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## River Rights and the Rights of Rivers: The Case of Acheloos

The notion that nature possesses rights is a welcome addition to our attempts to understand life in the Anthropocene, especially since it provides an intelligible—albeit controversial—alternative analytical framework for states and governments that hitherto have embraced strictly utilitarian views of nature. For Europe, a Rights of Nature discourse has begun to enter the political realm, with some parties even adopting it as part of their platform. In this paper, I examine a specific legal dispute over the proposed diversion of Greece's second largest river, the Acheloos. This case offers a particularly egregious example of the failure of existing laws and policies to provide sufficient protection to a natural entity, even though European environmental laws have become among the most stringent in the world.

The flawed outcome of this case—in which the environment was subjected to destructive activities despite protective environmental laws—has been ascribed to such technical problems as: execution, lack of follow-up, a backlog in court cases, or, more importantly, the power of special interests and government entities to push forward developmental and economic agendas, undermining the implementation of protections.[1] For those questioning the usefulness of a Rights of Nature discourse, I will dispute such a view and discuss how Rights of Nature arguments might have informed policy choices themselves and, as a consequence, moved them in a better direction. Underlying these "technical" policy problems were, I suggest, a series of utilitarian judicial attitudes that manifestly allowed and perhaps even facilitated gaps in legal protections, despite the letter of the law. Accordingly, a Rights of Nature perspective might not only have impeded such an outcome; it might have prevented from the outset such technical problems from arising and from undermining the very protections the laws were meant to uphold.

It might be helpful, however, to begin by outlining the facts of the case. The Acheloos River is the second largest river in Greece, flowing 220 kilometers westward to the Ionian Sea from the Pindos Mountains. It constitutes an important ecosystem, a cultural

1 For a general statement on this kind of argument see: Elder, P. S. "Legal Rights for Nature: The Wrong Answer to the Right(s) Question." *Osgoode Hall Law Journal*, 1984, 285. Pages 281–348 stem from a symposium on Rights of Nature.

treasure, but also a valuable source of water for the irrigation of the valley of Thessaly. Already in the 1920s, a plan was being formed to divert water to irrigate over 300,000 hectares of Thessaly's cotton crops, to build dams, and to provide additional drinking water. It was believed that the water of the ancient river-god, Acheloos, could awaken the "sleeping giant" of Thessaly's plains, which was seen as still carrying unexploited agricultural potential. A plan for this diversion was submitted to DEH, the Public Power Corporation, in 1958.[2]

In 1964, Prime Minister George Papandreou was the first politician to announce the plan to divert the river in the name of economic prosperity. The full scheme called for the construction of a major diversion channel, two tunnels, a water intake system, sluice gates, and surge shafts. Moreover, the project would also incorporate a hydroelectric project, with a series of large dams to be built by DEH. In addition to the main infrastructure, service tunnels and access roads were also considered necessary, significantly impacting the pristine forest ecosystems of the area. Over the years, and certainly by the end of the twentieth century, the political desire to divert the river continued unabated. More than a decade ago, constructions costs were already estimated at €720 million, with a total expenditure of between €3 billion and €4.5 billion. Environmental groups, however, succeeded in tying up the project in a series of court cases between 1991 and 2014, when the already fully fledged diversion scheme was finally defeated.

It was in 1992 that the case began in earnest. The first major building interventions—the construction of an 18-kilometer-long tunnel to direct water toward Thessaly, with a series of dams and water reservoirs along the way—were approved by the Ministers of Economy, Agriculture, Environment, Urban Planning, Public Works and Industry, and Energy and Technology. These decisions were reversed in 1994 by the Council of State Court after the filing of objections by the Hellenic Ornithological Society, WWF Greece, and the Greek Society for Environment and Cultural Heritage, claiming that the decision was not based on a thorough study of the environmental repercussions of the proposed project.

The project was subsequently resurrected by the same ministries in 1995 and, again, the same plaintiffs appealed to the court. This led to the decision by the court plenary (in

2 Papagiannakis, Spyridon. "Kritikí Axiológi tou shedíou tis ektropís tou potamoú Achelóou sti Thessalikí Pediáda," (Critical consideration of the Acheloos River diversion project in the Thessaly Plain). *Ethniko Metsovio Politehnio* (2010).

