Christopher Stone's Influence on European Legal Scholars

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The contribution discusses Christopher D. Stone's seminal paper Should Trees Have Standing's influence on literature, both in legal studies and philosophy, in the US and abroad, including Europe. It describes the three fundamentals issues raised by Stone (on law, on morals, on the evolution of social consciousness - Stone submitted that a society which spoke, however vaguely at first, of the rights of nature would evolve along different and better lines than a society that did not do so),explains their modernity and discusses their relevance. The contribution also observes how ideas circulate across the world (rights of nature are back) and how they can complement each other.

Ladies and gentleman,
Dear colleagues,

I was asked to say a word about Christopher Stone's influence on European legal scholars.

I am sure you meant Christopher D. Stone, who was Professor of Law at the University of Southern California in the seventies, at the time he wrote a paper on Rivers and Trees, and not Christopher Stone, who acted at the same moment in a Hollywood film called the Grasshopper. I don't know if they ever met and discuss about nature but, anyway, I propose this morning to focus of the writings of Christopher D. Stone indeed.

Christopher D. Stone wrote a seminal paper, *Should Trees have standing*, in 1972[1].

His paper raised three distinct issues, as Stone explained later on[2]:

One regarded the law;
another, morals;
the third, the evolution of social consciousness.

- The question of law was whether the legal system could be so arranged as to provide 'natural objects', such as lakes and forests, the status of legal persons, which could get rights.
  His answer was yes, definitely positive. It is technically possible.

- The moral question was whether we ought to do so.
  He answered that in certain situations, yes.

  Finally, Stone submitted that discourse matters. "Until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of us".

[1] C. Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450.
[2] C. Stone, 'Response to Commentators' (2012) 3 *J Hum Rts & Env't* 100

> A society which speaks, however vaguely at first, of the rights of nature would evolve along different and better lines than a society that does not do so.
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> Introducing the notion of something having a right – speaking that way – not only transforms law but also transforms society[3].
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> Stone invited to move boundaries, to bring the environment into society as a rightholder[4].

When Stone started writing that paper, a case was pending appeal to the United States Supreme Court (*Sierra Club v. Morton*)[5].

The lawsuit concerned the protection of a valley, the Mineral King Valley, against the construction of a huge resort by Walt Disney Enterprises.

A nature conservation organization, Sierra Club, lost the case for a problem of standing, access to justice. The Court decided that because the organization was not adversely affected, it did not have the right to sue.

It occurred to Stone that there was a gap in the legal system.

Something was going to be injured and no one could protect it[6]. Who could speak and defend the valley for its own sake? Nobody.

There could be a simple solution. An idea that occurred to him while teaching a class on Property Law.

He was explaining to its students how societies, like human beings, progress through different stages of growth and sensitivities[7].

Law, in its way, like art and literature,
participates to such evolution.

Changes in law actually drive changes in consciousness and vice-versa.

But the students were not listening and he had to lasso them back[8]. So, he said, what would a radically different law-driven consciousness look like?

Take one in which nature had rights. How would such a posture in law affect a community's view of itself?

The case of the valley happened to be an excellent opportunity to test its idea.

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[3] Christopher D Stone, 'Should Trees Have Standing Revisited: How Far Will Law and Morals Reach--A Pluralist Perspective' (1985) 59 *S Cal L Rev* 1, p.105.
[4] Robert Nash, *The Rights of Nature: A History of Environmental Ethics*, Wisconsin, University of Wisconsin Press, 1989, p.130.
[5] 405 U.S. 727 (USSC 1972). See Christopher D Stone, 'Should Trees Have Standing Revisited: How Far Will Law and Morals Reach--A Pluralist Perspective' (1985) 59 S Cal L Rev 1.
[6] R. Nash, op. cit., p.128.
[7] C. Stone, *Should Trees have Standing? And Other Essays on Law, Morals and the Environment*, Oceana Publications, 1996, Introduction. The roots of Trees.
[8] Id., p.viii.

If the tricky point was standing – access to justice, instead of Sierra Club being the plaintiff, why not imagine the valley itself being the plaintiff?

