the population unconnected to the network do not have access to this free volume, while it is probably they who should first benefit from the measure;

[5] Cf. Tissington *et al.* (2008).

- an insufficient volume of free water, particularly for the largest households. The real size of poor households poses serious problems in terms of the measure's equity. The organizations denouncing the FBW demand the increase in the volume of free water based on a truer estimation of the number of people per household (Bond, 2005);
- finally, in certain municipalities, an unadapted rate structure, the tranche placed just after the free tranche considered to be too high (Blanchon, 2006).

Thus, in spite of its social character and the government's announced will to realize the right to water for the poor, the FBW is today at the origin of most of the social mobilizations over water (Muller, 2008).

1.1.3. *The large development programs of the democratic South Africa*

At the national level, post-apartheid South Africa is marked by two large successive programs with very different orientations, which will strongly influence the management of services.

The Reconstruction and Development Programme (RDP) is adopted in 1994. A genuine national reconstruction program, it aims to wipe out the inequalities resulting from apartheid and to redistribute wealth. Its first objective is to develop access to essential services, principally social housing, electricity, primary health care, water and sanitation. The right to water is also recognized in the RDP which mentions in Section 2.6.3 that: *"The fundamental principle of our water resources policy is the right to access clean water – 'water security for all.'"* Two important norms are defined through this first program: the minimum volume of water to supply is set at 25-30 liters per person per day in the short term (and at 50-60 liters per day per person in the medium term), and a water point must be available at less than 200 meters from each household.

In 1996, a second development program, the Growth Employment and Distribution Plan (GEAR) is adopted by the Thabo Mbeki administration. The latter gives new orientations to government policy and to public finances in signing the entry into an era of reducing the budget deficit, of mastery of inflation and of a systematic policy of cost recovery in the essential services sector. Water services must thus function on the principle of self-financing, billing of real costs, and of cost recovery at the local level (Vircoulon, 2003). At the same time, certain municipalities have recourse to the private sector, considered better able to supply the necessary investment for the renovation

of services and having the indispensable know-how at their disposal to tackle the sector's inherent challenges (Marin *et al.*, 2009).

Overall, the policy of cost recovery provokes a significant rise in cases of essential service cutoffs, notably of water and electricity, for non-payment of bills. Thus, between 1996 and 2001, it is estimated that nearly 100,000 households were subject to water cutoffs (Blanc and Ghesquière, 2006). In this context, Plancq-Tournadre (2004) shows the contradiction between, on the one hand, the South African government's ambition to supply water to the entire population and the implementation of a voluntarist water policy and, on the other hand, the multiplication of the "disconnected." Besides, the GEAR, and more specifically the policy of cost recovery, are sharply criticized by a part of the scientific community which denounces the perverse effects on the poorest populations (McDonald, 2002, 2005). Indeed, for a certain number of observers, the GEAR marks the abandoning of any social revolution project and gradually leads South Africa towards a program of structural adjustment accompanied by an increase in "privatizations" of public services (even if, in reality, cost recovery was perceived by the State as a means of improving local finances, and more generally the management of local governments).

Thus there are tensions between the current water policies, the constitutional right to water and the universal goal stated by the Constitution, the social policies such as FBW and the general change in ANC policies which finally do not manage to reach the stated objective, social justice.

1.2. The challenge of the post-apartheid years: standardize heterogeneous services at city level

1.2.1. *The end of apartheid: the legacy of very heterogeneous and unequal services*

As we saw in the first part of this work, significant reforms are initiated in the water sector, at both the institutional and the financial levels: the first democratic government made a great effort to attempt to take social needs of the poor into account. But what essential services were proposed at the urban level, particularly in Johannesburg, at the end of the 1990s? What major challenges was the young city facing?

Apartheid was synonymous with inequalities in wealth and access to services. Indeed, the policy of separate development, expression of the economic hierarchy and the

policy put in place by the system based on white superiority aimed to provide inferior quality services to Africans. Moreover, in 1968, the government decided to stop the development of African zones in the heart of “white” cities, such development being obliged to limit itself to rural zones or homeland cities, respecting racial delineation. This decision further contributed to creating significant delays in the development of infrastructure and housing in the former townships.

Thus, the post-apartheid local governments inherited a very unequal situation in which infrastructure development followed racial delineation.

As an illustration, in 1995 it is estimated that:

- 67% of Africans have access to water *via* a home network connection versus 97% for whites (100% of coloreds and Indians);
- 29% of blacks have access to water *via* an outside connection (3% of whites, 0% for the other groups); and
- 4% have access to water *via* a standpipe, a kiosk or a well, versus 0% for the ensemble of the groups (Beall *et al.*, 2000).

These numbers well illustrate the differentiation in access to services according to race. In this context, Tournadre-Plancq (2004) explains that the apartheid regime created two types of poor populations: on the one hand, a population “connected” free of charge to water and sanitation (despite the low quality of services) primarily located in the townships (zones of legal or tolerated housing), and on the other hand, an “unconnected” population in the poor rural zones (autonomous states, Bantustans) and in certain urban zones populated with people without residence permits in cities due to the lack of jobs or other squatters’ camps.

In the middle of the 1990s, therefore, the city of Johannesburg inherited a similar situation. The city is obliged to manage profound inequalities in terms of access. There are three main old townships in the city: Soweto, Orange Farm and Alexandra, each of which are composed of formal and informal residence zones with some “connected” areas and others which are “unconnected.” Thus coexisting in the city are the most disparate types and access to services, from levels very near European standards to non-access to services.

Indeed, in 2000, of the three million people living in Johannesburg, it was estimated that:

- 1 million people with average and high incomes had access to water and sanitation *via* individual connections equipped with classic meters (post-payment and classic billing system). These households thus paid on a pro rata basis of their real consumption. The rate of payment was evaluated at 85% for these households;
- 1 million people with low income, living principally in Soweto, received water and had access to a sanitation system without meters. Until 2004, billing was on a flat rate basis on consumption estimated at 20 m³/month for 125 ZAR. For reasons which we will discuss later, the rate of payment was very low (estimated at about 10);
- 1 million poor people living in informal neighborhoods received minimum service free of charge *via* trucks or communal standpipes. Access to sanitation was proposed *via* communal latrines intended to serve up to 15 families. In this case, the service was free of charge.

The service was thus very heterogeneous and unequal at the scale of the city; thus the challenge was as much technical as it was economic. Indeed, even if the main part of the city was already connected to networks (approximately two thirds), it was nonetheless necessary to extend the networks in order to widen coverage to unconnected zones, and to renew the existing networks in the townships where such networks did exist but were of poor quality. In both cases, significant capital was needed to improve service. Still, in this case, and contrary to a number of African countries where the urban question in terms of access to services consists of connecting or inventing technical devices to widen coverage to a large part of the population unconnected to networks, in South Africa, the challenge was as much to adapt the service to a very disparate population (in socioeconomic terms and integration in the city) as it was to widen coverage. Beyond this, there was high tension between, on the one hand, the need to insure the continuity of services in historically white sections of the city, and on the other hand, the extension of services to sub-standard zones (townships).

1.2.2. *From the myth of “unwillingness to pay” to prepaid meters*

Beyond the challenge of extending service, another considerable challenge consisted in resolving the question of bill payment in a certain number of townships. Water payment too was very heterogeneous and depended, to some degree, on belonging to a type of neighborhood, the townships being particularly concerned. This question

was notably very meaningful at the scale of Johannesburg, where it is estimated that only 10% of the volume of water billed in Soweto was collected by the municipality early in the 2000s. To understand this situation, at least in part, one has to look back at the 1980s and the struggles against apartheid.

During the protests against the apartheid regime which arose in the townships in the 1980s, infrastructure took a central role and became at once the location and the object of the struggles. These protests grew after the introduction of the Black Local Authorities (BLA), intended to quell protests in urban zones, notably after the events in Soweto in 1976^[6]. Given their nature, they were perceived by residents as illegitimate at the time of their creation. These authorities were to be self-supporting through the setting up of urban taxes. Thus, during this period, the BLA billed water services based on a standard flat rate corresponding to an estimated consumption of 20 m³ per month. However, in the middle of the 1980s, one of the social mobilization demonstrations against the regime took the form of a boycott of rents and services, abiding by directives from the ANC, part of the illegal opposition at the time, to “make the townships ungovernable.” It indeed concerned refusing all State administrative structures (town hall, school, water services, etc.) and replacing them with neighborhood committees and civics. The goal was to bankrupt the government. It is estimated that, in the 1980s, financial losses amounted to more than 500 million (M) ZAR. Non-payment was above all a political act aimed at destabilizing the regime, which led a large part of the BLA into an extensive financial crisis. Consequently, as early as the end of the 1980s, the BLA stopped carrying out disconnection operations, meter reading or billing in the townships: It had become more important for the BLA to restrain the political rebellions than to ensure payment of services. Consequently, township residents had a *de facto* near-free access to service, and non-payment was perceived as fair and legitimate in view of the nature of the apartheid State, a synonym for oppression.

Soweto is one of the symbolic townships of this situation. It was in fact the motor and the model for the anti-apartheid revolt, and in 1976 the student revolts began there, sending the signal of rebellion to the entire country. It is in Soweto that the slogan “make the country ungovernable” will be best followed. It is estimated that, in the country, more than 300,000 households heeded the boycott, of which 75,000 were in Soweto.

[6] On June 16, 1976, a group of black students gathered to protest against the obligation to follow their studies in Afrikaans, the main language of the country's white community. This event is the beginning of a large wave of protests which spread to other townships in the country.

Thus at the start of apartheid, local urban services, and water services in particular, are a central element in building the power's legitimacy, both local and central, which continues beyond the democratic transition. As we have seen, upon reaching power, the ANC places improved access to essential services (housing, electricity, water, ...) at the heart of its political process. Similarly, already in 1994, payment for services is also at the center of the strategy of building the nation and citizenship. The latter strove to "normalize" the relationship between the State and the citizens by making payment a central question. The basic premise was that while the democratic transition had given rights to citizens, it had also given them responsibilities. Beyond this, law enforcement authorities considered that the payment of services was the demonstration of citizens' maturity. Furthermore, for these same authorities, non-payment by the urban poor was a "behavioral" matter, explaining the development of a moral and pedagogical discourse centered around notions of "active citizens" and "empowerment" aiming at reforming the "culture" of these inhabitants and prompting them to pay. In this context, the *Masakhane* campaign (meaning "let's build together") was launched in 1994, aimed at making citizens "responsible." Despite this prompting, the principle of covering costs very quickly ran up against the problem of payment for poor citizens, and the campaign was an outright failure: the rate of payment stagnated to its level during apartheid (it was still estimated at 13% in 2004; cf. Smith).

It is difficult to explain the deep-seated reasons for the persistence in non-payment, notably in Soweto, where there remains strong pride in the recent political struggles and doubtless a certain form of habit. Nonetheless, certain authors (van Ryneveld, 1995; Goldblatt, 1999; Alence, 2002) have revealed other parameters which may explain the non-payment, beyond this notion of habit. They notably stress the ineffectiveness of collection mechanisms and the very poor quality of services. More generally, these authors suggest that a careful distinction must be made between the capacity to pay and the unwillingness to pay, when others highlight the "non-payment myth" conveyed by the authorities (Smith, J.A., 2010), which explained the installation of prepaid meters in certain cities. It is in this context of failure to normalize through persuasion that prepaid meters prevailed as a technical means of resolving non-payment. Thus there was a gradual shift towards a period of "coercion" in the poor neighborhoods of certain cities like Johannesburg. Ultimately, we clearly see that the authorities' view of the subject is somewhat biased, or simplistic, and certainly open to criticism: non-payment is a complex problem which cannot be resolved with the mere recourse to restrictive sociotechnical tools such as prepaid meters.

This new technology has two “advantages”: it permits the supply to each household of the free water foreseen in the context of social policy and, beyond this quantity, it requires that residents buy additional water *via* a prepaid card system. This new system breaks radically with the previous billing system in effect in the townships. Roughly, it can be said that the inhabitants went from flat-rate billing with no sanctions for non-payment to obliged prepayment governing access to water. Thus in democratic South Africa, the meters were installed in the poor zones where citizens, who had never been considered as such during apartheid, were supposed to become responsible consumers in the days following the democratic transition.

Beyond this, with urban fragmentation still a reality in Johannesburg, we observe that the prepaid meters have been installed solely in the areas historically populated by blacks and the poor, whereas the richer zones in the city remained equipped with classic meters. Furthermore, while apartheid is now part of the past, the social and economic inequalities are particularly large and visible: the average salary in Soweto is about 20 times less than the average national salary. In these conditions, and given the political profile of Soweto (and this, even if its living heritage remains difficult to appreciate), putting in place a payment system such as the prepaid meters ran the risk, at best, of creating a very delicate situation. And this is what the young city of Johannesburg inherited at the end of the 1990s.

1.3 From the transformation of local power to the creation of Johannesburg Water

The transformation of the management of urban technical networks at the scale of Johannesburg cannot be discussed without placing the city in its historical perspective. Its institutional and financial trajectory, like that of South Africa’s six metropolises, has largely determined how water services are managed today.

The city has undergone two large waves of reforms and modernization: a first one prior to the first democratic local elections (1995-1996) and a second one in 2000 provoked by two internal and external factors (a declaration of bankruptcy in 1997 and the creation of “unicities” fostered by the national context).

The reorganization of the local government and the implementation of a services reform program leads the municipality to put a public utility in place, Johannesburg Water (JW), committed to a five-year management contract with an affiliate of Suez.

Although since 2006 JW has resumed its status as a state-owned company with no link to the private sector, we feel the need to review its history. Even if the *Gcin'Amanzi* project and the Mazibuko affair (of interest to us here) are not objectively tied to the controversies about public or private management which greatly animated debates over urban water services in developing countries, it is nonetheless useful to recall that the project was initiated at the time of a management contract. The latter is without a doubt one of the factors explaining the disputes which emerged as soon as it was launched. This origin thus explains, at least in part, the problem of social acceptability of the project associated in people's minds with a "privatization contract."

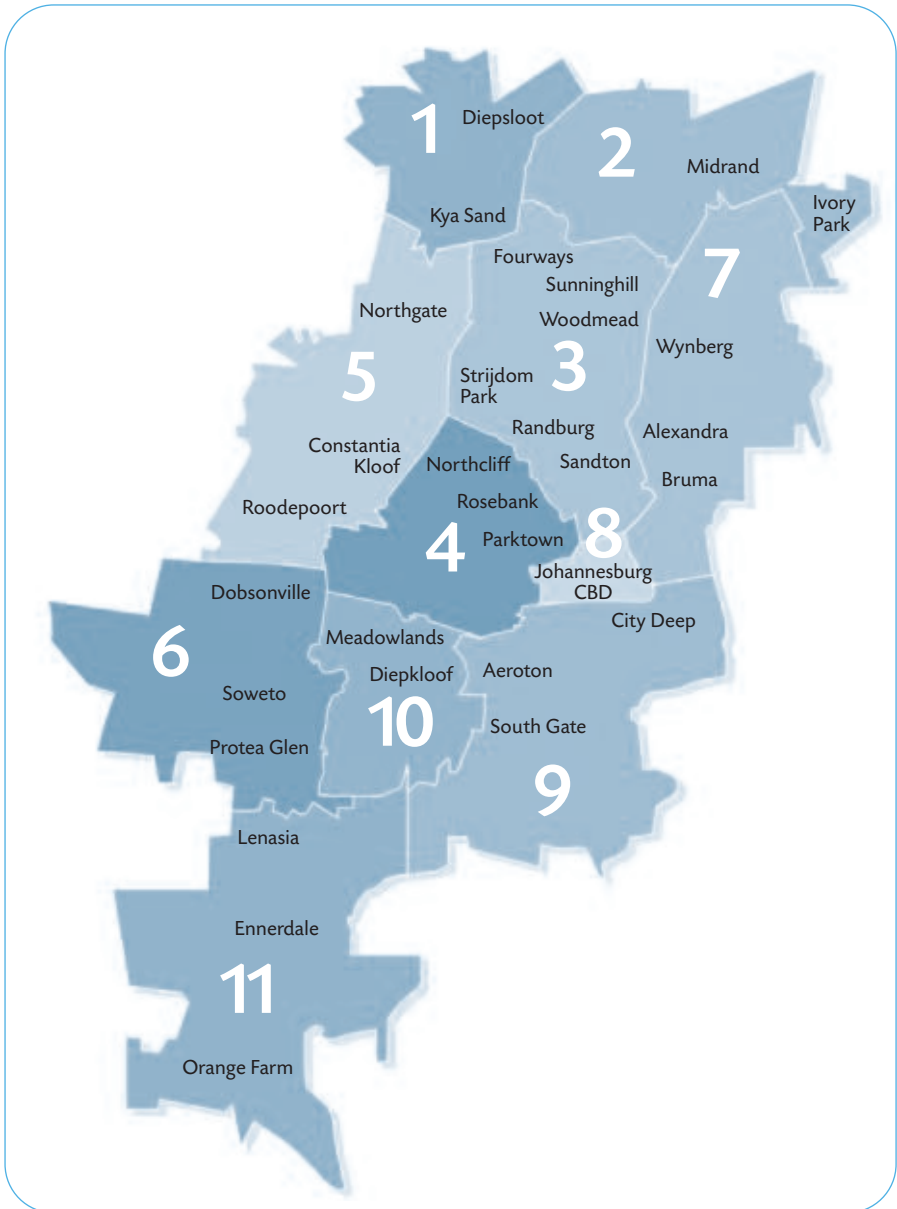
1.3.1. Unification of local government structures

After the first democratic elections of 1994, and to prepare the first democratic local elections, the new South African government decides to proceed with administrative redistricting and a redefinition of cities, once separated into white municipalities and black townships with the goal of ensuring a realignment between the rich and the poor, and a standardization of operating conditions of local powers (Jaglin, 2003). In a context of extreme urban fragmentation, the objective is to rapidly diminish inequalities. Therefore, until the early 1990s, the Johannesburg zone is comprised of 11 local authorities divided by racial criteria. Administrative redistricting means the creation of a metropolitan entity gathering these 11 local authorities and their 3 million inhabitants: Greater Johannesburg. The city thus sees a first temporary restructuring made up of four councils, effective in July 1996.

Considering the results of the first reform to be insufficient, the government decides to proceed with a second wave of territorial reorganization for the country's six largest metropolises. "The creation of a metropolitan power aimed to improve the effectiveness and the performance of the local administration, all while facilitating the homogenization of tax and tariff systems to the benefit of the underprivileged townships" (Jaglin, 2003). The creation of the unicities thus occurred in January 2001 following local elections of December 2000. The six unicities, also known as metropolitan municipalities, are from now on Pretoria, Cape Town, Port Elizabeth, Durban, East Rand and Johannesburg. On the scale of Johannesburg, the four provisional councils are therefore combined into one single municipality henceforth called City of Johannesburg (COJ). In 2000, the city is redistricted into eleven administrative regions (see Map 1).

From 1994 to the beginning of the 2000s, Johannesburg experiences a profound institutional transformation which must meet two objectives: "*dismantle the*

Map 1 Johannesburg, administrative areas



Source : Wikipedia.

management tools of segregational urbanism (apartheid) and reform the institutions of local power to make a transformation tool of urban society. More generally, the stated goal of the reform is to combine, at the local level, economic development and ‘urban integration’” (Jaglin, 2005a).

The creation of COJ and the successive structural reforms of the city have considerable consequences on the management and regulation of services, which means a unification effort and the centralization of technical services within one single unit.

Box 4 *The actors ensuring water distribution*

The Water Services Act (Act n° 108 of 1997) delegates water management services to the municipalities. They can either manage their network through a public authority or they can delegate it to a Water Services Provider, which can be either public or private. Two actors ensure water distribution:

- the Water Services Authorities (WSA), who have the legal responsibility to supply the water service over their jurisdictional territory, from the planning of service development up to the regulation of contracts concluded with potential service providers
- the Water Service Providers (WSP) designate the technical entity responsible for technically ensuring the network management and water distribution.

In these conditions, the WSP furnishes:

- a Bulk Water Services Provider which signs a contract with the WSA or another WSP to sell them water and/or accept treatable wastewater; or
- a Retail Water Services Provider which signs a contract with the WSA to take on the operational responsibility for the water services distribution to one or several consumers within a specific geographic entity; or
- both of these services.

The WSP role can be fulfilled by different entities. The municipality can:

- manage distribution itself through a public authority; in this case, WSA and WSP are joined;
- delegate the supply and treatment to Water Boards (state-owned company ensuring the sale of bulk water services for retail distribution);

The municipality can call in a public utility, private utility or community-based organizations.

Source: the author, from Blanc and Ghesquières, 2006.

The municipality must therefore overcome a dual challenge: meet the inherent institutional and financial challenge in restructuring the city but also develop infrastructures in order to provide access to water in highly diverse zones. Indeed, of the 284 municipalities in South Africa, these six unicipalities alone are to have exclusive municipal competence and to act as Water Services Authorities, which implies that these cities have the legal responsibility to supply water on their jurisdictional territory (see Box 4). COJ thus becomes responsible for supplying water to its 3 million inhabitants situated on a surface area totaling 1,380 km².

1.3.2. Igoli 2002 Plan: transformation of services management and creation of JW

At the same time as these institutional reforms, from 1995 the city confronts financial troubles and, in 1997, Greater Johannesburg is declared bankrupt. The city has two successive periods of financial malaise: between 1995 and 1997, called the period of “growth without sustainability” (Smith, 2006), in contrast, between 1997 and 1999, with another, of “sustainability without growth,” and investments are frozen. Thus, despite heavy investments undertaken by the municipality between 1995 and 1997 in order to reduce the disparity in access to services, its problems of investment capacity very quickly obstruct its urban renewal project.