2000) that although the study of the environmental impacts of the project was adequate, the project had not examined alternative scenarios for the construction, magnitude, and composition of the project. Such alternative plans could prevent the destruction of cultural monuments in the region, such as churches, old stone bridges, and the Monastery of Saint George Mirofilou. The Court, therefore, ruled against the undertaking on the grounds that it violated international legislation on the preservation of cultural heritage. It also found that the project violated Greek and EU legislation on water management. The Court concluded that the environmental impact assessment did not sufficiently examine the planning for the location of the construction of the dams, etc. Following this court decision, ΥΠΕΧΩΔΕ (Ministry of Environment and Public Works) decided to order a supplementary study in 2002 in order to facilitate the preservation of the aforementioned monastery. In addition, the ministry called for an updated general overview of the project with the continued aim of diverting 600 million cubic meters of water to ensure that the project itself was economically sustainable. These supplementary studies did not dissuade the court from again ruling against the ministerial decisions; this time in 2005 on the grounds of national law 1739/1987 for the "Management of Water Resources" and EU Water Framework Directive 2000/60/EC, because the project opposed EU policies on water management. Meanwhile, during this same period of review and resubmission of the plans, EU laws had also become stricter and were brought to bear on each new outcome.

These continued negative rulings did not, however, deter the government from trying to relaunch the plan yet again in 2006 as "a project of 'national interest,'" thus attempting to sidestep the prior ruling. In October 2009, the Supreme Administrative Court of Greece sent a request to the Court of Justice of the European Union (ECJ) in Luxembourg concerning the project's legality. Discussions of the case in the ECJ, involving 14 questions, began in May 2011. The ruling in 2012 found that while the project did not violate European laws in principle, it raised concerns about the potential environmental impact of the use of the water for irrigation, and stated that authorities should prohibit any "interventions" that could harm the environment, particularly in areas included within the Natura 2000 European protected-zone network. In 2006, the court had also already decided that the bid won by the Mihaniki construction company to complete the contested Sykia dam was null and void.

After the ECJ's 2012 decision, the Greek court ruled that the diversion project would greatly affect the protected areas and would require further impact studies. However,

these measures would still not be sufficient to validate the project because there was very little research and updated data on the ecosystems of the region, which left the court in reasonable doubt about the adverse impacts on the protected areas. In addition, there was insufficient evidence that the project—which was viewed as damaging—constituted the only alternative available. Its being vital to securing an uninterrupted water supply was not deemed an adequate reason to counterbalance the overall negative impacts because, in fact, the water supply was a secondary priority for the entire scheme. The primary objectives were the production of hydroelectricity and the irrigation of farmland. This put the project in clear violation of articles from Directive 92/43/EC of the 2012 European Court decision.

In 2014, the Supreme Court Council of State, consisting of 27 judges, issued a final non-appealable court decision against the proposed project, arguing that it violated sustainability principles and adversely impacted the environment. The Court maintained that the project violated: (a) the Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), because it would destroy important cultural artifacts; (b) the Greek Constitution (Article 24, paragraph 1) stating that "[t]he protection of the natural and cultural environment constitutes a duty of the State"; (c) the European Environmental Impact Assessment Directive 85/337/EEC, mandating a Europe-wide procedure ensuring that environmental consequences of projects are identified and assessed before authorization is given; (d) Directive 92/43/EC for ecosystems and animal and plant species.[3]

This decision was in accord with common European judicial attitudes aiming to protect the environment by using economic arguments to "justify" conservation. This reflects how environmental protection was first brought into European law through the back door of economic cooperation between member states. It should be noted that the European Union has been overhauling its environmental laws, yet they do not provide, I believe, a robust enough paradigm shift. This particular decision offers a case in point. The project had undergone transformations in response to previous court verdicts. Originally presented as an irrigation project, it was rejected and then resubmitted as an energy and irrigation project and only secondarily as a water supply project. The initial plan called for a diversion scheme that would provide 1.1 million cubic meters of water,

3 The Habitats Directive ensures the conservation of a wide range of rare, threatened, or endemic animal and plant species. Some two hundred rare and characteristic habitat types are also targeted for conservation in their own right. The Council Directive 92/43/EEC was adopted in 1992 and forms the cornerstone of Europe's nature conservation policy.

then 600 million cubic meters and, by the end, was considering 250 million cubic meters per annum. Since the 2000 verdict, which had shown that the project was not in direct violation of sustainability practices, the directive for Natura 2000 had come into effect as well as the new Common Agricultural Policy. These rulings did not exist at the time of the 2000 verdict and subsequently needed to be considered. Because of this and other reasons I described earlier, the court rendered a decision that meant the cancellation of the project in its entirety because now, first and foremost, it went against principles of sustainability.