To address this situation, the Igoli 2002 plan is drawn up in 1999 with support from the World Bank. This 3-year plan aims at reforming the city’s structure in depth in order to make COJ a “world class city” (now the city’s official slogan). More exactly, this plan aims to “ensure cost-effective service delivery by reducing fragmentation, eliminating duplication, improving accountability, focusing on human development and providing performance incentives. Furthermore, it sought to restore the city’s financial health and sustainability. It also envisaged that the city would work better through a combination of new political governance structures, a core administration, regional administrations, and utilities, agencies and corporatized entities.”^[7]

In the domain of services, it is thus decided to separate the client (in this case, the city) and the entrepreneur (delegation of the public services mandate) after having studied several restructuring possibilities (Smith, 2006). This is concretely translated in the establishment of municipal entities managed like companies in order to avoid the intrusion of political authorities. These entities, private companies 100% owned by the

[7] Annual Report of the City of Johannesburg (2000).

city, are divided into three types, according to the services: Utilities, Agencies and Corporatized Enterprises (UAC):

- utilities are created for water and sanitation services, electricity and waste collection;
- agencies are established for services traditionally financed by local taxes like roads (Johannesburg Roads), or the management of parks and cemeteries (City Parks);
- finally, corporatized entities are created for services which may require users to pay an entry fee but are nonetheless largely subsidized by local taxes; among these entities are theaters, zoos, bus services, etc.

This is the context in which JW is created, in November 2000, to ensure the provision of water and sanitation services; it begins operations in January 2001 in the entire COJ area. Its creation is motivated by the wish to promote the economic effectiveness and the improvement of service to the benefit of customers. Given the conditions stated previously, JW is a publicly owned company governed by private law regulated by two important texts: the “companies act,” the firm being governed by private law, and the “municipal finance act,” which defines the rules governing firms owned by municipalities. To ensure its operation, the municipality and JW sign a 25-year service delivery agreement in February 2001. The regulation of the firm is organized in a complex way with the sharing of responsibilities between the Mayoral Committee, a specially created regulator, and the shareholder unit, responsible for defending the municipality’s interests, notably financial (Smith, 2006).

To summarize, the management of water services in Johannesburg is provided by three main actors:

- the WSA: the municipality of Johannesburg;
- the water board, Rand Water, a publicly owned company responsible for providing the bulk sale of water and therefore to carry out the supply and treatment of water;
- JW, the public entity playing the role of WSP.

1.3.3. *The controversial but effective intervention of a private operator: the management contract between JW and JOWAM*

For fifteen years, in South Africa, as in certain other developing or emerging countries, the governments have considered public-private partnerships (PPP) to be a means of improving the quality, effectiveness and sustainability of water and sanitation services. In these conditions, in Johannesburg, a management contract was chosen by the city^[8]. For a relatively short period (between 3 and 5 years), this type of contract requires no financial investment by the private operator, and the remuneration of the latter occurs annually with a part indexed to its performance.

The city's motivations for bringing in a private operator were numerous and complex: to improve service, to transform the company into a financially viable entity for the long term, to launch JW while succeeding to group six previously independent entities into one with homogeneous operations, to strengthen the capacity of teams and finally to foster the establishment of Black Economic Empowerment (BEE). The challenge was thus financial (the company being in bankruptcy at the beginning of the 2000s), organizational, and directly linked to the management of human resources inside the company (Marin *et al.*, 2009).

Following an international invitation to tender, Johannesburg Water Management (JOWAM, a consortium composed of Ondo and Suez, the latter holding 63% of the capital) won a 5-year management contract (from the 1st of April 2001 to the 30th of April 2006) which specified that the operator was responsible for organizing the provision of a sustainable and affordable service integrating the principle of cost coverage, improvement of the network in low-income areas and the creation of a customer-oriented culture with users (Smith, 2006; Marin *et al.*, 2009; Wet (de) *et al.*, 2009).

Beyond this, a strong environmental preoccupation existed at the city level. This contextual element is important in that it was decisive for the establishment of the *Gcin'Amanzi* project which interests us in this study. Indeed, the municipality and the operator needed to reduce water losses to be able to ensure supply in the face of a constant rise in demand in a tense region (it has the largest economy and is the most urbanized in South Africa). Recent studies (Seago and McKenzie, 2007; McKenzie

[8] Today it is known that behind the generic term PPP is hidden a multiple reality ranging from the classic concession model to a much lighter management contract, each type of contract being based on the relatively large transfer of risk and responsibility to the private operator.

and Wegelin, 2009) show that the dual preoccupation of conserving the resource and setting up programs aimed at reducing amounts of water used are a necessity in the region of Gauteng.

In this context, one of the major objectives of JOWAM was to reduce non-revenue water, *i.e.* to reduce the difference between the amount of water produced and introduced into the distribution network and the amount billed to customers, such losses automatically translating into financial losses for the company. There are two main origins of financial losses:

- physical losses corresponding to water lost due to leaks in the distribution network,
- commercial losses corresponding to water distributed to customers but not billed due to billing problems or illegal consumption.

The total of these losses was estimated at 43% in 2001, well above international standards,^[9] which represented high financial losses and were in large part responsible for the company's operating account deficit. Very quickly it was determined that losses were lower in areas equipped with meters, thus middle and upper income urban zones, than in zones lacking meters and billed at a flat rate (20 m³ of water billed per month whatever the consumption): the townships, of which Soweto is the largest with more than one million people, represent nearly 1/3 of the city's population.

Table 1 *Estimated physical and commercial losses in Johannesburg (2004)*

	Physical losses (%)	Commercial losses (%)	Non-revenue water (losses)
Areas with meters	9	10	19
Areas without meters	11	58	69

Source: Johannesburg Water, 2004.

[9] It should be noted that an acceptable level of losses, commercial and physical combined, is between 10 and 15%; the municipality indeed had a serious problem to resolve.

Indeed, in the first category, the loss rate was 19% whereas, in the townships, the number is estimated at 69% (see Table 1). In short, the loss rate in the townships represented about 60% of that observed at the municipal level. The authorities had several explanations: the so-called “culture of non-payment” (cf. 1.2.2.), high consumption in the townships (about 66 m³ of water per household per month), and dilapidated networks.

As Table 1 illustrates, the issue particularly concerned commercial losses, notably in the zones billed at a flat rate, since their loss rate was 58% against only 10% in the zones where billing was based on the classic meter system. Reducing these losses thus becomes urgent for the municipality and for JOWAM, and, recognizing that the situation could not be ignored for the financial well-being of the firm and more generally to ensure the objective of resource conservation, the city and JOWAM decide to set up a water demand management program which would soon take the form of the project which interests us in this study: the *Gcin’Amanzi* project.

In financial terms, the management contract between JW and JOWAM was a success hailed by many observers: JW swung from a 25% financial loss in the first year of the contract to breaking even in the second year. The contract thus allowed JW to reach a certain financial viability (Marin *et al.*, 2009).

Nonetheless, certain limits are to be stressed. On the one hand, the inability of JOWAM to reduce the losses, the loss rate being essentially the same at the beginning and at the end of the contract. Different factors explain this: the short length of the contract, problems in the transfer of responsibilities between JOWAM and the municipality, and the difficulty of putting the OGA project in place in Soweto due to significant local resistance. Thus, Marin (2009) explains that it is rather common to find that management contracts are ill-adapted for reducing physical losses which require significant investment and lengthy pipe repair. Besides, there is a clear incapacity to implement a durable solution for informal settlements,^[10] despite the new diversification of services, in order to encourage a wide and rapid increase in coverage (see Box 7). This failure can be attributed to both not defining responsibilities between JOWAM and the municipal Housing Department, and to problems related to land status and the illegal occupation of land, posing problems for the extension of services.

[10] Approximately 171,000 households are concerned, 14% of which have access to water *via* an individual connection, 64% *via* a standpipe and 22% *via* a water tank.

If this management contract is internationally considered as a good example of “successful PPP” (Marin, 2009), it is also the object of many protests, notably by residents, certain unions, and social movements who have perceived it as a “privatization contract.” Two reasons can explain this bad press. The first is directly linked to the visibility, or rather the invisibility, of the project: the improvements brought by the management contract (better structuring of the company, improvement in financial results, etc.) are results which are essentially invisible to the inhabitants, which explains the difficulty in accepting the temporary introduction of the private operator. Indeed, the people, notably the most vulnerable, did not see any real improvement in their access to water during JOWAM’s mandate. Furthermore, it is at the end of this mandate that prepaid meters appeared, with the problems that we will explain later in this study.

Certain academics became active relays of these criticisms. These academics, often of a neo-Marxist influence, are interested in questions of social justice and equity in denouncing the government’s orientations on services, their choice of financial solutions or the sociotechnical tools adopted to ensure compliance with its policy. In the last few years in South Africa, the provision of essential services has primarily been treated in debates over the potential of the public or private sector, with a particular interest in the question of the capacity – or rather the incapacity – of the private sector to ensure affordable services for the urban poor, and the inadequacy of its implication in the water sector due to its tendency to put a priority on goals of economic effectiveness over those related to equity (Bond, 2000; McDonald and Pape, 2002; McDonald and Ruiters, 2005; Miraftab and Wills, 2005). In this context, the notions of “commodification of water” or of “privatization of services” are widely employed, often wrongly, to characterize much more complex realities.

1.4. The implementation of the *Gcin’Amanzi* Operation, or the obligation to conserve a resource

1.4.1. *Soweto: a strategic choice for such a big project? Between environmental justifications and difficult socioeconomic conditions*

In September 2003, the city’s mayor, Amos Masondo, announced the launch of a vast operation to renovate networks aiming at standardizing water services at the municipal level: Operation *Gcin’Amanzi* (OGA) (“conserve water” in Zulu). This wide-

reaching project includes the installation of 170,000 prepaid meters in Soweto, the equivalent of about 32% of the city's connections and 67.5% of all the connections in the townships. It is estimated that at this time 280,000 connections exist in areas equipped with classic meters (middle and upper classes) and 240,000 in the townships (Soweto, Orange Farm and Alexandra), giving a total of 520,000 private connections (Marin *et al.*, 2009). The *Gcin'Amanzi* project is the biggest network renovation and demand management project ever launched at the municipal level, with an initial cost estimated at 700 M ZAR. It is also the largest project in the world making mass use of prepaid meters. The issue, for the city, is thus to be able to set an example for the world if the project enables the city to reach the established objectives.

The project must respond to two major preoccupations: the first is environmental, with a need to conserve the resource and regulate the demand; the second is economic and financial. The two objectives set are to reduce physical losses by improving infrastructures and to cut commercial losses by installing prepaid meters.

At the time, Soweto suffered from two considerable handicaps:

- numerous leaks in the network; according to JW, 90% of the physical losses in zones unequipped with meters are found in Soweto. Further, Soweto consumes 30% of the water JW buys from Rand Water (about 132 million m³ at a cost of 350 M ZAR; Marin *et al.*, 2009);
- a very low collection rate (estimated at 10%) and high household debt.

In these conditions, Soweto quickly becomes a priority intervention zone for the municipality and the operator.

While these arguments show why Soweto was chosen as a target zone, questions must be asked about the socioeconomic conditions of the zone and the degree to which the project corresponded to local social realities. The perspectives provided by the following elements (cf. Box 5) lead us to believe that, much more than a commercial or physical challenge, for the municipality and the water company this project constituted a socioeconomic and political challenge which was doubtless initially badly assessed by both.

Box 5 *Soweto in the city: unfavorable socioeconomic characteristics*

While the latest city-level census was performed ten years ago,^[11] a forecasting exercise determined that the population of Johannesburg in 2006 was 3,790,324 with an annual growth rate of about 3.3%.

In spite of an income level which stands out as being the highest of all the nation's cities (average annual income per inhabitant 57% higher than the average national annual income), half of the population lives on less than 1,600 ZAR per month.^[12]

The Gini coefficient, which indicates the degree of inequality in a society and thus proves particularly useful in very unequal societies, was 0.56 in 2005 (and 0.60 for blacks), with 24.1% of the population living below the poverty line (32.3% for blacks, one of the poorest on the municipal level).^[13] In spite of its relative prosperity, Johannesburg remains a city which is quite socially and economically unequal, which is manifested by a persistent division of the city according to class and ethnic category.

Poor and black people in their majority live in the townships at the edges of the city, notably in Orange Farm, Alexandra or Soweto. The latter is also the biggest township in the city as estimates are that 1,250,310 people live there, about 43% of the total population. The unemployment rate there is very high (53%).^[14]

It is difficult to find recent socioeconomic data. Still, a satisfaction survey ordered by JW from a private consulting firm in 2007, measuring customer satisfaction with the OGA project through a sampling of over 3,000 people^[15] gives insight into the socioeconomic characteristics of Soweto. Overall, it shows that, for the sample selected:

- the median monthly revenue is 2,251 ZAR per household;
- more than one third of households questioned have no income;
- a large majority (79%) receive income assistance from the state (grants);
- 40% of households are recorded as poverty-stricken by the municipality.^[16]

[11] The last census took place in 2001 but remains our reference base to the degree that it is the only one existing for united Johannesburg, the next one planned for 2011.

[12] The amount corresponding to the minimum salary in South Africa.

[13] COJ, City Slide Pack (2008).

[14] *Ibid.*

[15] Operation Gcin'Amanzi Customer Satisfaction Survey, carried out in 2007 by CASE, a South African NGO.

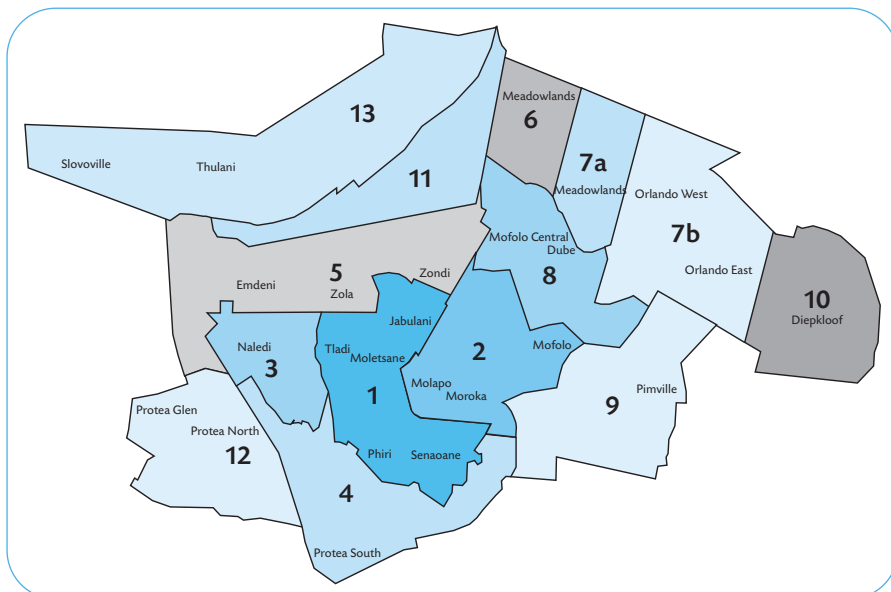
[16] According to the guidelines drawn up in 2005 by the Department of Provincial and Local Government, a person is considered poverty-stricken if they earn less than 1,600 ZAR per month. Municipalities are then free to define thresholds and social assistance depending on the city's capacity and the social realities it is facing.

1.4.2. Technical description of the project

In 2004, a pilot project is implemented in Phiri, one of the poorest neighborhoods in the municipality ^[17] and continues on a large-scale basis until June 2007. Its implementation is divided into superblocs (SB) of about 10,000 households (see Map 2). After the pilot phase of 2,000 households in Phiri, a phase of nine zones (99,000 households) is completed:

- SB1, SB2 and SB3 (Chiawelo, Phiri, Senaoane, Mapetla, Moletsane, Tladi and Jabulani);
- SB4, SB5 and SB7a: Rockville, Molapo, Moroka North, White City CWJ, White City, Mofolo Central and Foxlake;
- SB6, SB8, SB12 and 13a (Protea North, Naledi and Emndeni South).

Map 2 Soweto, superblocs drawn up in the context of the implementation of the OGA project



Source: JW, 2010.

[17] According to a report dated in 2008 (Johannesburg Poverty and Livelihoods Study), Phiri is the tenth poorest ward among the 109 in the Johannesburg municipality.

The main activities of the OGA project include:

- the renovation of the public water network in order to reduce leaks in dilapidated networks;
- for the households signing on to the project, the repair of leaks located in houses, the cancelation of household water debts^[18] and the installation of a prepaid meter obliging households to pay for water consumed beyond the free 6 m³. All of these elements make it possible to reach service level 3 (see Box 6 for the levels of service). Furthermore, attractive rates are proposed to people accepting a prepaid meter (cf. Table 2);

Table 2 *Rate schedule 2008-2009 and 2009-2010: differences between zones equipped with classic meters and zones equipped with prepaid meters (in ZAR/kl)*

Volume of water (in m ³)	2008-2009 rate		2009-2010 rate	
	Zones with meters	Zones previously billed at a flat rate equipped with meters through the OGA project	Zones with meters	Zones previously billed at a flat rate equipped with meters through the OGA project
From 0 to 6	0	0	0	0
From 7 to 10	4,40	3,40	4,66	3,60
From 11 to 15	6,28	4,00	6,83	4,35
From 16 to 20	7,93	6,58	8,79	7,29
From 21 to 30	9,52	9,11	10,64	10,19
From 31 to 40	9,60	9,20	10,83	10,38
40 and more	11,46	11,36	13,04	12,93

Source: author, adapted from JW (2009).

[18] As a reminder, less than 10% of the amount billed for water was recovered by the operator in Soweto. In these conditions, in all, the city foresaw eliminating more than 1.3 billion ZAR over the entire project.

Box 6 *The three levels of service at the municipal level in Johannesburg*

The diversification of services and the segmentation of supply is brought to Johannesburg with the aim of inclusion in the city. The goal of the city is to first respond to the basic needs of the entire population by proposing intermediate-level services before considering the gradual phasing in of the “right to water” through higher levels of service. The favored approach is rapid but uniform universal service rather than connecting everyone to a common network. Although this means a lowering of technical norms for certain poor segments of the population, the targeted goal is rapid total coverage, which has the notable advantage of being able to rapidly address the issue of informal settlements.

The three levels of service, as defined by municipal by-laws, are:

- level 1, the weakest, corresponds to free supply through collective standpipes located less than 200 meters from the place where water is needed; sanitation is assured with collective dry latrines. This level of service essentially concerns informal residential areas, termed non-permanent, which will be relocated to official sites in the near future. Migration to a superior level of service from this first level is not possible; that change is foreseen upon the relocation of households;
- level 2 corresponds to a water network connection outside the dwelling and an individual ventilated latrine for each property; in this case, there is no charge for water. This level of service is first and foremost designed for permanent areas or formalized informal dwellings as well as low-cost housing built in the context of the Provincial Housing Programme. This level of service can be transformed into a superior level of service if users’ capacity to pay permits;
- level 3 is the most sophisticated: it corresponds to a household connection equipped with a meter (post or prepaid) and a sanitation system connected to the public sewerage network; this system is the most widespread in Johannesburg.

In spite of the universality intentionally introduced by the city, as a former manager stressed in July 2009, “the true desire of the city is to supply level 3 to everyone, but this system allows us to account for the long road which lies before us before we reach that ideal situation.” The city of Johannesburg is therefore seeking equality and the universality of services with the introduction of a diversification of services.

- for the households refusing to sign on to the project, the maintenance of the debt and the installation of a single free water supply point on the plot, with no connection inside the dwelling. Water is supplied free of charge, but flow between 6 and 10 m³ is reduced in order to manage consumption. This solution

corresponds to an intermediate level of service and a downgrading of service level for residents who until then benefited from level 3 service (without prepaid meters), even if the latter was of low quality. Households refusing the installation of a prepaid meter and a downgrading to level 2 service were disconnected from the water network, a fact widely cited by the instigators of the Mazibuko trial;

- the installation of sales points allowing subscribers to easily buy prepaid cards.

The project thus has two essential components: one technical, with the renovation of the networks, and the other social, with respect to behavioral changes of poor citizens. The goal here is to change their “behavior” regarding the payment of their water bills; the chosen method is that of coercion, with the introduction of prepaid meters.

1.5. Relatively satisfactory results at the time of the project’s premature suspension

1.5.1. A convincing technical and financial record

Despite a strong challenge by social movements against the *Gcin’Amanzi* project and the emergence of the Mazibuko trial in 2006, it is noted that, upon the premature halt of the project following the High Court’s decision (cf. 2.1.2.) in 2008, the first phase of the project had rather satisfactory results (see Box 7), in technical and financial terms. JW boasts the following assessment:

- concerning the control of water consumption in Phiri, significant progress was made: before the project began, average consumption was noted at more than 60 m³ per household per month. In 2005, a JW report showed that 63% of households consumed an average of 11 m³;
- until the suspension of the project in May 2008, the return on investment was estimated at 36%. Furthermore, from the beginning of the project, JW estimated that the savings from limiting physical and financial losses amounted to 326 M ZAR. A slightly closer analysis confirms that it is indeed the reduction of physical and financial losses which account for this gain, and not sales, since the revenues from billing remain rather low (fewer than a third of the households benefiting from the project buy water beyond the free allocation of 6 m³);

- according to a consumer satisfaction survey carried out in 2006, more than 99% of the population signed on to the project. These results are nonetheless open to challenge given our observations in the field, the demonstrations against the project described above and the Mazibuko trial. This pilot phase ended in February 2005, but the OGA was extended to other neighborhoods in Soweto;
- in October 2009, JW restored 116 km of network and installed nearly 100,000 prepaid meters.

Box 7 OGA impacts in figures^[19]

Consumption before the intervention	66 m ³ per household per month
Consumption after the intervention	12 m ³ per household per month
Percentage reduction in water usage	81%
Percentage of users not buying water beyond the 6 m ³ of free water provided	48%
Average monthly cost of water purchase	42.05 ZAR
Monthly billed amount before intervention (flat-rate consumption)	149 ZAR
Total reduction in terms of water purchased from Rand Water (51 months, since July 2004)	Savings of 98,000,000 m ³ of water representing a cost of 290 M ZAR

Source: adapted from JW (2010).

By 2008, 98,207 prepaid meters were installed (see Table 3); during the same time, large water savings are recorded both in volume and in financial terms (reduction in water purchases by Rand Water). Nonetheless, after the stoppage of the project in 2008, water losses and financial expenditures rise again (cf. Figure 1). This surge to a high leakage level is explained at JW by the halt in the installation of prepaid meters: *“In 2008 the non-revenue water started to increase due to suspension of the Project following the legal process, due to some customers’ by-passing meters and hence reverting to old water-usage behavior.”*^[20] JW thus considers that prepaid meters are the effective sociotechnical tools which can assure a significant drop in water

[19] The data represented here is that corresponding to results recorded by the company up to the premature halt of the project in May 2008.

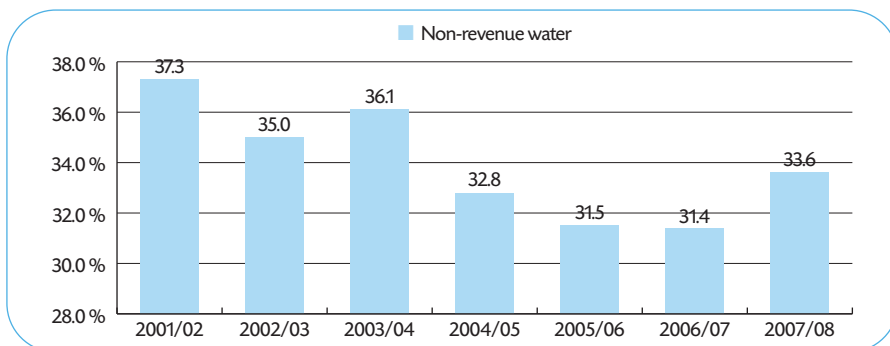
[20] Cf. JW (2010).

Table 3 *Project OGA: number of meters installed and water savings achieved*

Financial year	Number of prepaid meters installed since the start of the project	Cumulative number of meters installed	Annual reduction in water losses where meters have been installed	Annual water savings (reduction in terms of water bought from Rand Water)
	Number		in m ³	in ZAR
2004/2005	20,232	20,232	4,297,880	11,412,590
2005/2006	19,967	40,199	12,927,442	36,150,718
2006/2007	35,120	75,319	21,742,192	63,869,863
2007/2008	23,488	98,807	28,997,874	89,017,674
2008/2009	0	98,807	25,204,045	81,857,194
2009/2010	0	98,807	10,059,820	35,553,050
TOTAL	98,807	98,807	103,229,253	317,861,050

Source: JW, November 2009

Figure 1 *Evolution of water losses between 2001 and 2008*



Source: JW, 2010

consumption.

We feel it important to nuance these words: given the high level of illegal disconnection of meters (observed at the very outset of the project), it is impossible to attribute all the project's benefits to the meters. To the contrary, it is very likely that the drop in consumption was in large part equally due to the repairs of the numerous leaks in the deteriorated public network of Soweto. Thus, the effectiveness of prepaid meters must be placed in proper perspective.

1.5.2. What social outcome?

Beyond the technical and financial results of the project, and in spite of the legitimization granted by the Constitutional Court decision (cf. 21.2.), the project is also lacking in certain social aspects. Concerning the acceptance of prepaid meters, this first phase is a considerable failure: JW estimates that between 40 and 60% of the 98,000 meters installed were rendered unusable by residents, often encouraged by social movements. According to JW, there are more than 40,000 bypass connections, amounting to 41% of the meters installed and more than 4,000 meters vandalized or forcibly removed.

In this context, the operator estimates that the trial encouraged the development of a discourse legitimizing the bypassing of meters and therefore led to a massive level of sabotage. In particular it accuses the High Court decision denouncing the unconstitutional and illegal nature of prepaid meters. The failure to understand the exact terms of this decision encouraged the revival of illegal acts. Indeed, for many people, the first trial's decree ruling that the meters were illegal and unconstitutional legitimized their removal, as one militant says: "*after winning the trial, we began to rip out the meters; we applied the law ourselves!*"^[21] This rejection of meters spread beyond militant circles, as shown in the conclusions of the focus group surveys carried out during our field work. The surveys point up a very high rate of illegal disconnection of the meters in the homes of non-militants or those describing themselves as not close to social movements. This data also revealed that the operator failed in its aim to change user behavior. In other words, JW did not manage to "make" citizens "more responsible."

The social acceptance of the project is thus significantly questioned. While, at the time of the resumption of the project, these elements are played down by JW, it remains

[21] CAWP, July 2009.

true that they are part of the existing circumstances, and that a way must be found to minimize the impact.

Part Two

2. The law, a lever of change beyond the defeat in court?

From the beginning, the OGA project is the object of diverse protests which in 2006 culminate in the Mazibuko trial. In October 2009, the High Court hands down a ruling legitimizing the approach of the municipality and the operator, allowing them to resume the implementation of the project halted since the May 2008 court decision. Whereas the outlines of the project remain essentially identical to those prevailing during its first phase (2004-2008), significant technical and social evolutions are nonetheless introduced and participative engineering, accompanied by a strategy of communication, are hereafter adopted. Thus, beyond the plaintiffs' defeat, a critical reading of the trial can be adopted, showing that it nonetheless facilitated considerable advances towards a better integration of situations of poverty.

The objective of this part is to illustrate the changes established at city level. The first section will revisit the legal process. The second section will show that the militant recourse to the law is a paradoxical tool here to the extent that, in spite of the defeat of the applicants and the rejection of their arguments by the Constitutional Court, the trial brought about the emergence of technical and social innovations responding to their demands. The third section will revisit the participative engineering and the communications strategy deployed in the communities to gain acceptance of the project. Finally, we will show that the militant use of the law can be an effective lever of change in terms of public policy.

2.1. The Soweto “water war”^[22]: from the street to the courts

2.1.1. Social movements in the streets

Very quickly, the OGA project is the object of protests from certain residents who, on the one hand, rise up against the installation of prepaid meters obliging them to pay for water beyond the amount of free water and, on the other hand, the insufficient

[22] Phrase inspired by a *Mail and Guardian* article title of 24 July 2006: “Soweto starts its water war.”

quantity of free water. Already in August 2003, these residents formed an organized group: the Phiri Concerned Residents Forum (PCRf) with the support of the Anti Privatisation Forum (APF), one of the “new” influential social movements in Johannesburg (Ballard *et al.*, 2006; Tournadre-Plancq, 2008; Gentle, 2008;

Box 8 *A catalyzing actor: the APF*

The APF was created in 2000 by township residents and certain politically-committed students and intellectuals, often ex-members of the Communist party, the ANC or of influential unions such as the Congress of South African Trade Unions (COSATU). The APF is an organization gathering militants of rather diverse profiles, even if its members are predominately poor township inhabitants.

The APF is a forum of the left with proclaimed Marxist orientations. Still, its political identity is not unified as the organization is composed of militants of all color: Communists critical of the established Communist party, Trotskyists, etc.

The APF, a forum largely lacking in institutions, includes about thirty affiliated organizations located in Johannesburg’s townships, including the PCRf. Drawing strength from these affiliated members, the organization has a powerful social movement in Johannesburg, and more generally in the region of Gauteng. The structure concentrates on the defense of marginalized populations, mainly on questions concerning the access to basic services. It is developing a rather radical anti-privatization and anti-cost-coverage ideology. In this context, the meters symbolize a dual threat: that of the privatization of services and that of the commodification of water, a resource considered to be a public good.

Box 9 *An organization created to reinforce resistance on the ground: the CAWP*

In the context of the resistance against the *Gcin’Amanzi* project in Phiri, the APF implemented a larger and more specific resistance front to water access in 2004: the CAWP. This group allowed the gathering of organizations not sharing the APF’s political orientations but wishing to mobilize on questions of access to water. Despite its relative independence, the CAWP depends on the APF administratively, financially and logistically. The coalition has a role in coordinating and leading APF members in the field and also boasts a dedicated research section which has produced several reports on Orange Farm and Soweto townships’ access to water. The CAWP justifies all its actions in evoking the constitutional right to water.

White, 2006). The emergence of this collective resistance leads to the creation of the Coalition Against Water Privatisation (CAWP; see Box 9), a branch of the APF focused on water issues (cf. Box 8).

This collective organization materializes through the *Vul'Amanzi* operation (“more water” in Zulu) whose concrete translations are numerous: demonstrations before the municipal council, marches up to the water company’s offices, distribution of petitions, organization of weekly information and mobilization meetings, closing of trenches dug during the network renovation works, cutoff of conduits installed by JW, or sabotage of prepaid meters (cf. Box 10). In this context, the APF, the CAWP and the PCRf organize the material protest conditions by training volunteers in techniques of the illegal disconnection of meters or in manning several Soweto offices every day. Consequently, when households wish to disconnect their prepaid meters, they can simply phone the organization’s office which then sends volunteers to carry out the operation.

In response to these local protests, the repression by the municipality and the water company is quite vigorous. The police and private security companies (Wozani Security, better known under the name Red Ant^[23]) are brought in punctually to keep watch over the works.^[24] In the months that follow the beginning of the works, fourteen people are arrested for “public violence,” “provocation” or “damage to private property” (APF and CAWP, 2006).

Though the size of the protests against the project is quite difficult to determine, two indicators show that it was sizeable. Firstly, today, the water company estimates that 40 to 50% of meters were illegally disconnected in Soweto; secondly, the company estimates that a large part of the increase in project costs is linked to everyday security expenditures.

[23] Security company whose members, all wearing red (giving rise to their nickname “red ants”), are famous throughout the country for their acts of eviction, notably in Johannesburg.

[24] This situation corroborates a more global situation. Many observers note that the repression of the social movements by the State is radicalizing in democratic South Africa. It seems that, for the ANC and its allies, the “illegal” acts, considered valid in the times of apartheid, are no longer acceptable today given the democratic regime and the presence of elected and legitimate authorities.

Box 10 *Illegal disconnection of a prepaid meter (Senaoane, Soweto, extract from a field log, November, 2010)*

Walter, 40, member of the Soweto Electricity Crisis Committee (SECC), one of the active social movements in Soweto, visits Mrs. Mandela Tshabalala, a 60-year-old woman living in the Senaoane neighborhood of Soweto to disconnect the prepaid meter which was installed in 2007. The household consists of nineteen people: some are members of the family, others are tenants living in two “backyard shacks.” Of the inhabitants, just one has a regular job. Household income is low: 1,500-2,000 ZAR.

For half an hour, in the living room, Walter presents the SECC and its motivations to Mrs. Tshabalala, the owner. Here are some extracts from his sales pitch:

“As an organization we represent the residents of Soweto and we oppose the installation of meters as proposed by ANC councillors. In 1994 we thought we would receive free better services and that has not materialized. All that remains of those promises is patronage. [...] We want the community to be informed of the corruption inherent in the ANC led government. Their actions contradict their very Constitution. They have effectively deceived the masses; the strategy to install these meters is merely to extract revenue from the poor. At the first installation of these meters in Phiri during the year 2003-4 the authorities effectively installed the meters forcibly and a number of us were arrested. Thereafter we marched to the offices of the mayor Amos Masondo and we were subsequently arrested. The police were indiscriminate and arrested even the elderly in our midst. What the prepaid system succeeds in doing is ensuring that those who do not have money will not get water”. [...] As an organization we took the city to court in 2009 and we won the case. The presiding judge asserted that water is a basic human right and cannot be commercialized. We therefore felt vindicated and unapologetic in our demand for free water. In spite of our court success the city via the mayor Masondo continues to install these meters. Hence we have reason to pursue the matter further in the judicial system. It is therefore imperative that we remain united in our defiance of the meter system and support the findings of the courts which were in our favor. The city has been very arrogant in their approach and continues installing these meters despite the finding of the courts. You yourself have been affected by this. It is our view that if we mobilize this is a battle that can be won even though we are aware that our people are under the threat of being arrested when fighting for the basic most necessities of life under the ANC government.”

The old woman seems convinced by the arguments put forward. She explains that she wants to remove the meter because she pays more than 100 ZAR per month for water, which is too much for her budget. Besides, she says, when the 6 m³ are consumed, after about ten days, she has to walk 25 minutes to the nearest point of purchase, a real difficulty given her age.

After getting her agreement, Walter goes outside and begins to disconnect the meter. The rather simple though long process (2 hours) is carried out with basic tools: a simple pickaxe found at the back of the courtyard and a knife.

This collective resistance, intense at the beginning of the project, gradually loses steam. As a consequence, a joint CAWP-APF report (2006) explains that the field protests diminished considerably due to arrests, intimidation, threats from the authorities or water cutoffs to households refusing to cooperate with the project. By illustration, while the PCRf easily attracted 500 people for its weekly meetings in 2003, in 2006, it barely managed to gather a few dozen militants (CAWP and APF, 2006).

As a result of this sharp demobilization, in 2006, the three organizations jointly decide to change strategies^[25] and to turn to the courts to fight against the installation of meters, feeding hopes that the trial would revive mobilization in the field and make their claims heard. The move to a legal fight therefore seems to be a response to far weaker mobilization and it clearly appears that the recourse to the law was not considered an option by militants at the beginning of protests against the project: only later, when mobilization in the field declined, did legal recourse come to be seen as a possible strategy, indeed a necessary one (Aubriot, 2009).

2.1.2. *The Mazibuko trial, militant use of the law*

“Soweto starts its water war,” is the way the very popular Mail and Guardian runs its July 2006 headline^[26]. After three years of various protests against the installation of prepaid meters, five residents of the Phiri neighborhood, supported by two social movements (the APF and the CAWP), the CALS and a renowned constitutional lawyer decide to take their claims from the streets to the courts of justice in filing suit against the municipality of Johannesburg, JW and the DWAF. The three actors are taken to court based on their different responsibilities in the water sector: the city of Johannesburg being the Water Services Authority, JW the service provider and the ministry in its function as a national political establishment. Very quickly this formal complaint becomes “the Mazibuko Affair” after the name of the first applicant.

Box 11 provides detailed profiles of the five plaintiffs and shows the diversity of their situations. Each of them illustrates a situation typical of those identified in Phiri: an insufficient quantity of free water given the size of the household, problem of capacity to pay, technical complexity of the meters, prevalence of HIV/AIDS, high unemployment, etc. This will to represent all and testify to the diversity of situations

[25] Here we choose the term strategy as opposed to the term tactic, with reference to the works by Certeau (1990).

[26] *Mail and Guardian*, 24 July 2006

when choosing applicants to build the case is clearly expressed by CALS. In order to facilitate follow-up of the case, the legal team chooses not to bring in the 90 people offering to participate in the trial and prefers to select only five residents considered as “representative” of Phiri, and more largely Soweto. Indeed it is clear to the legal team that the legal battle will be long and that it will, for practical reasons, be hard to keep such a large number of people active over the long term (Aubriot, 2009).

Box 11 *Profile of the plaintiffs in the Mazibuko trial*

Lindiwe Mazibuko^[27] Thirty-nine-year-old woman, unemployed, died of cancer one month after the High Court’s ruling. In 2006, she is living on her mother’s property with twenty other people who inhabit the main house and two backyard shacks. Everyone on the property is jobless. The household revenue is composed of her mother’s retirement (820 ZAR/month), rent income from the shacks (150 ZAR/month), and a social grant for her two dependent children (180 ZAR/month), totaling 1300 ZAR per month. The household’s fixed costs include medical care (around 280 ZAR/month), transport, food, clothing, school fees for 6 children, electricity, water and various taxes (between 60 and 117 ZAR per month). In 2006, the debt corresponding to unpaid water bills amounted to 16,000 ZAR. From the time the prepaid meter was installed on the property, the amount of free water supplied was consumed after 12 or 15 days. This household estimates its consumption at 50 additional ZAR/month after consumption of the free 6 m³ and states that it practices a sort of self-regulation of its consumption, which corresponds to an overall decline in hygiene.

Grace Munyai^[28] Forty-three-year-old woman, unemployed. She owns the house where she lives with her husband (who has a steady job) and four other people. In November 2004, G. Munyai having refused the installation of a prepaid meter, an outside tap was installed on her property (service level 2).

[27] Founding Affidavit, High Court of South Africa, Witwatersrand Local Division, Case No 06/13865, 2006.

[28] Grace Munyai Affidavit, High Court of South Africa, Witwatersrand Local Division, Case No 06/13865, 2006.



In her affidavit,^[29] she explains that in the six months prior to the installation of the outside tap, the water was cut off. This cutoff occurred while she was responsible for the care of a relative suffering from AIDS and while she was having problems with access to water (needing to fetch water in the adjacent neighborhood) and quantity of water (impossibility of carrying enough water to properly care for the ill person).

Jennifer Makoatsane^[30] Woman, 35, unemployed. She lives in her sister's house with eight other people. A prepaid meter was installed on the property in November 2004. Her affidavit affirms an insufficient quantity of free water supplied in the context of free water for a household of this size, the problem of ability to pay, and finally the question of self-regulation practiced by certain households to the detriment of personal or domestic hygiene.

Sophia Malekutu^[31] Woman, 71, retired. Owner of her house since 1950, she lives with her 40-year-old son and 53-year-old niece, both of whom are jobless. The household income is 780 ZAR per month. The prepaid meter was installed on her property in October 2004. Her affidavit affirms technical problems linked to the meter (problem of metering water volume, problem linked to provision of the free 6 m³, etc.).

Vusimuzi Paki^[32] Man, 40, unemployed. On his property, 3 backyard shacks were built. Eleven people live on the property where ten tenants occupy the shacks, each of which provides him with 100 ZAR/month of rental income. In 2005, after installing a prepaid meter, a fire began in one of the shacks. The residents were unable to put it out due to an insufficient flow of water. Two young children died in this accident.

[29] Affidavit (Oxford dictionary): a written statement confirmed by oath or affirmation, for use as evidence in court.

[30] Jennifer Makoatsane Affidavit, High Court of South Africa, Witwatersrand Local Division, Case No 06/13865, 2006.

[31] Sophia Malekutu Affidavit, High Court of South Africa, Witwatersrand Local Division, Case No 06/13865, 2006.

[32] Vusimuzi Paki Affidavit, High Court of South Africa, Witwatersrand Local Division, Case No 06/13865, 2006.

What petitions for the plaintiffs?

The complaint registered with the High Court of South Africa, Witwatersrand Local Division is addressed in the name of the fundamental right to water recognized by the Constitution (1996). The Mazibuko trial thus challenged the South African courts to interpret and rule on a constitutional social right and the programs giving it content.

The five applicants and their representatives contest two elements of the municipal policy on access to water. The first concerns the installation of the prepaid meters themselves which restrain, according to them, the fulfilment of their right to water, these sociotechnical tools limiting their access automatically and without prior warning. They therefore demand recognition by the Court of the illegal and unconstitutional character of prepaid meters.

The second element is directly tied to the insufficient volume of free water (6 m³/month/household) supplied in the context of the policy measures of free water, given the size of the poor households. The plaintiffs' arguments underline the inappropriate character of the choice of eight people to calculate the volume supplied in the framework of the Free Basic Water policy. The South African authorities indeed estimated that the average South African household is composed of eight people, and that, in compliance with the recommendations of the World Health Organization, 25 l/person/day is a sufficient volume to satisfy basic needs (water for drinking, personal and household hygiene, basic sanitation and food preparation). To the contrary, the applicants show that Soweto households are on average composed of 16 people, including members of the family and tenants living in backyard shacks. The plaintiffs demand that the Court recognize the unconstitutional character of this standard. Besides, they question the method of targeting social aid, stressing the fact that the free water is delivered on the basis of a property with the conception – false – that one property equals one household. Thus the volume of water delivered for free benefits the entire property, whatever its composition (presence of several families, tenants, etc.) and does not respect governmental directives.

On these two aspects, the applicants demand that the court order JW and the municipality of Johannesburg (*i*) offer two technical options to residents: a classic meter or a prepaid meter, and (*ii*) increase the volume of free water from 25 l/person/day to 50 l/person/day based on recommendations voiced by certain international experts. Peter Gleick, for example, an international expert having

supported the complaint, stresses that the minimum volume of water per day and per person must be 50 liters^[33] to be able to meet basic needs.

Moreover, the applicants put forth the discriminatory nature of the water policy conducted by the municipality of Johannesburg, to the extent that the prepaid meters are only installed in a part of the city characterized by unfavorable socio-economic conditions which oblige poor households to pay for water in advance while the richest households continue to benefit from a classic billing system, and therefore enjoy credit or can negotiate payment rescheduling in case of financial difficulties. This trial thus raises an old question in South Africa: that of discrimination imposed by the State and the confrontation between a part of the population which is poor and black and another part which is rich and white, benefiting from different socio-economic conditions and different access to services. This trial focuses anew on questions which are sensitive in a country where the fabric of democracy is still being woven and where, if race questions are supposed to be part of the past, the political, societal, economic and social transformation is only partial or selective (Vircoulon, 2004), and simultaneously is emerging a discourse on the accession of a society divided along social class lines and no longer along racial lines (Bond, 2004). The trial thus refocuses the debate on these difficulties in clearly expressing a black/white or a rich/poor opposition.

The legal process

The trial is a long process (see Box 13) which goes through all the South African courts of justice (see Box 12) and has significant reversals. Indeed, whereas the High Court decision validates all the various requests by the plaintiffs and orders JW and the municipality to increase the volume of free water and to offer a choice between prepaid meters or classic meters to users, the Constitutional Court's decision, handed down four years later, entirely validates the municipality's approach and rejects the whole set of the applicants arguments. What could therefore be considered a total victory for the municipality and the operator, and conversely a radical defeat for the applicants, is however less obvious than it appears. We will see in the following parts that, in spite of the plaintiffs' defeat before the Constitutional Court, the recourse to the law made it possible to provoke an evolution in the municipality's water access policy in rendering it more pro-poor (at least on paper) and that the near totality of arguments put forth by the plaintiffs were heard and taken into account by the operator and the municipality.

[33] His estimate is based on the following calculation: 5 liters for drinking water + 20 liters for basic sanitation + 15 liters for hygiene + 10 liters for food preparation.

Box 12 *The superior courts of justice in South Africa*

Constitutional Court	The constitutional Court was created in 1994. All affairs related to the South African Constitution are dealt with before this institution. It is composed of nine permanent judges. Its decisions overturn all inferior court decisions.
Supreme Court of Appeal	As its name indicates, this court rules only on appealed cases. It is the highest court in the country, except where cases are related to the Constitution. Appeal court decisions overturn those handed down by inferior courts.
High Court	The high courts of justice, thirteen in number, are geographic jurisdictions of initial proceedings. They are competent in all subjects in their geographic area but hear only criminal cases where sums greater than 100,000 ZAR are concerned.