Unfortunately, this apparent legal victory and triumph for wider EU policies has been somewhat pyrrhic because the government was given time to continue building while the court reviewed the case. Indeed, a majority of the works—whether completed or semi-completed—now remain abandoned. Moreover, the government demonstratively continues to seek new ways of restating its claims under new guises in order to recoup some of the costs incurred—which have been reported to be close to €600 million. Unfortunately, this infrastructure has already damaged the ecosystem significantly; if the courts had succeeded in throwing out the case in 2000, much of the construction could have been prevented in the interim. Lurking behind the many faces of this dispute has been the mantra of growth and the suspicion that if nature per se is granted legal rights it would mean the adoption of extreme, or "deep," ecological positions that reject development *simpliciter*. Moreover, it is argued that there is no need for a Rights of Nature perspective in Europe, given its conscious choice to transition to a low carbon economy and to decouple growth from resource use in order to ensure a sustainable global society.

However, the Acheloos case, I think, offers some possible hints about why the present legal status quo is insufficient. Given that the current legal system regulates human behavior predominantly through the distinction of "rights" holders—broadly recognizing these as human beings and entities created by human beings (corporations and countries)—nature is viewed as being in the category of "property," and as a consequence, environmental issues are treated in administrative courts primarily as issues of planning. As the case of the Acheloos diversion scheme shows, often the best that can be achieved when facing decisions about property and its development is the reversal of a planning decision—only to then face a stream of newly revised applications. The result is that projects often go ahead under a different rubric or are

left abandoned, ultimately with damaging consequences. A general lassitude often informs policy administration and implementation because the objects of policy decisions are not viewed as having any value beyond the purely instrumental. I do not want to enter here into the entrenched battle lines that have been drawn between Kantians and deep ecologists about the coherence of conceptions of the nature of rights and the moral requirements for ascriptions of rights, etc. Yet, as perceptions of value change and sometimes enlarge, as in the cases where other so-called categories of "property" were seen to be morally problematic, it is clear that the effectiveness, precision, and care of policy implementation follows suit. Similarly, the inadequacy of current laws to account for and sufficiently face a wider range of long-term issues resulting from interference with ecosystems in an interconnected world, suggest the examination and adoption of new legal paradigms.

In the past, rights discourses have underscored legal inadequacies not only in the laws but also in the implementation of policies regarding slaves, women, children, and animals. The latter, for instance, in some countries today and certainly through Article 13 of the Treaty of the European Union, are recognized as sentient beings that have claims to being treated in ways beyond that of being mere property. But there has also been a sea change in the quality of the implementation of more fine-grained policies affecting animals, precisely because of changing views about their worth and our moral obligations towards them. By the same token, conceptions of Rights of Nature encourage the recognition of the value of ecosystems that need protection beyond and above state and private property interests. The debates about if and how such value can be grounded in conceptions of rights, and how such rights are to be weighed in comparison with other rights, etc., are likely to remain gridlocked at the level of abstract argument. My point, however, is that policy implementation is linked with the recognition of value, and as long as ecosystems are viewed, in general, as purely planning and development opportunities, the kinds of problems that afflicted the Acheloos case will continue, however stringent the legal basis for protecting them *qua* property.

How would the Acheloos case have gone had a recognition of the river's value and its rights been part of the legal framework? The court, I believe, would have more quickly and more effectively stopped the push for a project of such pharaonic dimensions. In the end, the ever-shifting development arguments used by the state resulted in continued abuses, inefficiencies, and the wasting of water resources already available

in other parts of the country. Nor would it have been possible for the government to exploit the delays and court backlogs to continue building and developing "property" under the pretext that such changes could be altered or rectified in the future.

Ultimately, of course, the court has to make decisions about the relative strengths of conflicting claims based on the interests and duties of different rights holders. But, the kind of after-the-fact, bittersweet pyrrhic victory that resulted in this case might have been avoided had there been at least some recognition from the outset of the intrinsic value of this ecosystem. So too, such recognition might have forestalled the kinds of legal and governmental abuses and manipulation of policies and their implementation that have left the Acheloos unnecessarily damaged, with no plan in evidence to ever make things right.