Box 13 *The major stages in the Mazibuko trial*

July 2006	Filing of the complaint by five residents of Phiri, the APF and CALS.
December 2007 (3 rd , 4 th and 5 th)	First hearing before the High Court of Justice, Witwatersrand Local Division
April 2008 (18 th)	<p>The decision is handed down on the 8th of April 2008 in favor of the applicants, the Judge Tsoka concluding that:</p> <ul style="list-style-type: none"> - the prepaid meters are illegal because they are not recognized by municipal rules regulating the water service in Johannesburg; - the meters are illegal and unconstitutional because residents are forced to accept them and only have the choice between an outside connection (service level 2) or a prepaid meter (service level 3); - the amount of free water supplied by the municipality is too low considering the size of poor households. <p>The judge therefore demands that the authorities increase the water volume from 25 l to 50 l/person/day and to systematically give users the choice between classic and prepaid meters.</p>
May 2008	JW and the municipality suspend project activities despite rather satisfactory technical and financial results (cf. 1.5.). In May 2008, 98,000 prepaid meters are installed in Soweto and 116 km of network are renovated.





September 2008 The municipality of Johannesburg and JW appeal the High Court's decision.

February 2009 (25th) The case is heard by the Supreme Court of Appeal.

March 2009 (25th) The decision, handed down the 25th of March 2009, recommends a new free water amount of 42 l/day/person and upholds the ruling on the illegality of meters (and not their unconstitutionality). The judge also demands that JW systematically give users the choice between prepaid and post-payment meters. Moreover, the municipality is given two years to revise its municipal rules on prepaid meters and to correct their "illegality."

September 2009 All parties appeal the second decision. For the plaintiffs, it is a matter of (i) restoring the first decision (and more precisely canceling the two-year period offered to the municipality of Johannesburg to revise municipal rules and (ii) to request a restoration of the norm of 50 l/person/day in terms of minimum free water. JW and COJ request a cross-appeal: the opposing party wants a cancelation of the amount of free water required by the Supreme Court and to show that prepaid meters are not illegal.

September 2009 The last stage in the legal process takes place on the 2nd and 3rd of September 2009 before the Constitutional Court, the highest authority in the State.

October 2009 The final decision is handed down on the 8th of October 2009 in favor of the defendants^[34]; it rejects all arguments put forward by the applicants and overturns the previous decisions. The decision is summarized as follows: "After careful consideration of the issues, this judgment finds that the City's Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services. The installation of pre-paid meters in Phiri is found to be lawful. Accordingly, the orders made by the Supreme Court of Appeal and the High Court are set aside.^[35]" From a legal point of view, it is thus a total victory for the municipality and the operator and, to the contrary, a radical and wholly unexpected defeat for the applicants.

[34] Mazibuko vs City of Johannesburg and others, Judgement, Constitutional Court of South Africa, 8 October 2009.

[35] *Ibid.*, paragraph 9.

How should the Constitutional Court's decision be explained?

One can naturally wonder about the motivations of the Constitutional Court in rendering a decision which appears so contradictory to those of the inferior courts. While certain explanations are directly connected to the ruling (we will briefly present two), others are linked to the jurisprudence which the Constitutional Court has developed in recent years, and to the way that the sitting judges interpret their mandate.

For reasons specific to the trial, the Constitutional Court decision can be explained by the fact that the city had modified its policy of access to water all along the legal process, thus countering the arguments put forth by the applicants and one by one taking up the problems raised by the applicants throughout the legal process. These different elements will be studied in the following part. Besides, concerning the volume of free water, the differences in interpretation come from the sources used. The High Court of justice used the international expertise (*amicus curae*^[36]) submitted by the international NGO Center on Housing Rights and Evictions – COHRE^[37] and that of international expert P. Gleick^[38] advocating a minimum volume of 50 l/person/day. As for the Court of Appeal, it used the expertise of local engineers having carried out studies in South Africa to give its decision defining the minimum volume as 42 l/person/day. The Constitutional Court set itself apart in clarifying that, while international jurisprudence could be useful for the analysis, such jurisprudence should not advocate for an approach aiming to define a minimum quantity for social rights.

More largely, the Constitutional Court decision can be explained by the jurisprudence developed in recent years on the issue of social rights, notably through decisions related to the right to health or to housing in the context of the TAC and Grootboom affairs (cf. Box 14). In these two affairs, the Court developed the concept of “reasonableness,” allowing it to rule on the coherence of public policies and their impartiality on the subject of resource allocation. In the Mazibuko affair, the Court used this same concept to evaluate the water policy implemented by the City of

[36] The South African system allows an *amicus curae* presentation at a trial: people with a particular competence in a case and who wish to have a say may do so with the prior agreement of the concerned parties and the president of the court concerned.

[37] Mazibuko vs City of Johannesburg and others, *Amicus curae*, Center on Housing Rights and Evictions, 2008.

[38] Mazibuko vs City of Johannesburg and others, *Amicus curae*, P. Gleick, 2008.

Johannesburg and to invalidate the approach of the inferior courts, on the grounds that the courts' role was not to define the core minimum of social rights (here, the volume of free water). Indeed, the Constitutional Court refuses to rule on the latter point, stressing that the Constitutional Court is not competent since it is not the Court's responsibility to define public policies, notably due to their budget implications. The Constitutional Court expressed its will to respect the principle of the separation of powers and to not infringe upon the prerogatives of the executive and legislative branches. Let us point out that, concerning the justiciability for social rights, the self-limitation of the judges' understanding of their mandate, for reasons described as technical and democratic, is a phenomenon which, as Roman(2010) noted, exists well beyond South Africa's borders.

The concept of "reasonableness" developed by the Constitutional Court was hailed by a certain number of observers who underline the "culture of justification" introduced by the latter and its ability to focus on certain deficiencies in public policy (Robitaille, 2010). Yet this concept is elsewhere roundly criticized by jurists who lament the incapacity of the Court to improve the lot of poor fringes of the population (Blichlitz, 2007; Liebenberg, 2010) in refusing to propose a minimum content to social rights, and which denounces its leniency towards the government while others see a notable way of respecting the separation of powers.^[39] As Robitaille (2010) summarizes, South African jurisprudence *"has been as much praised for its contribution to the theory of justiciability for social rights as it has been criticized for being too deferential, as in the case of the Court concerning public policies."*

Thus the Mazibuko trial results, beyond the specific arguments discussed in its core, from the jurisprudence developed by the Constitutional Court since its creation. While its decision was the source of many questions and much disappointment among the applicants, this brief jurisprudential explanation nonetheless makes it possible to understand that this reversal was somehow predictable, in spite of decisions by the inferior courts.

[39] For a legal discussion of these questions in French, see Robitaille (2010).

Box 14 *The TAC and Grootboom affairs, two important precedents in the South African jurisprudence on social rights*

The Grootboom affair

In 2000, on the outskirts of Cape Town, a community of 900 squatters, evicted from a private property where they had set up an informal living zone, move onto a neighboring sports field. With no shelter, no access to water and electricity nor to minimal sanitary equipment, the community decided, based on two provisions of South Africa's 1996 Constitution (Article 26 on the right to housing and Article 28 on the protection of children), to engage in legal proceedings against the provincial and national governments. In a second decision, the Constitutional Court determined there was a violation of Article 26 and declared that the progressive realization of economic and social rights is a State obligation as this extract from the judge's ruling shows: *"I insist ... on the fact that these are rights, and that the Constitution requires compliance. This is an obligation which the courts may, and in appropriate circumstances must, carry out."*^[40] The Court concluded that in not responding to the needs of the worst off, the housing policy implemented by the State did not respond to the obligation to take *"all reasonable measures within the limits of available resources."* In its decision, the Court ordered the provincial and national governments *"to develop, finance, implement and supervise the measures to provide aid to those in desperate need"* and took interim measures to improve the lot of the community (provision of sheets, toilets and standpipes, etc.); it equally demanded that a field be provided to them.

The Treatment Action Campaign affair

TAC is one of the main organizations in the fight against AIDS in South Africa; it was created in 1998 in the aim of widening access to care. The organization has resorted to using the courts to improve access to Néviparine in order to eliminate the transmission of the virus from mother to child. The treatment was previously only available at certain research sites, and this, even if the pharmaceutical firm had accepted to supply it for free for five years. At the time, the president of South Africa, Thabo Mbeki, was strongly opposed to the widespread use of antiviral drugs. TAC therefore sued the government on this precise point of its policy on treating HIV, showing that the policy violated the right to an individual's health (Articles 27 and 28 of the Constitution). In this case, the Constitutional Court took up the concept of reasonableness developed in the Grootboom affair to judge the government's policies, declaring that the availability of Néviparine exclusively at research sites was



[40] Government of the Republic of South Africa and Others vs Grootboom and Others, 2001, SA 46 (CC).



not reasonable and was in contradiction with the State's obligations as defined by the Constitution. The Constitutional Court thus ordered the government to immediately open the supply of Néviparine to sites outside of research centers.^[41]

2.2. The paradox of the trial: technical and social improvements in spite of the plaintiffs' defeat

The consequences of the Mazibuko trial on the city's approach in the domain of access to water for the urban poor in general, and on the OGC project in particular, were considerable. Even though the plaintiffs lost the trial, the process of the trial constrained the operator and the public authorities to modify the project according to nearly all of the arguments made by the plaintiffs: the discriminatory nature of the project, the social risks of automatically cutting off water and having no prior warning from prepaid meters, the insufficient amount of free water supplied to poor households by the city, and the limits of the system of targeted social grants.

In this context, city and water company representatives who were questioned unanimously affirm that the trial had a beneficial impact to the extent that it forced the institutions to take a critical look at their approach and their implementation of water policies. Many observers attest to the impact of the trial on municipal policy: *"The impact of the trial is quite significant. First, it forced the city to pay real attention to the policies it is implementing in terms of basic services. That forced the city to be more careful, to analyze its actions."* (Consultant, July 2009). *"For the city and JW, this trial also had a positive impact in that it pushed the two actors to pay closer attention to the way they proceeded, to be more attentive to the population's expectations, and finally to be sure to give the people a voice when a project is implemented. Finally, what everyone learned via this case is that the people must be put first in all public services."* (DWAF, July 2009).

After briefly presenting the plan to resume the OGA project, this part provides a critical review of the different technical and social evolutions proposed by the city and the water company in response to the trial.

[41] Minister of Health vs Treatment Action Campaign, 2002, SA 721 (CC).

2.2.1. Plan to resume the OGA project

The JW and city representatives who were questioned do not consider the first phase of the project to be a failure (which would have been plausible, given the trial, the number of demonstrations or the sizeable number of prepaid meters rendered unusable), but rather a victory, to the degree that it made it possible to reach their initial goal: cut losses and water consumption. Thus, with satisfactory financial and technical results, the legitimization from the Constitutional Court and the critical stakes of resource conservation (at both the local and national levels), the city and the operator are working to restart the project in Soweto.

Tableau 4 *Provisional planning relative to a renewal of the project*

Activities	Provisional Planning	
	Start	End
Communication and consultation campaign (educating consumers on the importance of water resource conservation and on their rights and obligations; implication of councilors; public meetings; door-to-door campaigning; etc.)	December 2009 (effective start February 2010)	July 2010
Technical intervention in the areas covered between 2006 and 2008 in three stages: 1) 'pre-intervention surveys' to evaluate the state of the infrastructure on properties and pre-paid meters; 2) renovation of plumbing inside houses to stop waste due to leaks in private systems; 3) replacement of water connections and systematic installation of pre-paid meters.	August 2010 (underway, effective start November/December 2010)	December 2011
Implementation of phase 4 of the project (extension to the whole of Soweto).	July 2011	December 2013
Installation of pre-paid meters throughout the town.	July 2012	To be determined

Source: JW (2010) after adaptation by the author

The second phase of the project is scheduled to be implemented over a thirty-month period (2010-2012) for an estimated cost of 450 M ZAR. The accent is placed on communication and the consultation of communities preceding the purely technical interventions (see Table 4). Indeed, the city wants to be sure of the support of communities through a vast mobilization and information campaign before the technical implementation. These aspects will be amply discussed in section 3.

The technical interventions are scheduled to begin in the areas already covered by the project during the 2004-2008 period in order to repair any new leaks; prepaid meters remain the predominant technology in use. Upon completion of this phase, the project will be rolled out in all of Soweto. Discussions are also under way to extend the project to the entire city.

2.2.2. The discriminatory nature of the municipal policy in question

At the Mazibuko trial, the plaintiffs pointed up the discriminatory nature of the *Gcin'Amanzi* project in the sense that it targeted only areas which are poor, historically underprivileged and inhabited by blacks. These accusations were based on fundamental notions of equality and non-discrimination, core values of the 1996 Constitution.^[42] In response to these criticisms, the city and JW justified the choice of Soweto with technical and environmental arguments and indicated that their unified approach was part of a goal to conserve and manage the demand for water. Thus, two types of arguments clashed during the trial: a first of a social and ethical style underlining notions of equality and non-discrimination, a second declaring environmental concerns going far beyond the context of Soweto. However, we will see that JW admitted to badly or little communicating on the environmental stakes, favoring a debate largely focused on prepaid meters; JW is trying to rectify this approach during the resumption of the project. In the end, the Constitutional Court ruled that the OGA project was not discriminatory to the extent that it was implemented in Soweto for environmental reasons on the one hand, and that the city had put social accompaniment programs in place on the other.

Beyond the discriminatory nature of the OGA project underlined here, the affidavit filed by the applicants with the Supreme Court brought stigmas which officially belonged to the past back to the surface: racism, apartheid, discrimination, the

[42] South African Constitution, article 9 (3): "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

opposition of rich and poor, between blacks and whites, as this extract shows: “[...] inequality and discrimination are sometimes rooted in a paternalistic, not a malevolent, attitude. The city’s policy is based on the idea that the inhabitants of Parktown may have the right to choose the best means of settling their affairs, whereas the city decides what is good for those of Phiri. It is an insidious form of racism which was common in colonial and apartheid times, and which remains offensive, even if comes from good intentions.”^[43]

These accusations, which arouse tensions which officially belong to the past (even if South Africa remains an extremely unequal country,^[44] were taken very seriously by the city in spite of their rejection by the Constitutional Court: in this young democracy, there is no longer question that a city can allow such accusations to be an influence nor to allow public debate to take place in these terms.

To overcome these criticisms, today the city proposes a technical solution which in principle is more egalitarian and could come to pass within the next few years: prepaid meters for the entire city, for both water and electricity. A city representative says that the trial made it possible to see that it is preferable to have an inclusive approach targeting both poor and rich neighborhoods: *“In hindsight, if I look at the entire process, the legal affair and everything that happened, part of what we should have done was to target another area, areas which are more mixed but also have high water losses, but not only in low revenue areas [...] I think that as a city, that’s something we have to change and we have to think of the way we address this issue. We’re in the process of setting up a system of prepaid meters for the entire city, that is, to see if it’s possible to install these meters citywide. We’re doing things that way because we have to manage water demand: not only can we reduce losses but we can also bring in revenue because there are residents of some rich areas who don’t pay for water. That way, people would monitor their water use better and the city would be able to collect its revenue ahead of time; there would be a double advantage for us.”*

Beyond the aspects related to non-discrimination, in this reform the city also sees the chance to effectively target the goal of resource conservation as well as financial performance imperatives. However, the decision has not yet been validated politically. At present, thought is being concentrated on technical and financial matters: an

[43] Mazibuko vs City of Johannesburg and Others, Head of Arguments, Respondents’ Submissions, Supreme Court of Appeal, Case 489/2008, art 246.

[44] On this subject see Vircoulon (2004) and Terreblanche (2004).

evaluation must be made of the possible cost – no doubt colossal – to public authorities relative to its possible advantages (environmental, economic, political).

It is therefore interesting to stress that this proposal results from the Mazibuko trial and, beyond the Constitutional Court's decision, the city continues to wonder about its policies and their implementation. Still, its effectiveness is a real question: is it truly practical or merely symbolic? Is it only a means to overcome accusations of racism and discrimination in proposing a project reaching all members of the population, or quite the contrary, is it a real change in the city's water access policy? Is this a declaration intended only to appease or is this project a real effort at making a change? Finally, is the project technically, financially and politically realistic? Additional research would be needed to follow the evolution of these discussions and the possible implementation of these works.

2.2.3. The evolution of the sociotechnical tools: towards more "social" prepaid meters?

As we have seen, the prepaid meters have been the object of numerous controversies and a central factor of discord between the stakeholders for the length of the trial. At the end of the legal process, the Constitutional Court having validated their legal and constitutional natures, these sociotechnical tools remain a key component in the city's approach and a cornerstone in the resumption of the project. Nevertheless, there have been many technical improvements showing an awareness of the limits of the approach prevailing until now. These technical innovations aim to better account for the situations of the poorest households and to propose solutions to problems raised in the Mazibuko trial, notably that of automatic disconnections without prior warning to users, or a volume of water available for particular cases. Among these innovations:

- in case of water cutoff, the "new" meter can deliver a minimum flow of water at 40 l/hour with low pressure; this system is known as a lifeline flow. It allows users to continually benefit from a minimum quantity of water and thus resolves, from the city's perspective, problems related to automatic disconnections raised by the plaintiffs during the trial;
- 1,000 liters of "emergency water" can be released four times per year for exceptional reasons. This measure is important to fight against frequent fires in the townships caused by widespread use of kerosene; the Mazibuko trial is an example: the complaint was filed following a fire;

- 2,000 additional liters of water can exceptionally be allocated in the case of special needs upon the request of local authorities. However, according to the municipal services, this system is not very effective in the sense that residents are not properly informed of its existence and due to the complexity of its management.
- an increased number of sales points, making water purchases possible not only from dedicated JW offices but also from diverse neighborhood stores: food stores, gas stations, etc.). Eventually, it will be possible to buy water by using a cell phone or on the Internet, the overall idea being to facilitate the purchase of water and to minimize physically constraining trips;
- finally, more generally, the new prepaid meters (“intelligent metering system”) permitting these innovations, designed by Lasira Teq (a South African company), are much more sophisticated than the previous ones. They allow at-distance reading in order to improve the response level in case of problems, to detect leaks, to produce statistics, etc. The old prepaid meters installed in Soweto will be entirely replaced by the new ones. While this type of meter carries a higher cost than a classic meter (1,200 ZAR, *versus* 500 and 600 ZAR), the anticipated profits are greater than the initial cost of investment.

Nonetheless, in spite of these innovations making meters more “social” and more flexible, more than ever the social acceptability of these tools is an unresolved question. Indeed, despite these substantial changes, the meter is becoming a mandatory tool, unlike the first phase of the project when residents could refuse prepaid meters (seeing, in this case, a lower quality of service being offered). The second phase no longer allows this choice: without exception, all households must be connected *via* a prepaid meter. Effectively, the operator wishes to avoid repeating a confusing situation spotted in the first phase where households having free access to water coexisted with those which were obliged to pay due to the existence of prepaid meters. No longer is there an “escape” from prepaid meters, which remain a cornerstone of the project. Given the great amount of controversy around these meters in Johannesburg, one can wonder about their future acceptance within the Soweto communities. Furthermore, our latest field surveys show that these sociotechnical tools remain at the heart of polemics and that a certain number of social movements remain ready to mobilize against their installation. This leads us to more general questions: is the current bet on “100% meters” a good one? What are the real chances of social acceptance of this persistent orientation, and what are the factors of evolution?

It is obviously a bit early to foresee the real impact of these technical changes and their social acceptance, their installation having just begun in the field. However, it is relevant to hypothesize that this challenge can only be met if social aid is satisfactorily implemented, *i.e.* inclusively on the one hand and if the environmental stakes are understood by the user-citizens on the other. It is a question of managing to convince these users of their role in a project of society from which they often feel socially or economically excluded. A certain number of them could indeed ask themselves the following question: *“Why ask us to participate in an environmental project, notably in ‘restraining’ our access to water for basic uses, when we are excluded from the overall social and economic project?”*

To ensure the success of the project, it is essential that the resource conservation aspect of the message be integrated by the communities, but given the persistent social inequalities (which go largely beyond the limits of the OGA project), the city could still face doubts about the project. Moreover, the question of social aid is fundamental to the extent that the city is counting on this aid for the success of the project, intended to correct the question of economic accessibility to water, while maintaining a clear policy of resource management and cost coverage. Still, as we will see in the following part, the implementation of social grants presents a certain number of sizeable problems which barely include all people living precariously. Thus, in spite of the city’s efforts to explain and communicate on the objective grounds of the project and to change the view of meters from objects of controversy to tools needed to implement a wider environmental and social policy, a high risk of non-acceptance of the meters remains.

2.2.4. *Influence of the Mazibuko trial on the evolution of social grants for water*

In South Africa, poverty is a key question, having repercussions on access to services whose payment has been generalized since the advent of democracy, along with the adoption of the principle of cost coverage. The South African state, even if far from being a rich State, nonetheless has the capacity to implement social measures to fight against poverty. Social grants, calculated according to income and offered to particularly vulnerable groups (the handicapped, retirees, children, etc.), are evidence of this. They represent a significant source of revenue for the majority of poor households (Mubanzigi and Mubanzigi, 2005) and, according to some estimates, more than half the budget for the poorest 20% of households (Triegaardt, 2007). Moreover, since the beginning of the 2000s, the government has been asking municipalities which are

financially able to do so to put policies for the destitute in place. These policies enable the State to respect its constitutional commitments, notably for essential services (water, sanitation, housing, etc.), benefiting people who lack the financial means to gain access to these services.

As for grants targeting water, the national free water policy – universal policy without targeting – is the cornerstone of the political will allowing citizens to exercise their right to water. As early as 1998, the city of Johannesburg put in place specific social grants^[45] which, from the start, were subject to constant improvement^[46]. The revision of social grants occurred in two major steps: a first interim step, applied in 2006, on which brainstorming had begun before the Mazibuko trial, and a second “final” step, applied in 2009 known as the Expanded Social Package (or ‘*Siyasizana*’) from which outlines relative to access to water were largely drawn on in the arguments exchanged at the Mazibuko trial. Indeed, the new system brought two essential new elements: more free water was granted in accordance with the poverty level (calculated using new methods), and attempts to be more inclusive by offering a supposedly better targeting system. In this part, we will see how this played out concretely.

Here and now, let us stress that the trial was not the triggering event of the revision trial in its entirety but, as representatives of various city departments testify, it sustained and accelerated it. Thus, according to the manager of the social grants department, the impact of the Mazibuko trial was undeniable: “Yes, it had an impact. The legal affair had, at least at the beginning, a very positive impact in inciting internal change.” (November 2010). The trial shed light on a certain number of problems linked to targeting social grants and forced public authorities to propose concrete solutions. Today it is certain that the government’s commitment to reducing poverty and inequality since 1994 could only be effective with better targeting of the poor. Therefore, it would be untrue to say that the trial is the sole cause of these changes (to the extent that as of 2005 the city was busy revising its instruments of poverty administration). Nonetheless, the elements discussed here correspond to a repercussion from the Mazibuko trial.

[45] Refer to *Mazibuko vs City of Johannesburg and Others, Answering Affidavit* in the High Court of South Africa, 2007, Seedat R.A., paragraphs 26-31 for more details on the period 1998-2006.

[46] *Ibid*, paragraph 25.

Adoption of an interim measure (2006): more free water for poor households

A first interim measure concerning the volume of free water for people declared destitute is adopted in December 2006 (its implementation began in March 2007 with a certain number of problems limiting its impact^[47]).

This measure was adopted following surveys led by the city, and notably after the publication of a study ordered by its services in June 2006. That is why, in the affidavits filed with the High Court, the city affirms having knowledge of the problem linked with insufficient quantities of free water for the poorest households, considers having undertaken actions aimed at rectifying these insufficiencies, and stresses the fact that, from the beginning of the trial, the applicants challenged a measure (6 m³ of free water) which was already obsolete.

The interim measures propose an initial improvement for the urban poor identified by city departments through three measures.

First measure: the increase in the volume of free water. In place of the initial 6 m³ of free water, a volume of 10 m³ is proposed to the destitute with a target per housing unit and per month. This allocation is based on the recognition that, in numerous cases, poor households are composed of more than eight people. Why this first change? The city became aware of the following figures^[48]: the average number of households per housing unit is 2.3, meaning that the basic equation on which rests the implementation of the free water policy stating that one household equals one property is false. Therefore it benefits housing units and not households, as foreseen in official texts. Moreover, 28.5% of households contain more than 8 people, which implies here also that the city's arbitration is not optimal because, in this case, individuals receive less than 25 l of water per day, which is nevertheless the minimum level set by the government.

This awareness led the city to reconsider its system of social grants which meant, at this stage of thinking, an increase in the volume of water distributed to the destitute in order to comply with government directives. Thus, the interim reform allows, with the 10 m³ of water allocated per housing unit, a household, or several households

[47] For detail on the implementation steps of these interim measures, see: *Mazibuko vs City of Johannesburg and Others, Answering Affidavit* in the High Court of South Africa, Eales K., (2007), paragraph 68.

[48] *Ibid*, paragraph 62; *Mazibuko vs City of Johannesburg and Others, Answering Affidavit* in the High Court of South Africa, *Head of Arguments*, COJ, 2007, paragraphs 62.2 and 62.3.

living in the same housing unit, composed of 13 people to receive 25 l of water per person per day and to respect the government's directives. Given the research carried out, the city considers having limited exclusion errors and allows the large majority of individuals among the urban poor to receive the minimum amount of free water to which they have a right. This interim measure was to be implemented until July 2008, when it was initially foreseen to introduce the complete system of social grants, and was supposed to represent a cost of around 100 M ZAR shared by the city and the operator.^[49] However, in 2006, the city estimated it could not manage to administer

Box 15 *Composition of a classic housing unit in Senaoane, Soweto (extract from a field log)*

We go to a household in Senaoane, Soweto. The owner of the main house, an old woman of about seventy years, welcomes us. To better prepare the debates on targeting social grants, we are trying to determine the classic composition of a Soweto housing unit and are seeking to verify the equation according to which one housing unit equals one home.

The first observation concerns the notion of ownership. It is composed of the main house, a small dwelling made of sheet metal, and two permanent shacks deep in the back yard. The lot thus has four distinct dwellings.

We are seeking to learn how many people live here, how they are related, and whether they are tenants. More than ten people live here. The sheet metal shack is rented to a couple with a young child. They are unrelated to the owner. The old woman lives in the main house with four of her grandchildren, two young children and two teenagers, for whom she is responsible. The two backyard shacks are occupied by six members of her family. The owner collects rent on just one of these rooms. Thus, on this lot, several different households are living, and all are not members of the same family.

Finally, we're trying to determine the income of the owner's household. Our contact estimates her monthly income at about 1200 ZAR, mostly from welfare (1000 ZAR old age pension and aid for the children in her care) and rental income (200 ZAR).

Every person living on the lot has access to water through the same connection, to which a prepaid meter is attached since 2007. Given the number of people living on the lot, the government directives concerning the policy of free water are not respected.

[49] *Mazibuko vs City of Johannesburg and Others, Answering Affidavit in the High Court of South Africa*, Eales K., paragraphs 68.3, 68.4 and 68.5.

social grants to more than 118,549 properties or holders of city accounts, or only about 1/5 of the eligible population.^[50]

Second measure: making additional quantities of water available in the case of households with special needs (HIV, for example). This measure is known under the name special needs.

Third measure: in the event of emergencies at households equipped with prepaid meters, an additional 4 m³ of water are made available. However, certain documents show that this particular measure was very little implemented.^[51]

An essential limit remains in spite of these improvements: the poor households not declared as destitute to the city are unable to receive this aid. From the beginnings of the trial in 2006,^[52] the city recognized the imperfections of this targeting technique in reminding residents who are not account holders (notably people living in informal settlements or informal tenants in backyard shacks, very numerous in the townships) are *de facto* excluded from the system of social grants. City services acknowledge that the proposed solutions are “imperfect.” “It’s an imperfect solution to guarantee access to all in sufficient quantities, but this measure must be temporary while awaiting the installation of a system which is more effective at measuring individual consumption and the launch of inquiries into the possibility of installing a separate meter (a solution which would be very costly) for each household of a same unit, which would be installed in a place gathering several meters of this sort.^[53]”

Expanded Social Package (2009): towards a better consideration of levels of poverty

The above-explained measure was considered, as soon as it was adopted, as a temporary measure meant to progressively lead to the adoption of a more complete system known as the Expanded Social Package (ESP), adopted in July 2009. Not restricted to water issues, it proposes aid for sanitation, waste and electricity management, taxes, transport, rent payment and assistance in job seeking.

[50] *Mazibuko vs City of Johannesburg and Others, Respondents’ Submission*, Supreme Court of Appeal, p. 49.

[51] *Mazibuko vs City of Johannesburg and Others, Respondents’ Submission*, Supreme Court of Appeal, paragraph 134, p. 51.

[52] *Mazibuko vs City of Johannesburg and Others, Answering Affidavit in the High Court of South Africa*, 2007, Seedat R.A., paragraph 17.12.

[53] *Mazibuko vs City of Johannesburg and Others, Answering Affidavit in the High Court of South Africa*, Eales K., 2007, paragraph 66.

This system, intended to better account for the multidimensional nature of poverty, introduces a new method of calculating the level of poverty henceforth represented by a score between 0 and 100: 70 points account for individual conditions (income, number of dependents, handicap, retirement, etc.) and 30 points are linked to the person's dwelling ("ward deprivation," *i.e.* distance from economic centers, transport, etc.), and the property's value (cf. Appendix 2).^[54] The total score results in the person's poverty level, and consequently makes it possible to calculate the amount of aid the person is eligible for. There are three levels: level 1 giving right to the least amount of aid, and level 3 giving right to the greatest amount of aid, particularly for people lacking a formal income, for example (see Box 16). All people with a monthly income below 3,660 ZAR can benefit from the ESP.

Box 16 Expanded Social Package: *level of aid according to level of poverty*

Level of aid	Level of poverty	Income	Corresponding score
Level 3	No formal income	from R 0 to R 593	70 – 100
Level 2	'survival' level	from R 593 to R 2,244	35 – 69
Level 1	'vulnerability' level	from R 2,244 to R 3,660	1 – 34

Source: COJ Mayoral Committee, 6 March 2009, *Community Development Report*.

As for access to water, the system allows people who are declared destitute to receive 10, 12 or 15 m³ of water free of charge each month depending on their level of poverty (cf. Table 5).

An advantageous rate schedule is proposed: beyond an amount of free water, the price of water is lower for the destitute than for households not receiving social grants^[55].

[54] This system was developed by the city of Johannesburg in a collaboration with the Center for Analysis of South African Social Policy, based at the University of Oxford. The following reports exemplify the debates which preceded the adoption of the system: Development and refinement of a poverty index for the City of Johannesburg: a project proposal prepared for the Human Sciences Research Council, in consortium with the Centre for Analysis of South African Social Policy, Oxford University and Response to the draft discussion document 'Development and refinement of a poverty index for the City of Johannesburg, Policy Analysis Unit, Human Sciences Research Council & Centre for the Analysis of South African Social Policy,' University of Oxford, 27 August 2008.

[55] Further Amendment of Tariff Charges for Water Services and Sewerage and Sanitation Services: 2009-2010; Report presented at the Mayoral Committee, 11 June 2009 by the Community Development Department (not published).

Table 5 *Supplementary allocation of water depending on level of poverty*

Score on prevailing COJ poverty index		Allocation of additional free water per person per day (liters)	Monthly allocation cap of free water per household in which at least 50% of registered social package recipients qualify for the band in question (Kilo-liters)
Band 1	1-34	25	10
Band 2	35-69	35	12
Band 3	70-100	50	15

Source: JW, *Community Development*, 2010.

At first sight, this new measure seems to satisfactorily take into account the plaintiffs' arguments at the trial: the monthly allocation of water is increased depending on the level of poverty, and the amounts of free water proposed seem to suggest that the poorest households will have no expense for water, and that, even if additional water were bought, its cost would not be prohibitive. Yet below we will see a more critical view of these improvements showing that the system of justification of proposed volumes has no objective basis and that the city was above all concerned with closing two significant debates: the first concerning the minimum amount of free water and the second discussing poor households' capacity to pay (see Section 2.5).

2.2.5. Reform of targeting of social grants or how to try to include the "invisible poor"

The importance of social grants in the budgets of poor households and in gaining access to fee-based essential services is widely recognized, but a debate on their targeting continues in South Africa (Parnell, 2005) and more generally in emerging or developing countries (Lavallée *et al.*, 2009). The grants concern all individuals in need, creating the need to work on institutional inclusion and targeting, which can be defined as the selection in the population of individuals or households considered to

be poor (Lavallée *et al.*, 2009, p. 7). The latter raises practical questions (means and costs linked to the identification of households). While theoretically, targeting makes it possible to meet specific needs of the poor by facilitating the effective allocation of resources, numerous experiments show that the practical application is not so simple and that the determination of individuals' poverty level is a central problem, as much in terms of cost as in institutional mechanisms to set up (Lavallée *et al.*, 2009).

In South Africa, studies show that, in a certain number of cases, the neediest individuals are unable to gain access to social grants because they are institutionally excluded (Parnell, 2005). Thus, for Parnell, without effective reforms of the social grant system, there can be no effective treatment of poverty. She emphasizes the need for more governance (Parnell, 2005; Parnell and Pieterse, 2010): while pointing out certain efforts approved by the government in the fight against poverty (notably urban), she states that, in order to be effective, institutional reforms are necessary so that issues affecting the poor are properly identified and treated. In other words, the question asked is the following: how should cities be governed in order to assure essential services to reach those who are not connected to networks, or those who cannot pay the fees charged for services? Thinking is therefore oriented towards the "readability" of the poor by the State: indeed, it is impossible to offer rights to "invisible" or "unreachable" citizens. Thus, systems making the poor visible to the State must be imagined.

These questions also arise concerning aid for the purchase of water, which were relatively little used in the country, with distinct modes of targeting. Here, South Africa has set itself apart by offering, since 2001, a universal allocation (FBW) and, for certain cities, complementary social grant systems, while some countries offer targeted aid, Chile and Colombia being references on the subject (Gomez-Lobo and Contreras, 2003).

In Johannesburg, the targeting of social grants for water is more than ever at the center of questioning on urban inclusion and access to essential services since the Mazibuko trial, and due to the central place they occupy today in the process of resuming the OGA project. The constant revision of the social grant system in attempting to render the situation of the poor more "visible" is obvious in Johannesburg as both the interviews carried out and the gathered documentation show. Here we propose to study the initial results.

Table 6 *Terms used by the city in targeting*

Terms used by the city	Translation used
<i>Properties/Stand</i>	Housing unit
<i>Households/Dwelling</i>	Household
<i>Account holders</i>	People holding an account for the payment of city taxes and essential services. Necessarily, these people are the official owners of the property. This register serves as a reference for the provision of social grants.

Targeting individuals rather than targeting properties

As we have seen, the new system of social grants has several new features: a renewed means of calculating poverty level, differentiated grants depending on the latter level, and a different method of targeting. The system strives to be more inclusive by no longer requiring city account holder status to benefit from grants. Tenants, or people living informally in backyard shacks or in multi-household housing units, therefore can now receive social grants. This difference is a cornerstone in the evolution of the system. Historically, relations between individuals and the city were conditioned by the payment of services, and thus, by the existence of one account per living unit established with the city. This allowed the city to send bills to residents and allowed the latter to pay the bills as well as city taxes. Up to the introduction of ESP in 2009, social grants were allocated on the basis of city accounts, *de facto* evicting tenants, formal or informal, even though they were numerous in the townships (by way of example, see Box 16). Thus, a city official explains: *“The biggest difference from the old system is that you no longer had to be an account holder to ask for grants. Before, you had an account in your name for such-and-such a property because historically, the relations between the users and the city were based on those paying for the services. Going beyond that and trying to reach the tenants, or the ones living in the backyard shacks or apartments, was considered too complicated until recently. We changed the policy at the beginning of 2008. We convinced the city to overcome these problems, to make efforts. We convinced them because the majority of the city’s*

poor are not the ones whose name is on the bill. They're attached to one account. If they live in a large building, it's the owner who has the account, if they live in a backyard shack, it's the owner of the main house who has the account. In short, they're attached to an account and depend on it to have access to services even if they're not the account holders" (November 2010).

Thus, the major new feature of this system is targeting, no longer of housing units via the city subscriber accounts, but of individuals, with hopes of reducing errors of exclusion. All individuals, including tenants, can thus be registered with the city as destitute, giving the city a more accurate view of the reality of housing units in poor neighborhoods. Registration concerns all residents over sixteen years old. Those younger are declared "dependents" by an adult in the household.

This significant nuance provides a clearer picture of the composition of housing units and thus allows better targeting of social grants. With the old system, a housing unit received the same level of aid, regardless of the number of people within it; with the new system, the city is proceeding with the allocation of grants in accordance with the true number of people living in the declared properties.

These changes show that the city has realized that using the notion of a housing unit, which initially served as a reference for the provision of free water, was not relevant. While this fault had already been pointed up in other cities, like Cape Town (Smith, 2004), it was highlighted for Soweto during the Mazibuko trial.

Estimates show that in Phiri, the average number of people per housing unit is 10^[56] and that 50.3% of these units are composed of several formal or informal households. Similarly, these studies reveal that on average 2.55 households live on a same property in Soweto. Thus, one easily understands that the supposed equation of "one household = one housing unit" previously used to allocate social grants did not correspond to reality. The city is beginning to take this aspect into consideration in allocating social grants based on individual need, and not on the notion of property, making it possible to respond to the question of the "invisible poor" (Parnell, 2005) and to reinforce aid effectiveness.

This new feature transforms the relationship between tenants and owners to the extent that, concretely, the owner receives the grant for the total number of people declared destitute who are living on his property, and this whether they are owners

[56] COJ Affidavit, High Court, paragraph 62.21.

or tenants. Indeed, at the time of their registration as destitute, tenants must produce, beyond an identity card, a copy of the city account of the property where they live. Subsequently they receive confirmation of their registration indicating the amount of reduction benefiting the owner. At the same time, the owner is informed that he or she is benefiting from grants for the destitute, deducted from that person's bill, notably for water, electricity, taxes, sanitation and waste collection. For properties equipped with prepaid meters for water access, tokens can be updated in registration centers or JW payment centers. A city official explains as follows: *"If you live in a backyard shack in Soweto, you belong to the house's principal account. This account receives, on the 15th of every month, a certain amount of subsidy for each person declared and belonging to the house."* (November 2010).

Finally, this new system brings a dual shift with, on the one hand, the coverage of tenants (formal or informal), and not only of owners, and on the other hand, the awareness of the lack of homogeneity between the housing unit and the household, permitting the avoidance of major exclusion errors.

Significant limits to implementation

Despite these notable changes, some significant limits must be stressed. Indeed, the evaluations of the implementation of this new targeting show mixed results, seen in a weak registration level. Thus, just a tiny fraction of people who would normally benefit from grants actually do so. It is estimated that on the scale of Johannesburg, 800,000 people could benefit, or 200,000 households, which, on the scale of Soweto would correspond to about 10 to 20% of the population. Nevertheless, in January 2010, the city counted only 40,000 registered individuals, notably due to the slow pace in equipping and developing registration sites. To handle these problems, 30 to 40 additional sites are to be provided in 2011. The low level of registration is also explained by more sociological reasons. One city official says that the reluctance of individuals to register as destitute is explained by their lack of trust in the city and its processes. *"People who register have to trust the process, and communities' trust for this type of process is not high. There are lots of historic reasons that come into play on this level, and also lots of political agendas at street level. People say, 'We don't want to register, apartheid made us do that,' etc., and they don't want to do it again. But if you don't want to register and you hope that the city, by some unknown process, comes to learn that you're poor, well you're asking for something magical!"* (November 2010).

Besides, due to insufficient budgets, communication on the system of social grants remained too limited. If the councillors are supposed to play a role in spreading information, it has to be said that, as of today, the process has not been as effective as the city could have hoped.

Finally, exclusion errors persist since people living in informal housing zones cannot benefit from aid for water, nor from the other urban services and taxes, whereas they can receive aid for transport and access to employment. These errors are very numerous: in 2001, the census estimated that about 191,500 households (about one million people) were living in 109 informal zones scattered in 10 of the 11 administrative regions of the city. Furthermore, a certain number of people remain excluded because they lack identity cards. The registration of individuals is done on the basis of producing an identity card, which not all urban poor people have. In this case, the individuals must first register with the State civil services and request the issuing of an identity card before being able to declare themselves destitute and benefit from social grants according to their level of poverty.

This ambitious program is thus having a certain number of implementation problems, leading to a paradoxical situation where many poor people do not always receive social grants for which they may nonetheless qualify. These problems should be quickly resolved by the city as the success of the OGA project rests largely on the complementarity of social grants and the technical arrangements of the service.

Perspective: from universal free water to targeting by geographical zone?

Simultaneous with the previously described reform of targeting social grants, the department of social grants is working on a new restructuring proposing a dual shift: the questioning of universal free water and the implementation of targeting by geographic zones. The goal is to improve the effectiveness of targeting by changing the principle of identification of the level of poverty. Thus the city seems to be reconsidering old political arbitrations which remain closely linked to its institutional capacity to manage complex instruments.

This change would not consist in distributing water free of charge either, as foreseen in the context of the policy of free water for all households (with additional measures for the destitute), but only to those identified as poor. In an interview, the manager of the social grants department stresses that the implementation of the policy of free water costs about 350 M ZAR per year to the city, for a relative effectiveness and a certain financial waste in that households which do not need social grants receive

them for water. The policy of free water, as it is practiced in Johannesburg, generates inequality in its implementation because all households, regardless of their income and their composition, receive 6 m³ of water for free. The errors of inclusion are thus numerous. Therefore it is considered that with better targeting, the financial savings made could be redistributed to the neediest households.

Beyond these aspects, the reform project proposes coupling this change with more thorough geographic targeting than that achieved with the current ESP, in which 10% of the level of poverty is calculated according to a geographic index. The project would be based on a “deprivation index” attributed to each ward and calculated with data from the 2001 census (knowing that a new census is planned for 2011) and the study of communities carried out in 2007. Based on several criteria (revenue, level of education, access to infrastructure and services, employment, etc.) obtained from existing data, it makes it possible to identify levels of poverty by geographic zone and consequently allocate different levels of social grants. Such targeting would make the city more effective and to make significant savings by putting an end to the universal allocation of the free water policy and in giving more to households situated in zones identified as poorer and less well equipped.

Other experiments led in developing countries have shown that the effectiveness of this type of targeting strongly depends on (i) the concentration of poor people inside the geographic zones (the more homogeneous they are, the more effective the targeting can be), on (ii) the quality of the geographic division (Grosh, 1994) and on (iii) the quality of data used to determine poor and non-poor zones (the existence of a recent census and household surveys, for example). When these three elements are combined, this type of targeting is a preferable method for targeting individuals or households. It is less costly since the determination of beneficiaries is produced from existing data (Lavallée *et al.*, 2009). Thus, Grosh (1994), from a study on targeting programs in Latin America, shows that the cost of geographic targeting is three times less than targeting individuals. While the city of Johannesburg seems to be able to combine these criteria, the effectiveness of political systems (and here, poverty reduction policies) largely depend on the country’s institutional and administrative capacity at the central and local levels.

The building of the modernizing State, a necessary precondition

In 2000, when universal free water was adopted, the South African authorities were engaged in a process of shrinking the civil service and implementing World Bank

recommendations and rules of the New Public Management (Dreyfus, 2006). In these conditions, Vircoulon (2003) explains that the choice of universal service, while it may hardly seem redistributive at first glance and contrary to the goal of poverty reduction, was at the time the object of a great deal of thought by governmental authorities. Indeed, the targeting of low income households was envisaged, notably in light of the classic examples of Chile and Colombia which proposed targeting systems for water subsidies (Gomez-Lobo and Contreras, 2003) but then abandoned due to administrative and budgetary complexities related to its implementation. The government thus opted for universal free water in order to avoid burdening the civil service.

Ten years later, it seems that the city is entering a new period of thinking about its institutional and administrative capacity since it is now considered that the current bureaucratic system is able to effectively administer a more effective targeting system. A city official declares: *"According to some academics, our governance systems have not evolved sufficiently and that's why grants should be allocated to everyone. The reason I don't agree with that is that as a result there are heavily subsidized rich zones and poor zones lacking aid. That's why we have to set up a system of geographic targeting. I agree, the registration system may be long, but without a targeting process we cannot effectively manage the grants."* (November 2010).

This city official thus considers that it is more the lack of targeting rather than its excess which poses a problem to the degree that it generates situations of inequality (over-assisted rich zones *versus* under-assisted poor zones). He defends a more progressive and visionary view in declaring that the structure of city governance today permits the development of systems of sophisticated management of social grants which indeed disrupt habits but in the long term would make it possible to respect and implement the right to water for all, particularly the urban poor.

In a historical perspective, the thinking which is beginning today at the city level is interesting in that it concerns reconsidering political arbitrations which had led to the choice of universal free water shortly after the advent of democracy. The arbitrations which prevail in the design and management of social grants are necessarily complex and changing, and it is rather encouraging to see that debates are not closed and that, quite the contrary, public authorities are ready to re-evaluate their tools for managing urban poverty by trying to adopt a critical position in the face of their own results, international experiences, and according to the changing social and political context in which it is evolving.

In South Africa as in all emerging countries, the construction of the State and rational and competent public authorities (which can be qualified as a Weberian administration) is central today (Sgard, 2008). Social grants are a fertile ground for judging this construction, to the extent that effective management assumes the ability to “*define the poor, count them, situate them in space, measure their income and meet them regularly*” (*ibid.*). The city of Johannesburg thus seems ready to engage in a sizeable administrative reform in envisaging revision of its social grant policy, to date found partial and inegalitarian, and implement ever more sophisticated tools to govern.

In 1994, administration reform was an issue in the transition in South Africa: its transformation, largely inspired by the doctrines of international financial institutions, allowed for the implementation of a certain number of public policies aimed at improving living conditions for a large majority of the population (Dreyfus, 2006). Today, at the scale of the city of Johannesburg, unlike the reconstruction policies (reconstruction and development programmes, or RDP) of the mid-1990s, the way is clear for policies to consolidate democracy, necessarily built upon complex bureaucratic systems.

2.2.6. *The trial, opening the debate on old controversies in the water sector*

The Mazibuko trial, beyond the technical and social innovations whose development was enabled at the local level, is without contest a place, an “arena,” of debate, a moment of justification of social policies. The publicizing of social problems, the creation of a debating space permits the resumption of old debates and constrains institutional actors to a critical examination of their policies. The Mazibuko affair made it possible to revive two wide-ranging debates in South Africa on the arbitrations related to the minimum amount of water to supply in the context of the FBW, and the capacity of poor households to pay.

Reopening an old debate on the minimum amount of water

The policy of free water has, from its beginning, been the object of strong criticism. Indeed, large controversies emerged over the amount of free water to supply to poor populations and over justifications of 6 m³. While they were brought up again during the Mazibuko trial, the stakes go well beyond the simple quantity of water. The applicants questioned the justification of this number, given the size of some poor families, and questioned not only the methods of calculation but also the ability of

some households to pay. Some of the literature questions the justifications of 6 m³ and stresses that it does not meet the real needs of the poor, often drawing on ideological arguments (McDonald and Pape, 2002; Bond, 2004 and Ruiters, 2007). Another, more institutional part of the literature tries to explain and show the correspondence of these choices to minimal needs and environmental stakes specific to South Africa (Schreiner, 2007; Macleod, 2007; Muller, 2008). Synthesizing the debates and attempting to shed light on these questions, a recent article (Smith, J.A., 2010) shows that, while the decision on the amount of free water was initially based on WHO guidelines, it was above all based on subjective and essentially political arbitrations and that in the end, it did not correspond to the real needs of poor households. Its appropriateness in the face of uses and poor urban household consumption remains to be proven. Furthermore, this debate is highly contextualized to the degree that the relative weight of factors varies depending on the place or economic situation. Thus, prerogatives adopted at the national level but for application at the city level may not be truly adapted to different contexts of implementation.

Taking note of the debates rekindled by the Mazibuko trial, the city of Johannesburg consequently proposed larger amounts of free water to households declared to be destitute. Still, some studies (see satisfaction survey, 2006) show that the 6 m³ were sufficient for a large number of poor households benefiting from the OGA project. In one of these studies, only 40% of the people questioned considered that 6 m³ was not enough (against 60% holding the opposite view).

Beyond these differences on the numbers, many questions remain unanswered: of the households buying water, what is the average monthly purchase of additional water? What portion of the global budget do these purchases represent? Are these households then in a situation known as water poverty?^[57] Among those not buying water, how many are victims of self-restriction which may have health impacts, and how many, in fact, have a truly sufficient amount of water? Lastly, in this case, what is the average size of households? This information would make it possible to better understand the real correspondence between the amount of water proposed and the amount needed by poor households. Similarly, answering these questions would make it possible to objectively evaluate the revisions made by the city in terms of free water for the destitute and cut short the debate on the amount of necessary water. Indeed,

[57] In many countries, water is considered economically inaccessible when households spend more than 3% of their budget on water. In this case, the term water poverty is used, even if this notion receives less media attention than energy poverty. On this subject, see Hillyard and Scullion (2005).

it seems that the amounts proposed in the context of revising the policy on the destitute are the product of approximations as well as subjective and political arbitrations, as was the case when 6 m³ was chosen at the national level, in 2001. The consumption habits of poor households are little known, making it difficult to appreciate the city's efforts in the face of social reality. Thus the essential question of "how much water is enough" remains unresolved, and the city and the operator could conceivably face new debates and new system inadequacies, given the reality of a certain number of poor households.

Finally, while there is no doubt of the city's will to account for situations of poverty (its constant efforts to improve the social grant system since its inception prove it), there can be doubt about the scientific foundation or the objectives of its sociotechnical arbitrations as well as the future effectiveness of this program, even if on paper it is genuinely pro-poor. Additional in-depth research into consumption habits and the needs of poor households would be desirable in order to precisely measure the correspondence between the city's programs and the socioeconomic reality.

Poor households' ability to pay questioned

Another debate, this one bitter, concerns poor households' ability to pay. Two schools of thought clash: the first supposes the existence of a culture of non-payment and the need to educate the poor, whereas the second affirms that poverty is a factor explaining this phenomenon.

The first school, institutional and largely relayed in government policies, denounces the unwillingness to pay, the absence of responsibility of poor citizens, and/or their lack of citizenship. More generally it conveys the myth of the culture of non-payment. It is thus a matter of "educating" poor citizens, making them responsible, and teaching them to pay for water in using, if need be, sociotechnical tools such as prepaid meters. This first interpretation of non-payment, largely conveyed by officials, and which explained (at least in part) the installation of prepaid meters in Soweto, merits criticism and seems to deny the socioeconomic reality of dire urban poverty.

The second school, majority-controlled by academics, deplores the first position and proposes an entirely different interpretation highlighting the inability to pay as an explanatory factor in the non-payment and recalcitrant behavior in the face of prepaid meters. Thus, in contemporary South Africa, the persistence of non-payment or boycott of prepaid meters does not correspond, as it seems to be perceived in institutional spheres, to a heritage of apartheid or a refusal of citizenship on the part

of users, but rather concerns an inability to pay for some of the poorest users (McDonald, 2002). This analysis is confirmed by certain other works (Booyesen, 2001; Plancq-Tournadre, 2004) which show a clear link between non-payment and poverty, calling into question the myth of the culture of non-payment conveyed by the authorities (Smith, J.A., 2010). Furthermore, certain studies (Goldblatt, 1999; Alence, 2002) stress three factors which can explain non-payment: the ineffectiveness of bill-collecting mechanisms, the very poor quality of services, and a kind of habit of non-payment carried over from apartheid.

It seems to us that non-payment is a mix of these different elements but that precise data and objectives are lacking to clearly evaluate local situations, inevitably diverse and subject to a variety of changes. Ultimately, these studies show that, even if authorities gradually become aware of the various parameters which arise, they still have a somewhat biased or simplistic view of the question of non-payment, the problem being unsolvable solely with prepaid meters.

In adjusting the system of social grants, the city of Johannesburg thus hopes to move beyond this debate, and certain interviews held with city representatives show a clear and positive change in discourse. Therefore, poverty is now considered to be a serious explanatory factor in the phenomena of non-payment and rejection of prepaid meters. In a recent article (Jiya, 2010), it is recognized that the question of payment for water in Johannesburg is a tricky problem due to the habit of non-payment and the inability of certain households to pay, whatever technology is used. In this context, the author recognizes that the social grants proposed by the city upon the project's launch in 2006 were unable to function effectively (newness of the system and ongoing adjustment). For this reason, a certain number of poor households which accepted prepaid meters faced real financial hardship. The author therefore stresses the need, for the city, to reform the social grant system. For these reasons, the city now wants to make sure that the resumption of the OGA project occurs at the same time as the effective implementation of social grants to which it is linking, at least partly, the effectiveness to the success and acceptance of the project. Nevertheless, here again, it is a bit early to assess the impact of this new policy and its correspondence to social reality. It can only be hoped that the scientific community focuses on this question while avoiding ideological arguments and seeking to produce the most objective data possible.

To conclude, in South Africa, the main question which has been underlying the debate for a long time is much more than the price of water or the ability of poor households to pay, or even the necessary amount of free water. Above all it deals with policy

choices on water distribution around a founding question: must water be entirely free or (in part) commercial? Two positions thus clash, one considering water to be a social good (therefore free?) and the other viewing it as economic (therefore not free). The terms of this debate are equally illustrated by the Mazibuko trial. Yet, it seems to us that, the government having already decided this question in adopting the principle of cost recovery, the relevant question is that of the accompaniment of this process for the poorest people: how should they be included in this system? How should effective social grants be put in place establishing a link between social (or pro-poor) preoccupations and the will to achieve economic effectiveness in network services? This is what the city is attempting to do in reforming the system of social grants.

2.3. Renewing participative engineering in the face of an essential actor: the poor urban user

In the previous part, we showed that the militant use of the law, in the case of the Mazibuko trial, compelled the city and the operator to reposition themselves on a certain number of technical and social controversies connected with the OGA project, and more generally to revise their approach to water access for the urban poor. The lack of consultation with and participation of users in the construction of the service also played a part in the charges stressed by the plaintiffs for whom the city had adopted, during the first phase of implementation of the OGA project, an authoritarian approach.

The Mazibuko trial was at once the symptom and a source of additional deterioration of the link between citizens and local authorities. Indeed, the trial and the demonstrations leading to it show the gradual emergence of the citizen user apt to contest, through different channels (including the courts), the operator's choices, and influenced policy in requesting greater transparency and more justifications (on the technical choices made, the nature of sociotechnical systems used or the targeting of action areas). For this reason, the operator and the city found themselves forced to reconsider and develop new strategies in the face of an essential player: the poor urban user.

Furthermore, the OGA project leads to a paradoxical fact: on the one hand, the project's results until its premature halt in 2008 are quite satisfactory (cf. 1.5.); on the other hand, its limits seem numerous (numerous demonstrations, thousands of prepaid

meters put out of service, dozens of newspaper articles decrying the project, heavy media coverage of the affair, etc.). To overcome these contradictions and the crisis of confidence declared between the poor citizen users and the public water service, the city and the operator were forced to determine the possible causes of these controversies. They learned a lesson from the legal process: community participation and trust between communities and service operators are crucial elements. Today, JW considers that the troubles encountered in the first phase of the OGA project are the result not only of bad communication concerning the real stakes of the project, the messages on water conservation having disappeared from its discourse in order to focus on the sensitive topic of prepaid meters, but also a lack of approval by beneficiary communities, a direct consequence of their non-implication by the operator.

Consequently, JW is developing protean participative engineering called the new public engagement and communication approach. Its goals are to (i) sensitize people to environmental issues, (ii) justify the validity of the project (through poster campaigns, radio spots, etc.), (iii) mobilize communities to participate *via* local councillors, and finally (iv) accede to a request for greater transparency. This approach means not only a policy of openness towards people who were previously opponents, but also an attempt at a more comprehensive change in external communication. The overall idea in this change in communication is to convince users of the validity of the technical operation in having some of them switch from a status of adversaries of the operator (through political contestation, the trial, etc.) to that of citizen users.

As often occurs in water projects, the development of participatory engineering corresponds at once to a concern over renewing confidence between the public service users and the local governments, and to an interest in proposing a response to a conflict over the conception of service (Breuil, 2004, p. 195). It is also what is at stake at the scale of Johannesburg, where communication and participation are presented by the city and the operator as indispensable elements to the reconstitution of collective action in the city. This change leads to a certain number of questions: will this strategy of social change be effective? Will the ways and means implemented lead to restoring user confidence (weakened during the Mazibuko trial, and which is generally weak in South African water services (Smith and Eales, 2010))? Does the applied participative engineering aim to create genuine democratic urban governance or is it, quite the opposite, merely a gentle manner of imposing the project under the cover of renewed ways and means?

2.3.1. Sensitizing: the importance of resource conservation

To the question, “what did not work in the first phase of the OGA project?”, JW answers that the breakdown of the environmental message (resource conservation) due to a focus on prepaid meters was devastating. The company judges that the development of a message more focused on resource conservation would have allowed it to better justify the project and gain its social acceptance. It is true that no doubt such a message would have made it possible to answer, at least in part, the often-asked question: “why was Soweto chosen?” and thus avoid criticism expressed in terms such as “discrimination” or “targeting the poor” as occurred during the Mazibuko case. Soweto was chosen because a higher level of consumption was identified than in other parts of the city for reasons already stated in this document (dilapidated infrastructure, flat-rate consumption, massive non-payment, etc.). These justifications, put into perspective with that of resource conservation in the city and more largely in the country (Seago and McKenzie, 2007; McKenzie *et al.*, 2010), would have better explained the targeting of Soweto.

Also, the new communication policy of JW is focused on the benefits of the approach in environmental terms (for communities, the city, and more generally for the country) and on the need to reduce water losses, whether commercial or physical, through adapted solutions ranging from restoring the network to the installation of sociotechnical tools (like prepaid meters) enabling the management of demand. JW’s preoccupation is thus to make the local and national environmental stakes understood in order to have communities sign on to the project. Nonetheless, it is doubtful that these arguments easily reach poor communities which feel excluded from the economic and social transformation project, and which could find it difficult to feel obliged to participate in the ecological or sustainable transformation of the country.

Moreover, JW and the city are repositioning and rebranding the project by not reducing it to the question of the meters, but, quite the contrary, widening the message and focusing preoccupations on water conservation, the idea being to depoliticize and stop the “demonization” of prepaid meters. At the heart of the two institutions now lies the idea that, during the first phase of the project, the polemic crystalized around the meters, whereas the project was in fact a management and resource conservation project with a technical solution: the meters. It was in no way a project aimed only at installing these sociotechnical tools in order to restrict consumption or to make customers pay for water. Therefore, it is considered that the messages on the need to conserve the resource, the arid character of South Africa and the strategy of

conservation developed by the city were diluted in communication which was overly focused on prepaid meters and were thus unable to succeed in explaining the justifications for the project and its interest for the entire city and its inhabitants. On this subject, a JW representative explains that the city gradually drifted from its own messages in order to focus excessively on the issue of prepaid meters: *“To a degree our focus got shifted, we got distracted and we fell into defending meters and forgetting to explain that bigger context [...] But if we leave the decision down, the conversation is only about the prepaid meter, then it becomes emotional, it becomes ‘but you’re not ruling them out anywhere else’, but we are going to be rolling them out but people don’t understand the context of water losses in Soweto. If you don’t explain that to them then it becomes a second matter ‘ah, you do this in black areas, you don’t do it in Sandton’ and that’s not the case. But it takes telling the full picture so I suppose it takes a greater degree of transparency from us and not just assuming people will understand if we haven’t explained.”* (November 2010).

In short, it is affirmed that JW did not well explain the environmental stakes and let itself be drawn into a process of justifying the use of prepaid meters. Thus with environmental justifications pushed to the background, it became difficult to have communities sign on to the project. Now prepaid meters are presented as part of a project to manage demand and to conserve water, as a tool serving a greater goal, and not an end in itself. They are also presented as an effective technical means of implementing a policy of free water.

Finally, communication is focused on two aspects: the reasons for targeting Soweto and its impact on the city on the one hand, and a city objective of water conservation by 2015 on the other hand (a 15% decrease in water consumption). Analysis of this new communication policy indicates that the city and the operator deem that by better explaining the stakes, communities will naturally support the project and that the sensitive subject (the meters) will then be considered a simple component of the said project. This assumption is debatable: communication is different from placating a conflict and, to the contrary, a risk of social non-acceptance of the project remains.

2.3.2. Doubts about participative engineering: good urban governance or illusion?

A Procedural problem...

In Johannesburg, communication and user participation are now identified as obligatory steps in the development of urban projects. Stress is placed on listening to

complaints from all users to the extent that it has been proven that residents, even the most deprived, have different means, including recourse to the law, to make their voices heard and that these kinds of initiatives are very costly to the city, in both financial terms (the trial cost more than 100 M ZAR) and in terms of image. This is all the more important in that the city is, or has recently been, implicated in several other trials concerning social rights (housing, electricity).

This rise in awareness does not mean nothing was done to inform users when the first phase of the project was implemented. On the contrary, JW had already set up a community mobilization program in the form of several public consultations and door-to-door operations in order to gain residents' backing for the project. For this, JW had sent out 300 facilitators to explain the project to residents and obtain their agreement to install prepaid meters on their properties. The evaluations carried out by JW are quite satisfactory: in February 2005 only eight households among Phiri's 1,771 inhabitants had refused that a meter be installed on their property and had opted for an outside tap (level 2 service) giving the impression that the project was well accepted (Jiya, 2010). Similarly, a satisfaction survey of a sample of 3,000^[58] residents found a high level of satisfaction: the overall mark was 8.11 out of 10.

Still, a recent study estimates that only 5% of Phiri inhabitants were consulted, and for many observers, these efforts were closer to persuasion than a real consultation effort (Smith, 2009), suggesting that communication was not done on a sufficiently large level and that its methods and its objectives are debatable. The focus group meetings held during our inquiries on the ground in several neighborhoods in Soweto confirm this analysis. These groups indeed show that the lack of information and participation are very often lamented by users. The people questioned are often little informed about the outlines of the project and the way the meters function; at best they have a vague understanding and at worst they are mistaken. Besides, in Senoane, one person declared, as did several other participants, that they had heard that, whatever the inhabitants' opinion, the meters would be installed ("they said we like it or not, we are going to put in those meters"), throwing the consultation process into doubt. The same sort of affirmation was found in the other focus groups: in all neighborhoods, residents denounced the lack of consideration (listening, or even respect) for their needs, and the very hierarchical decision-making system. These failures are recognized by the operator and the city today, as the declaration of a city representative shows:

[58] Operation Gcin'Amanzi Customer Satisfaction Survey, conducted in 2007 by CASE, a South African NGO, ordered by JW.

“I do feel that with any projects, especially technical projects, if you don’t have community buy-in or if communities don’t understand, they won’t accept it and I think that there is a huge lesson to be learned from this court case” (November 2010).

Concretely, the engineering put in place by JW materializes in the holding of public meetings, the use of the media (broadcast of radio and television messages), the realization of door-to-door campaigns and the organization of workshops directed at different stakeholders (politicians, NGOs, JW personnel, ward councillors, etc.). The methods used are identical to those used during the first phase of the project even if their use has intensified. For example, 10 M ZAR has been budgeted to finance door-to-door operations.

The door-to-door operations take place in all areas targeted by the project, are carried out by a thousand community facilitators recruited by JW, and have three objectives: (i) inform about the resumption of the project, (ii) explain the outlines, and (iii) obtain the agreement of residents for restoration works on their property and to install prepaid meters. According to JW and the city, these operations are a great success, as the official figures indicate: between 75 and 85% of households consulted gave their approval. Our observations on the ground, however, contradict these official figures to a certain extent and show significant reluctance by inhabitants to give their approval (see Box 17).

In spite of the intensification of the process, this project remains very controversial: on the one hand the social movements or the representatives of groups defending social rights (like Socio-Economic Rights of South Africa – SERI) denounce JW’s procedures and stress people’s persistent refusal to support the project; on the other hand, the city and JW display exemplary signature rates. To offset this lack of information on the consultation process and avoid polemics on a subject which was already critically examined during the Mazibuko trial, the city is considering holding a call for tenders for an external audit. Thus it will be interesting to follow this process and study the conclusions.

... or a problem of sequencing?

The trial is a chance for a second lesson on sequencing and planning urban projects for the operator and the city. Indeed, in hindsight, the operator recognizes that the deployment of a certain form of participative engineering during the first phase of project implementation, beyond lacking intensity, posed a problem of sequencing

Box 17 *Observation of a door-to-door operation with JW community facilitators (22/11/2010)*

9h00. Arrival in Mofolo North. We meet one of the community facilitators hired by Johannesburg Water. Gradually, four other people join us: in all, two men and three women, all under 30 years of age. They have two types of documents with them: letters signed by the ward councillor and a sample bill, as well as small desk pads where each page represents a street with numbers for each house and has a column to note each owner's decision (signature, refusal, on hold).

While waiting for them, I ask two of the community facilitators a few questions. They explain that there are 860 houses in this ward and that they needed a month to visit them all. The teams were able to collect signatures at only 340 of them. They themselves obviously had to sign. They are sometimes discouraged, sometimes irritated by inhabitants who, according to them, made up a pile of pretexts to not sign. Often the residents are not there, the owners are absent, documents are missing, people want to put off making a decision until they have consulted with their children before signing, etc. Thus, to obtain a signature, the agents must return to each home several times. They even worked on weekends, with only one day of rest. They confide, however, that some inhabitants are very friendly and do ask some questions but sign without protest. Clearly, the question of the signature and the attitude of inhabitants has nearly become a personal affair for them since we learn that they are paid for each signature. It turns out that the notion of profitability is at the heart of the consultation process, given the precarious employment conditions of the community facilitators.

During the few hours spent with this team, we visited 15 homes, only two people agreed to sign, eleven refused, and at the two remaining homes, the owners were absent. Most of the time, the reasons put forward, with more or less hostility, were the following: inability to pay, the need to consult with another member of the household before signing the documents, etc. In the first house visited, for example, we were received by an old woman who refused to sign because she claimed she had to discuss the matter with her children. In her case, it turned out that the JW teams had already visited twice. The first time, she claimed that she had to leave the house for a meeting; the second time, she simply refused to sign. Her case is not unusual: the JW teams often encounter this type of problem and must call back several times to convince these households

since it was planned at the same time as the technical phase. JW had put on contract too soon with local companies charged with restoring networks, who waited to be able to begin works, which ultimately pushed the operator, who was under pressure to be financially profitable, to neglect its communication phase. As one JW manager

explained, in its initial phase, the project was designed only with technical concerns in mind and did not take users into account: *"I think previously we made assumptions about the project's acceptability. As long as we had the correct rationale: acting in the interests of properly managing the water resources on behalf of the residents, acting in ways that were securing their supply for the future and doing all the responsible things we're supposed to, as a service provider. We assume that therefore communities will understand and they will go along with us. Before, projects tended to be planned from the perspective of the technical stuff, we focused on the technical requirements and getting the project right from a technical perspective. We did have an organization strategy – and the court found this to be true as well – but I think the biggest mistake probably was the fact that we did not use the mobilization effort as a decision-making tool, in other words, to tell us when and if communities are ready for us to begin the technical work."* (November 2010)

Consequently, today JW is reviewing its overall planning of the project in order to ensure that participative engineering precedes its technical work. In scheduling terms, the resumption of the project began in February 2010, for social and information action, and the beginning of works was initially planned for July 2010. In fact, the works began at the end of 2010, the communication phase having taken more time than planned. JW claims that it would like to avoid making the same mistakes as before and is taking care to set aside the time necessary for participative engineering. The operator has therefore managed to adopt a critical view of its work methods, as this representative's testimony shows: *"Perhaps we ought to have started with the consultations before we rolled out the construction. That way we could have taken on board the concerns that were raised, we could have addressed the questions without us being seen as authoritative, because it's possible that some people just saw us as ticking a box so we can say we've done mobilization. But already we were on the ground. And this, the new approach within Johannesburg Water says 'we are now ensuring that communication and community mobilization is planned and integrated into the project plan from the very beginning.' That's in fact used as a decision-making tool to ensure that we are able to make the decision about when and whether to actually start with the technical processes when we're sure that there is enough buy-in on the ground. In other words, we are working with a different assumption that says 'as much as rationally we know what the case is and, in terms of why it is that Soweto becomes a priority, we understand the context for us proceeding in the way that we are proceeding.' That's not something we ought to assume, we ought to actually share that with communities and make sure that they*

understand and take their concerns on board as we develop answers for, and proceed with greater care, and that is a lesson that we haven't just applied to the resumption of this project. It's now part of Jo'burg Water strategy for all capital projects." (November 2010)

The question of the users' role in public service

While it is undeniable that the participative engineering deployed is more intensive than before, certain confusion in the terms used can be observed: the terms "communication," "public participation campaign," "consultation" and "public mobilization" are often confused although they refer to the same operational reality for the operator and the city. This semantic confusion shows that the distinction between participation and communication, albeit essential, is not clear.

Breuil (2004), however, shows that participative engineering is diverse, and that it corresponds, depending on the modes chosen, to different conflictual situations. There are different models of participation, ranging from information and sensitization of communities to participation in managing services, and even to extension works. In view of this classification of models of engineering, it can be said that the mode of participation proposed in the context of this municipal project is passive (Breuil, 2004, p. 199). According to the author, this model, focused on information and sensitization of communities, makes it possible to re-establish trust between users and the operator. Furthermore, that is the first degree of participation among all the arrangements which can be mobilized. The city and JW, in stopping at the first step, do not clearly complete the consultation, understood as an evaluation of the demand allowing for the replacement of a supply approach with a demand approach. In spite of the use of the term, then, institutions do not engage in this exercise because the outlines of the project are all defined beforehand. Therefore, the issue is not to consult users and listen to their claims, but rather to inform them and affirm support while closing debate areas, and this even if the above-quoted JW manager explains that the company wants to use community mobilization as a decision-making tool. A top-down approach remains, despite a discourse touting a more bottom-up approach. In this way, and this despite speeches which would have people believe otherwise, Johannesburg does not distinguish itself from the other South African cities which favor technocratic development without implicating citizens in the management of urban services (Smith and Eales, 2010).

Despite strengthening its ways and means, the city is above all concerned with creating an illusion of involvement of the urban poor in questions central to their daily lives,

more than with promoting a real democratic urban governance. Given the above-stated reservations, it is questionable whether JW's approach to communication will suffice. As of now, the demonstrations observed during our last field survey (November

Box 18 *March organized by several social movements against the resumption of the OGA project (extract from the field journal, 17 November 2009)*

The demonstration's departure is planned for a small square in Meadowlands, Region 10. The final destination is the offices of JW and the Meadowlands councillor, located about one kilometer from here. We arrive at 10 o'clock. Fifty people, many of them women, are already present; they are wearing red T-shirts with the colors of the APF or the SCR or displaying the local communist party's acronym. Shortly thereafter, the militants unfurl a banner on which is written: "Free basic services for the poor." Women are chanting. We speak with David, 60, who says he is used to the demonstrations. He is demonstrating because his retirement does not provide him with enough income to pay for water; he also wants to denounce the councillors' lack of listening and attention to the claims of the poor. At 10:40, two buses arrive with fifty militants on board. This new arrival little changes the initial basic sociological observations, even if a certain number of young people join the procession; they begin to hand out tracts.

One hundred people are present, 10% of them young. At 11 o'clock, the march begins, first preceded by two police cars which stop traffic. Behind them are the militants waving the banner, followed by fifty more demonstrators. The others, too old or too tired, are transported (by bus or taxi) to the point of arrival where they await the arrival of the procession. People sing and whistle; the atmosphere is quite cheerful. Fifteen minutes later, the demonstration is already in front of JW's offices and that of the Meadowlands councillor.

Everyone gathers in front of the official buildings. The councillor arrives after twenty minutes. The militants read him a memorandum, to which he responds: "I cannot sign this memorandum because of these reasons: the people who are here at the moment are not my constituency, and not all of you here are even from Meadowlands and the fact that there are buses and taxis full of people with red T-shirts, it shows that you are not from around, so for these reasons I cannot attend to your concerns. [...] JAPF should not complain about anything because it is the government that provides the free services to poor and the pensioners of Meadowlands." It is noon. The demonstration ends and the crowd disperses calmly. The militants express their disappointment with the councillor's reaction but declare themselves unbeaten: they will begin demonstrating again to make their claims heard.

2010) leave the impression that a certain number of challenges remain (see Box 18). Beyond this, we hypothesize that the city considers that all questions were raised and handled during the trial and that, to the degree that answers were provided for the near-totality of the plaintiffs' arguments, the issue today is not to consult but to inform and communicate, the "consultation" having in a certain way taken the form of the trial.

Finally, despite the intensified rhetoric on user participation and a densification of systems implemented on the ground, this aspect remains little considered by the echelons of the metropolitan government and the operator. Even if more time and means were allocated to these systems, it must be noted that the users have no power over the outlines of the project, and ultimately, the only thing expected of them is acquiescence.

2.3.3. The local elected officials at the heart of the project: a paradoxical choice given the institutional dysfunctions of the sociopolitical apparatus.

The water services, concerned with a wider debate on the role of local governments which ensure the responsibility (as stipulated in the Constitution), are a very political debate in South Africa. Yet the city and JW made the councillors one of the cornerstones of their new strategy. In the South African politico-administrative system, the councillors are the neighborhood elected officials, and their role, even if it is poorly understood as much by the councillors as by their electors, consists in managing local development (notably in the domain of services) and to serve as a link between the residents and the city (in passing on inhabitants' requests in the dedicated institutional channels and in disseminating information put out by the city for inhabitants). Thanks to their electoral legitimacy, it has seemed logical for the city to use them as relays for this very controversial project.

Thus one of the first steps in the communication process prior to resumption of the project requires the implication of local elected officials with the organization of awareness workshops. The latter serve to verify that elected officials understand the project well so that (i) they can pass on messages and answer citizens' questions in their respective wards, but also (ii) they can be entrusted with the organization of public information meetings (see Box 19) and, more generally (iii) their political support of the project is assured. Indeed, as agents of local development, they are on the front lines to receive user criticism. They must know the project well in order to

have good arguments to respond with. The councillor consultation phase took place in February 2010. Following that, a certain number of public meetings (central elements in the participative engineering which was deployed) were organized in Soweto between June and December 2010. These meetings were systematically organized by the councillors, who led them in the presence of a technician (sent by the operator) responsible for explaining the technical and social process and the environmental imperatives inherent to the project (see Box 19).

In this part, we will show how counting on the implication of councillors is a paradoxical choice. Indeed, while it seems necessary (given the construction of the South African

Box 19 *Public information meeting on the OGA project, ward 45 (21/11/2010)*

The awareness meeting is organized by the councillor of ward 45 in the presence of a JW agent. It begins at 2 p.m. in the area's school. Eighty people, packed into a small classroom, attend.^[59] About a third of the audience is composed of elderly women, one third elderly men, and the last third of younger people (between 20 and 40 years old). The meeting begins with a prayer said by one of the elderly women. Next, the councillor, a 40-year-old member of the ANC, opens the session. Afterward, the JW technician presents the project for an hour. Stress is placed on the need to conserve the resource, the technical details of the operation (usefulness of prepaid meters, social measures brought in with the new meters, social grants, etc.), and finally the need to "cooperate" with community facilitators and the teams which will need access to properties in order to carry out the works. The atmosphere is calm, the audience is silent, occasionally punctuating the speech with a "hmm" of approval. Then the councillor leads the debate; nearly a dozen questions are asked. When responding, the JW representative insists on residents' rights but also their responsibilities: while they have the right to protest in court against the city or JW in the event of a disagreement, they mustn't vandalize the meters or prevent the company from gaining access to their property. Stress is also placed on the legality and the legitimacy of the project, confirmed by the Constitutional Court. At the end of the meeting, the community facilitators, responsible for the door-to-door operations in this ward, are introduced to the residents; there are five of them, aged between 20 and 30. The JW representative explains that these people will visit their homes to have them sign a certain number of documents indicating their agreement with the project. The watchword is clear and repeated time and again: they must be "cooperative"!

[59] The total population of ward 45 is 23,789 people, which is 6,237 households, according to the document entitled Integrated Development Plan, Area-based Initiatives and Projects, 2009-2010, volume 2.

politico-administrative system), their implication is above all a risky bet, given residents' lack of confidence in their local elected officials (State of Local Government in South Africa, 2009), the lack of competence of some officials and the lack of margin of maneuver of these same officials. Thus the city's challenge is to make the politico-institutional system function, recognized as largely dysfunctional, for the benefit of the OGA project. Thus, without predicting the failure of this approach, it can be viewed as a risky bet.

Actors with little legitimacy

The councillors have a central role in the process of relaunching the project. Still, as some of the interviews and focus groups carried out during our ground surveys show (see Box 20), the local elected officials are highly controversial public people, whom citizens do not trust; at best, citizens consider that these officials do not assume their responsibilities and do not listen to them, and at worst, they are corrupt and seek only to get rich (see Box 20).

In recent years in South Africa, a significant increase in demonstrations against the poor quality or lack of basic services has been observed, mostly in urban areas or the townships (see Figure 2), with an increase of 30% seen in Gauteng province in 2009 (resulting in growing discontent over the lack of transparency of local governments; cf. State of Local Government in South Africa, 2009). These demonstrations are also the expression of citizens' frustration amid their desire for respect from their local elected officials (Smith and Eales, 2010), whom they accuse of arrogance and insensitivity to communities' needs (State of Local Government in South Africa, p. 12). The claims of social movements over basic services are largely centered on this lack of trust (see Box 21).

Smith (2010) explains the unprecedented increase in demonstrations against the services by the weakness of local governments whose quite ineffective communication and lack of transparency lead to two related phenomena. First, the people hesitate to use institutional channels to communicate their demands of the State apparatus and tend to withdraw completely. This first factor has consequences on basic services since, at the same time, the people withdraw from their responsibilities towards the community, leading to an increase in the rate of non-payment or to illegal reconstructions. Second, this situation fosters the onset of a feeling of frustration among users due to their inability to gain access to formal channels in order to communicate their discontent, leading them to express themselves in the street.

Box 20 *"The problem is the councillor" Soweto residents' perceptions of local elected officials (extracts from focus groups)*

In November 2010, we held five focus groups in five Soweto neighborhoods (Phiri, Senaoane, Dube, Dlamini and Orlando West). There were ten people per group, and all were heads of household. The relationship with local elected officials, notably concerning access to basic services, was at the heart of the discussions. Everyone seemed to consider elected officials to be very controversial people, often unavailable to respond to residents' requests, leading to a clear lack of confidence between citizen users and residents. The following quotes, extracts of testimony by residents of these different neighborhoods, provide an overview of users' perceptions of local elected officials:

"We cannot reach that person. We elected that person. But we cannot speak with him face to face."

"When we look for our councillor, he is never available. You will wait forever, even if you can say someone is dying here he needs help, you will wait forever."

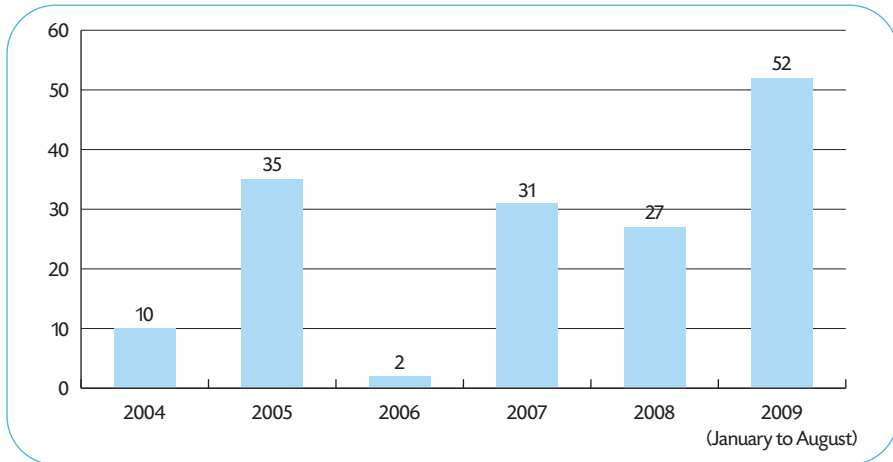
"We have spoken to our councillor but he is doing nothing for us. Even if you go and cry in his face he does not care."

"The problem with the ANC is they choose their own brothers but they do not serve the community. That is the problem. Lack of service delivery is caused by the councillors that are not part of the community. Even this meter problem is caused by the councillors, they placed people who do not know. They are educated but they do not do what the people want. They must appoint people who know and are part of the community."

"The ANC, they have selected councillors who do not know our problems. They do not even know how to open a file, and so on. There is too much corruption, the problem is the councillor."

These phenomena reveal the significant disconnect between citizen users and local governments. Similarly, recent research (Bénil-Gbaffou, 2008) shows that the dysfunctions in participative democracy mechanisms in Johannesburg explain residents' nearly systematic shunning of their elected officials, prompting residents to communicate their claims of the city *via* extra institutional channels. Similar remarks can be made at the national level, where the spaces and channels intended to facilitate citizen participation are at best ineffective and at worst totally abandoned. Yet the country has State-level regulatory tools (Municipal Systems Act 2000; Constitution articles 151, 152 and 195, which encourage community participation in decision-making;

Figure 2 *Increase in demonstrations in South Africa against the poor quality of services*



Source: *State of Local Government in South Africa, 2009*

cf. Mohanty *et al.*, 2010), and structures were put in place: the ward committees, intended to be the cornerstone of citizen participation, but which are perceived more as spaces of information exchange (Thompson and Tapscott, 2010). Furthermore, the quasi-unique position of the ANC does not improve elected officials' responsiveness (cf. Smith and Eales, 2010). This situation even strengthens their lack of legitimacy, even if the effects are not widely seen at the voting booth (Booyesen, 2007).

In these conditions, it could seem risky to have bet largely on councillors to ensure the success of the project. Indeed, given the lack of trust, the suspicions, and citizens' avoidance strategies vis-à-vis their local elected officials, how can these officials truly share the facts on the project and organize public meetings followed by a majority of the community? It seems that the councillors are the required but quite ineffective – or at least risky – communicators with the people, especially on such a controversial subject.

Beyond the demonstrations denouncing the quality of services, the conclusions of recent studies (Bénit-Gbaffou, 2008), confirmed by our own field surveys, show that recourse to or membership in social movements is one of the privileged avenues for citizen users who are disappointed or angry with their elected officials. The focus groups held during our surveys show that the citizens who became members of a social

movement feel protected: if they have a problem with JW or Eskom (company managing electricity in Soweto) concerning their access to basic services, the social movement can intervene rapidly and resolve the problem whereas the elected official is attacked for his slow reaction. Thus, in the discourse, the speed, effectiveness and ease of resolving conflicts by social movements is contrasted with the lack of receptiveness and transparency on the part of councillors who “do nothing for their voters” (focus group, Dlamini, November 2010). In the face of the councillors’ (and more generally the government’s) denounced failure to act, social movements are a means of effectively responding to day-to-day problems. Moreover, the feelings of being abandoned and disappointment in the face of the ANC national government felt by many citizens has repercussions on local elected officials. Users’ disappointment following unkept promises by the government on access to free services when it took power have not been forgotten by poor citizens.

Under these conditions, the Mazibuko trial looks like a form of radicalization of the social movements which have decided, at one time in their evolution, to use the courts to make themselves heard. This process can be attributed to a lack of competence of local officials to respond to expectations of user-citizens, as Bénit-Gbaffou (2008) stresses: “You have to be radical to be heard!”

Finally, in the context of the OGA project, the lack of confidence in local elected officials may be cause for fear, and the persistent presence of active social movements in Soweto does not make social acceptance of the project easy.

Box 21 *Extract from a memorandum (SECC, APF)*

“The councillors are not delivering a better life for all. They are not listening and acting on the needs of the community. Instead, they are busy making us pay big money so that the capitalists can make a profit. When we complain, they send the police who arrest us when we protest. Today, we say ‘Enough is enough.’ We are sick and tired of mayors and councillors who do not serve the community but serve the capitalists.”

What capacity to relay information?

During our field surveys, we noted a number of approximations in the discourse of elected officials, who poorly master the technical outlines and the overall stakes which the project is supposed to respond to. The councillors who were questioned have a very smooth discourse on the project and trot out notions on climate change or

resource conservation. One also observes an effect of storytelling faithfully illustrated by a “story” showing residents’ lack of responsibility in the face of water conservation: Soweto residents are used to going off to work in the morning and leaving the tap running all day. Thus the OGA project allegedly comes in response to these habits and makes it possible to give them a sense of responsibility, notably through the prepaid meters. These observations are confirmed by recent studies (Smith, J.A., 2010) which show councillors’ lack of capacity on technical subjects, like access to water on the one hand, and the paradoxical feeling of shame (due to a lack of knowledge and competence on certain technical subjects) and honor (as an elected or appointed member) which on the other hand diminishes them in their function as local development agent (Goldin 2010). Because of this, in the context of the OGA project, one can wonder about their capacity to relay quality information or to position themselves as defenders of the project beyond the public meetings organized with the operator. Besides, this very smooth discourse of the interviewed councillors reinforces the idea that the participative engineering developed by the city is more an exercise of conviction of local elected officials than a will to have the latter participate in design of urban services.

To overcome these dysfunctions, the city of Johannesburg contacted the NGO Mvula Trust^[60] to study the possibility of developing the program Raising Citizens’ Voice. Already implemented in four other cities (Cape Town, Durban, Msunduzi and Ekurhuleni), it aims to train citizens and local elected officials in the functioning of water services, to create platforms of exchange and, more generally, to strengthen the trust between service users and local authorities (Smith 2011; Smith, L., 2010). Given the prevailing conditions in Johannesburg, it would seem that the experiment could have been useful. Yet the process was ultimately unsuccessful. Should this be seen as a will to maintain control over local politics (Bénil-Gbaffou 2008)?

Elected officials sometimes opposed to the OGA project

In spite of local elected officials’ apparent support for the OGA project, a certain number of them were firmly opposed to its resumption, which partly explains the delay compared to the initial schedule. A JW official explains: “I can tell you, there was a point in time when the councillors themselves were standing back and saying, ‘No no no no no! We’re not party of, we can’t be party to something that discriminates against the community that we represent now.’ Then, we had to go back to the basics and explain to them ‘but remember where this discrimination came from,’ etc.” (November 2010)

[60] Interview with L. Smith, July 2009.

Still, the councillors are obliged to support the project to the degree that it was approved by the mayoral committee. A local elected official informs us that a councillor not supporting the project can be excluded from his party. Bénit-Gbaffou (2008) explains that local elected officials have very limited power on the metropolitan council due, on the one hand, to the extreme centralization of decision-making at the level of the mayor and his executive committee, and, on the other hand, to the weak decision-making power of thematic committees (at which this sort of project cannot be discussed). Thus it is easily understood that the consultation work of local elected officials consisted more in an exercise of persuasion of the validity of the OGA project than a veritable forum at which the needs of certain wards or the particular reluctance of certain territories could be discussed and the decisions of the mayor's executive committee could possibly be modified. On this subject, a JW agent confided that the local elected officials "work for the city" and that they really had no choice but to support the project. Despite the rhetoric of participation in the context of the OGA project, or more broadly at city level (Bénit-Gbaffou, 2008), there is no real delegation of power by the State to lower echelons.

The local elections of May 2011 also explain the resistance of certain councillors. The OGA project, eminently political, sometimes appears as an obstacle to the reelection of those in wards where opposition to the project is greatest. This November 2010 declaration by a JW manager well illustrates this risk: *"Local elections are planned for next year. That's a very sensitive subject for councillors who must do their utmost to attend to their voters and focus on projects which are important to them, like water. If councillors don't do what the voters want, they won't vote for them. Elections put pressure on councillors; the communities don't want to be betrayed."*

In spite of this approaching deadline, the resumption of the OGA project is in progress in Soweto, meaning that councillors must make an extra communication effort in order to ensure the understanding and acceptance of the project by their voters who are preparing to go to the ballot box.

Little margin of maneuver

In spite of the important role granted to local elected officials in the process, it can be seen that their decision-making power and margin of maneuver are very small. The structure of the politico-administrative system is designed in such way that councillors have little weight in political decisions, notably those affecting basic services, affecting their wards. The interviews carried out with certain councillors show that, while they appear to be at the center of the system, in reality they are merely in charge of

implementing the project as it was defined by the city and validated by the ANC, and have practically no say in how it is designed. One elected official had this comment: “From the council, it means that it’s an agreement, it must be implemented. But of course it’s important to take your communities on board. It’s very important. That’s why we have ward councillors. Their responsibility is to call public meetings to inform the communities about any development or any decision that is taken by the city of Joburg.” (November 2010)

Once the project is validated by the mayoral committee, there is no longer any question of opposing it, so overwhelming is the weight of the party in the decision-making process. Thus there is a great paradox between the central role which is given to them and the little opportunity they have to any impact on the project.

This limited margin of maneuver, observed in the OGA project, is found more generally at the level of the city. Recent studies (Bénil-Gbaffou, 2008) show that the councillors have very limited power on the city council due, as we have just seen, to the concentration of power with the mayor and the mayoral committee. In turn, this concentration of power strengthens the ANC by marginalizing the opposition. This small margin of maneuver and lack of criticism of ANC policies implies that residents cannot count on their representatives to convey their difficulties or their criticism to the committee.

Besides, Mayoral Committee member Christin Walters explains that the councillors, like the people, often have a mistaken view of their role, which consists in communicating the concerns of their citizens in the institutional channels of the metropolitan government apparatus (without being able to provide direct answers). These misunderstandings would also play a role in explaining residents’ recurrent disappointment and disapproval with regards to their local elected officials.

2.3.4. The beginnings of the city’s change in attitude?

More generally, this change in approach shows the beginning of a new orientation for the city and the operator, often considered “arrogant” or “contemptuous” towards claims from the grassroots level, and accused of a lack of transparency in decision-making and in project management. This criticism (conveyed as much by non-institutional actors who were questioned as in the literature) shows that until recently the city was defiant, refusing to communicate about its projects because actors were considered extra-institutional, at best as troublemakers and as brakes on the implementation of a democratic system, at worst as “anti-system” actors or

“revolutionaries” of “the far left” jeopardizing the democratic equilibrium which was already complicated to establish (Zuern, 2006). This lack of consideration no doubt explains the radicalization of certain social movements and the recourse to the law in certain cases related to social rights, like the Mazibuko trial.

City and JW representatives now recognize that this attitude is quite harmful and today the new policy tends towards greater “transparency.” Indeed, while previously the city and JW tended to avoid any information leaks about their activities, out of fear that they could be used against them, this way of functioning seems to be changing and the general will is to communicate better, and this even with the opponents of the recent past. Concretely, this is seen in a policy of openness towards opponents. One of the first steps in the process was to organize a meeting with the SERI (a human rights defense organization; cf. 2.3.2.) and the social movements implicated in the Mazibuko trial (APF and CAWP) in order to discuss the resumption of the project. The assessment of this first step, certainly notable, varies depending on the stakeholders: the non-institutional actors invited to participate complain that the meeting’s format does not allow for an open conversation, whereas the city is very pleased with this advance. A city representative declares: *“I think sometimes as a city we feel that if we give you information, you will use it against us... But I think whatever we’re doing, it’s in line with government policy and legislation so we should be able to follow a transparent process. And that’s what we are trying to do now with the new rollout of the OGA project: we try to show that we are transparent and we are not really scared to engage with any stakeholders and the social rights groups out there. We know that in some ways, they will use the information we gave them against us... but I think for us it’s just to know whatever they use, we can defend it because we have nothing to hide as a municipality. So I think there is a lesson that it is not easy for people to admit it and to engage with especially social rights people but it’s really something we want to push forward to ensure that we are on the same page in terms of that.”* (November 2010).

For a certain number of observers questioned, the city’s will to be open is a result of the trial: it is risking its reputation (as in a certain number of past or ongoing cases), and it is trying to improve both its image and its reputation (even if, internally, city officials can find it hard to accept this change). In the future, it will be necessary to continue studying how this will to change, displayed after the Mazibuko trial, will be implemented by the city and the operator. Will it lead to greater transparency for the city council? Or will it remain only words?

Conclusion

Conclusion

We will conclude this study in two parts. In the first, we will revisit the lessons of this project in terms of building urban services for marginalized populations. In the second, we will attempt to answer the question asked in the introduction, *i.e.* is the recourse to the courts an effective engine of change for social policies in general and on the topic of water in particular?

The construction of urban services

While the city and the operator provided a certain number of answers to the arguments put forth by the plaintiffs in the Mazibuko trial, through the implementation of new technical and social arrangements, it can be seen that the methods of implementing the OGA project have not really changed. In spite of the rhetoric about participation and seeking opinions (among both users and local elected officials), the issue is more to communicate and convince all actors than to seek their opinion. Thus, it appears that the city's "contempt" towards local participation (Bénit-Gbaffou, 2008) has not been changed by this "new" approach to the OGA project. On the contrary, the city, considering that sizeable efforts were made in the social and technical aspects of the project, and with the Supreme Court's favorable decision giving it newfound legitimacy, continues to address questions of local participation just as it did in the first phase of the project.

In this context, it is doubtful that the (re)conquest of a trusting relationship between the urban poor and the city will be achieved through participative engineering developed by the city. Conversely, the new complexity introduced by the gradual emergence of the poor urban user fosters doubt about the validity of the process imagined by the operator to ensure the transformation of basic urban services of water supply; it cannot, in any case, be negotiated only over the long term.

Furthermore, it is possible that the lack of significant change in perception of local participation could endanger the success of the resumption of the OGA project, and this in spite of the efforts of certain city employees to better address questions of poverty.

Finally, the change in attitude begun by the city in the face of its critics (be they from social movements, human rights defense organizations or academic spheres) should prove real and lead to an awareness of the contestation and a second assessment (whether they come from social movements or elsewhere), if the city government wishes to ensure the success of urban projects and allow fairer access to basic services. It would be necessary to accept, listen to and to negotiate with marginalized communities, especially if they are represented by social movements, which are still rarely accounted for in discussions on the transformation of services, or more generally on the development of democracy (Zuern, 2006). Indeed, this process has shown the city government that the modernization of basic services must now allow for a new “constraint”: that of the figure of the poor urban user. He can no longer be evicted but on the contrary must be integrated into the decision-making process on proposed service models.

To conclude this first part, this study reminds us that the principal problem in constructing basic services is above all political (Coing, 2010). As in many contexts in developing countries, the question of access to water for the poor of Soweto leads to inquire what place the poor have in cities (Coing, 2010). A “shared diagnosis” must be found to construct the services of tomorrow.

The courts, effective engines of change in social policies?

In light of the thorough examination of the Mazibuko affair, it seems to us that the militant use of the law can sway the political debate and give power to groups of poor citizens. Indeed, in spite of the applicants’ defeat, the victory of the city and JW in the courts does not mean that militant use of the law had no impact on their approach. On the contrary, it led them to profoundly revise their approach to become pro-poor, at least on paper, and this even if the city’s approach in terms of local participation (which could evolve in reality) could question the effectiveness of proposed technical and social improvements. Thus the legal process obliged agents from the city and JW as well as political deciders to take a critical look at how they “make” the city.

The Mazibuko affaire perfectly illustrates the difficulty in defining what a legal victory is when the law is mobilized for militant ends. This is what Maioni and Manfredi (2006) explain in their study on the role of lawsuits and the use of courts for the development of health policy in Canada: *“In an ideal world, the court victory of a given social*

movement would lead to establishing new rules of law that it desired. In turn these rules would lead to new political measures favorable to the movement; the latter would come out of the adventure strengthened by its success. However, in the real world, the situation is rarely so simple. Sometimes, while the lawsuit does not result in the desired rules of law, the government reacts in the desired way. At other times, on the contrary, the status quo persists, in spite of a court victory. It also happens that a failure in court strengthens a movement by rallying its members around a same cause and that a victory weakens it or stimulates its adversaries. Therefore there are two ways to look at recourse to the courts: either as a “false hope” (Rosenberg, 1991), or as a way of reorienting the political debate and giving power to underprivileged groups (McCann, 1994).”

In this context, the Mazibuko affair is a good example of the small victories that we mentioned in the introduction. Indeed, while they are at first less clear than the brilliant court victories, they can nonetheless have significant effects on policies and show relative effectiveness in enforceability in cases involving water which can, in certain conditions, become an effective political arm for underprivileged groups.

Finally, the Mazibuko affair (like all the other affairs related to social rights referred to in this document) asks the more general question on the role of the courts and more specifically that of the Constitutional Court in social policies. There are numerous controversies on this subject in the South African legal literature, with the more progressive lawyers wanting the Court to take firmer positions, notably on a definition of a minimum social rights content. Yet, in spite of this “soft” position of the Constitutional Court (Robitaille, 2010), the decisions of courts of justice are, sometimes in spite of themselves, powerful agents of change in governmental and municipal policies.

Appendices

Appendix 1. List of people interviewed

Mission 1 (June/July 2009):

- Virginie Dago, Investment Officer (AFD) (23/06/2009)
- Jacky Dugard, researcher, responsible for the Mazibuko affair (CALs) (25/06/2009)
- Kate Tissington, researcher (CALs) (25/06/2009)
- Jean-Pierre Mas, former Director of JOWAM, subsidiary of Suez, from 2001 to 2006 (26/06/2009)
- Dale McKinley, activist, cofounder and leader of the APF, (29/06/2009)
- Barbara Schreiner, former representative of the DWAF, author of first DWAF affidavit of the DWAF during the Phiri trial (30/06/2009)
- Mike Muller, Professor at the University of the Witwatersrand and former Director of the DWAF (01/07/2009)
- Alan Mabin, researcher at the University of the Witwatersrand (01/07/2009)
- Godfrey Mingsa, Water Projects Manager (DBSA), (01/07/2009)
- Graeme Gotz (City of Johannesburg) (02/07/2009)
- Enoch Mudau, Senior Manager (Johannesburg Water) (03/07/2009)
- Laila Smith, Head of Policy (Mvula Trust) (03/07/2009)
- Steve Faulkner, International and Equality Officer (SAMWU) (06/07/2009)
- Nonhlanhla Vilakazi, Coordinator (SECC) (07/07/2009)
- Simon Mtembu, Coordinator of the SCR branch in Orlando (08/07/2009)
- Militants of the SCR, SCR Orlando (08/07/2009)
- Virginia Setshedi, founding member of the SECC and the SCR (08/07/2009)
- Jacky Neil, Policy Manager (DWAF) (09/07/2009)
- Wim Trengove, constitutional lawyer in charge of the applicants' defense in the Phiri trial (10/07/2009)
- Observation of a meeting of the Soweto Electricity Crisis Committee (SECC) (14/07/2009)

- Mish Tladi, Coordinator of the CAWP, APF militant, (15/07/2009)
- Yuri Ramkinssoon, Head of environmental questions (South African Human Rights Commission) (15/07/2009)
- Jeff Rudin, Head of research on water questions (SAMWU), (20/07/2009, by telephone)
- Molefe Pilane, (Kanhya College) (20/07/2009)
- Trevor Ngwane, militant, founder of the SECC (21/07/2009)
- Helene Moremong, Head of plea programs (DWAF) (22/07/2009)
- Matabane Tshiamo, Head of governance questions (DWAF) (22/07/2009)
- Kathy Eales, former Programme Manager for Water, Infrastructure Service Department (COJ) (22/07/2009)
- Boitumelo Matlatla, student at the University of the Witwatersrand, wrote her master's memoire under the direction of Claire Bénit-Gbaffou (23/07/2009)
- Gerald Dumas, Director of Johannesburg Water (24/07/2009)
- Observation at SECC branch meeting in Phiri (Soweto) (25/07/2009)
- Mummy Tladi, spokesperson for the APF (27/07/2009)
- Naseema Fakir, Head of water questions (Legal Resources Center) (28/07/2009)
- Zeenat Sujee, Head of assisting applicants in the Phiri trial (Legal Resources Center) (28/07/2009)
- Sphiwe Segodi, activist, coordinator of the FXI, founding member of the Thembelile Crisis Committee (29/07/2009)
- Bricks Makolo, activist, President and founder of the Orange Farm Water Crisis Committee (29/07/2009)
- Karen Brits, Head of litigation unit (COJ) (30/07/2009)
- Jack Koseff, Director, Social Assistance, Department of Community Development (COJ) (30/07/2009)

Mission 2 (March 2010):

- Dale McKinley, founding member (APF) (08/03/2010)
- Bobo, militant (SECC) (09/03/2010)
- Vuzi, militant (SECC) (09/03/2010)

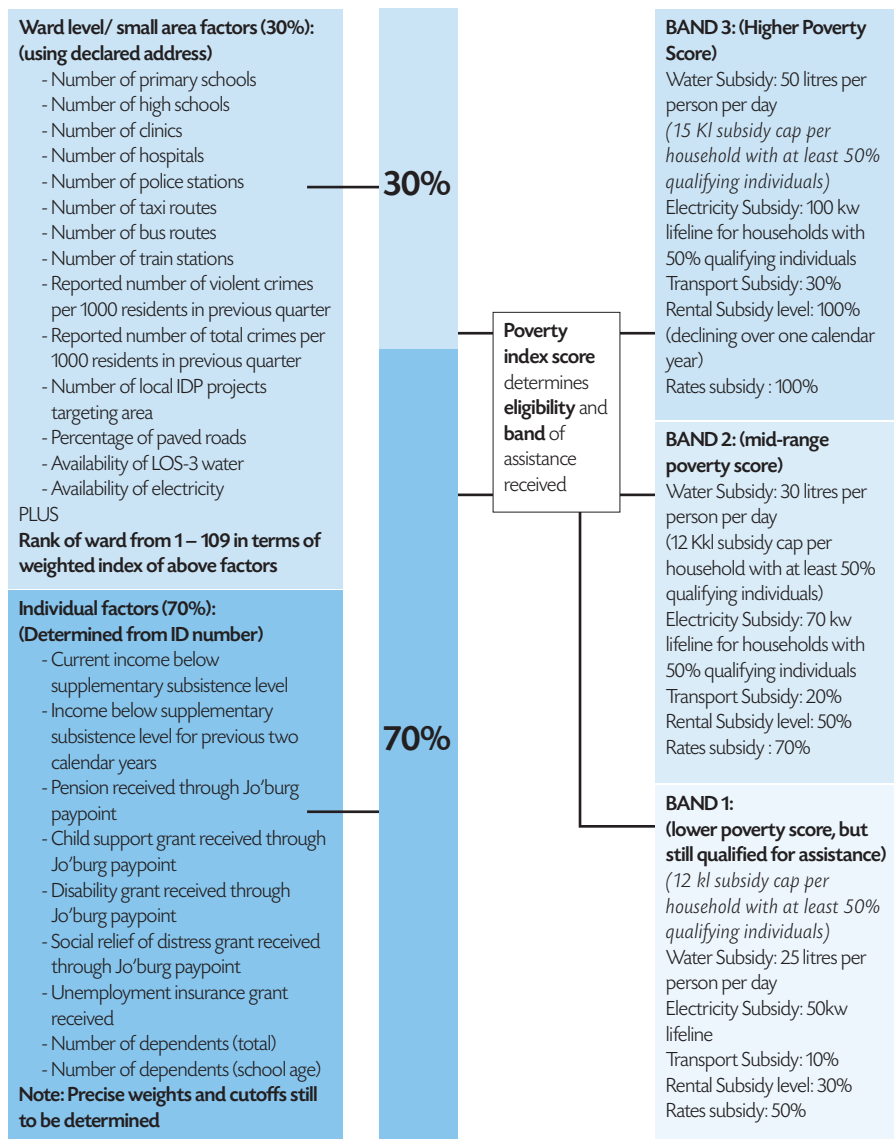
- Mary Meitse, militant (SECC) (09/03/2010)
- Mary Moloko, militant (SECC) (09/03/2010)
- Sam Makgoka, member of the Orange Farm Water Crisis Committee (10/03/2010)
- Bricks Makolo, activist, President and founder of the Orange Farm Water Crisis Committee (10/03/2010)
- Wim Trengove, constitutional lawyer in charge of the applicants' defense in the Phiri trial (12/03/2010)

Mission 3 (November/December 2010):

- Ms Raphephe, head of family, Naledi (10/11/2010)
- Zodwa, militant (APF), Head of the local Phiri branch (10/11/2010)
- Botsang Moletsane, militant (SECC), Moletsane (10/11/2010)
- Charlotte Mahlangu, militant (SECC), Dube (10/11/2010)
- Nqobile Shezi and Mimi Ntshingulani, militants (SECC) (12/11/2010)
- Moshe Masitenyane, new Coordinator of the CAWP (12/11/2010)
- Zodwa Madiba, PR Councillor, Operation Khanyisa Movement – OKM (12/11/2010)
- Observation of an SECC meeting in Moletsane (16/11/2010)
- Sipho Kubeka, resident of Doornkop, Soweto (22/11/2010)
- Observation of a protest march organized by SECC, SCR, APF in Soweto (17/11/2010)
- Walter, militant (SECC) (18/11/2010)
- Mandela Tshabalala, resident of Senoane, Soweto (18/11/2010)
- Observation of a public meeting, ward 45 (21/11/2010)
- Edwin Sibya, Director of Lesira Teq (11/11/2010)
- Enoch Mudau, Senior Manager (JW) (15/11/2010)
- Mish Tladi, former Coordinator of the CAWP (15/11/2010)
- Bonginkosi Xaba, Manager, Stakeholder Relations, JW (16/11/2010)
- Attendance of the lecture 'Decade of Dissent', University of Johannesburg (14/11/2010)

- Neil McLeod, Manager of Durban Water, member of the JW board (17/11/2010)
- Lusinda Jiya, Communication Manager (JW) (16/11/2010)
- Antonino Manus, Director, Water and Sanitation, Infrastructures and Service Department (COJ) (23/11/2010)
- Field visit with the company Nyoni Projects, Naledi, Soweto (24/11/2010)
- Field visit with the company Lesira Teq, Soweto (25/11/2010)
- Claire Bénit-Gbaffou, Geographer, Lecturer, School of Architecture and Planning, University of the Witwatersand (24/11/2010)
- B.D. Zondi, Councillor, ward 35, (26/11/2010)
- P. Magubane, Councillor, ward 45 (26/11/2010)
- V. Mchunu, Councillor, ward 15, Phiri (03/12/2010)
- Christine Walters, Mayoral Committee member (COJ) (29/11/2010)
- David Bilchitz, Associate Professor of Law at UJ and Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) (29/11/2010)
- Mary-Anne Munyambate, Head of Litigation, CALS (29/11/2010)
- Laila Smith, former Head of Mvula Trust NGO (30/11/2010)
- Virginia Setshedi, founding member of the SECC and of the SCR (24/11/2010)
- Jacky Dugard, Executive Director (SERI) (by email)
- Kate Tissington, Research and Advocacy Officer (SERI) (by email)
- M. Makhubo, Councillor, ward 21, Tladi, Moletsane (03/12/2010)
- Eunice Zutin, Thandi Sangweni, militants (SCR), Orlando East (01/12/2010)
- Jack Koseff, Director, Social Assistance, Department of Community Development (02/12/2010)
- Karen Brits (26/11/2010), Head of Litigation Unit (COJ)

Appendix 2. Calculation system for users' water subsidy



Source : City of Johannesburg (2008).

Acronyms

List of Acronyms

ACF	Action contre la faim
AFD	Agence Française de Développement
ANC	African National Congress
APF	Anti Privatisation Forum
BEE	Black Economic Empowerment
BLA	Black Local Authorities
CALS	Center for Applied and Legal Studies
CAWP	Coalition Against Water Privatisation
CDESC	Comité des droits économiques, sociaux et culturels des Nations unies
COHRE	Center on Housing Rights and Evictions
COJ	City of Johannesburg
COSATU	Congress of South African Trade Unions
DWAF	Department of Water Affairs and Forestry
ESP	Expanded Social Package
FBW	Free Basic Water Policy
GEAR	Growth Employment and Redistribution Plan
JOWAM	Johannesburg Water Management
JW	Johannesburg Water
NAACP	National Association for Advancement of Colored People
OGA	Opération Gcin'Amanzi
OKM	Operation Khanysa Movement

OMS	Organisation mondiale de la santé
PCRF	Phiri Concerned Residents Forum
PIDESC	Pacte international des droits économiques, sociaux et culturels
PPP	Public-Private Partnership
RDP	Reconstruction and Development Programme
SAMWU	South Africa Municipal Workers Unions
SB	Superblocks
SECC	Soweto Electricity Crisis Committee
SCR	Soweto Concerned Residents
SERI	Socio-Economic Rights of South Africa
TAC	Treatment Action Campaign
UAC	Utilities, Agencies and Corporatized Enterprises
WSA	Water Services Authorities
WSP	Water Services Providers
ZAR	Zuid-Afrikaanse Rand (official currency of South Africa)

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Access to Water and Militant Uses of the Law

At the end of apartheid, in 1994, hopes for political, economic and social renewal are emerging in South Africa. Among the preoccupations of the new ANC government: wipe out inequalities and generalize access to basic services. Realizing the right to water, as it is recognized in the new Constitution, becomes a priority. The city of Johannesburg, committed at the end of the 1990s to a process of renewing its water policy, in 1993 launches its Gcin'Amanzi project in its largest township: Soweto. From the outset, it is the object of numerous controversies and in 2006 leads to a trial: "the Mazibuko affair." Under the impetus of militant organizations and with the support of a human rights organization and a renowned constitutional lawyer, five Soweto residents contest two aspects of the project: the installation of prepaid water meters and the policy of free water, whose quantity is judged insufficient.

This study intends to retrace the history of this "affair" and to study the repercussions of militant use of the law, by a group of underprivileged citizens, on city water policy. Researchers interested by issues concerning militant use of the law and actors in the water sector, notably those working in South countries, will find a useful illustration to anticipate the potential effects of the right to water, and to judge the effectiveness of the justiciability of the right to water, like social rights in general.

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