Would it be more unthinkable than other legal developments, which are now obvious but which were all unthinkable at the time, such as giving rights to companies, slaves, women? Would it be so at odds with the way the legal systems are being built and evolve?

Stone observed that, technically speaking, extending rights to rivers and trees would not be inconsistent with accepted standards. It was not fatal to the proposal that valleys could not speak. Lawyers speak for them. The Law can arrange the designation of a guardian to represent rivers and trees. An administration. An authority. An association.

But why would the law do so?

There were three main advantages to the proposal and this is, I think, the most important part of the paper:

- The first one concerned standing and the procedural dimension. Access to Court. Like in the case of the valley, there were too many situations where nature had actually no voice to oppose a development or destruction project and no possibility to be represented in Court. Giving personhood and a few associated rights to nature would ease access to courts. The impact taken into consideration for granting locus standi would be the impact on nature itself;

- Second, on the substance, damages to the river or trees, independent of damages to natural persons, would have to be a factor in establishing liability or relief. What made Stone's proposal remarkable is that it defined injury "not merely in human terms" but with regard to nature.[9]
  We need here to see how modern and lucid the proposal was. What was discussed here was the need to create a place in law for the damage to nature for its own sake, the ecological damage. Stone explains that so long it has no rights, the stream of a river shall always be forgotten in quantitative compromises between two conflicting interests, as they were solved at the time.

- Third, where relief was ordered, whether in the form of damages or an injunction, the thing itself would have to be the beneficiary. This leads to developments on the necessity to create appropriate funds.

Stone's writing is very enjoyable and sometimes even gently funny. I am convinced this contributed to the success of the paper[10]. Altogether, the demonstration is clinical, solid, logical, squared.

Remember, its first thoughts were not about the environment but about how changes in law reflects or influence changes in society. The exercise was intellectual. There was a point to make.

He actually rushed through days and nights[11], with the help of the editor of the Southern California Law review, to produce a draft that could timely be placed on one of the Supreme Court Judge's desk,

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[9] Nash, op.cit., p. 129.

[10] Ph. Sands, 'On Being 40: A Celebration of Should Trees Have Standing' (2012) 3 J Hum Rts & Env't 2: "It must be said that 'Should Trees Have Standing?' is a pleasure to read. In this way it is a singular creature: an original law review article that is beautifully written and accessible in its ability to generate reactions »

[11] As explained later on, in a paper written in 1985: Christopher D Stone, 'Should Trees Have Standing Revisited: How Far Will Law and Morals Reach--A Pluralist Perspective' (1985) 59 S Cal L Rev 1.

Justice Douglas, quite known for its interest in wilderness and human rights, who indeed read it and approved. Sierra Club lost the case but Stone got its name on the first page of a dissenting opinion[12].

Later on, many scholars will associate Stone with deep ecology or with radical environmentalism.

I observe that this is a mistake and wonder sometimes if they read the seminal paper. There is not a single author of the Deep ecology movement that is being quoted in there, and no direct discussion of their theses.

As Stone wrote, "the movement in which Trees played a part rolled on afterwards without him".[13]

His writings seduced and inspired environmental movements and other scholars. Nash wrote that "where Stone and Douglas located the conceptual door to the rights of nature in 1972, philosophers and legal theorists were quick to push it open"[14] or at least to discuss it.[15]

2. The influence

The proposal had a large impact. It raised the interest of media in environmental ethics[16]. Stone was invited on TV.

Let not forget the context. As Philippe Sands recalls: "*Let us not forget that in the world of 1972, not a single textbook on public international law had a chapter on the environment. The only country to have an Environmental Protection Agency (or its equivalent) was the United States. But the courts were usually not the kinds of places in which decent professionals would always feel comfortable raising full-scale environmental claims*"[17].

The dissenting opinion and its references provoked a sort of creative wave, in support or against it. If the proposal was a sort of poetry, with a professor speaking for trees, poetry seemed to be the answer, in quite a cynical and naughty way. Rhymes were being written by attorneys and other lawyers to express their doubts[18].

Scholars, especially philosophers, engaged in intellectual battles. Defending nature for its own sake was for many an oddity.

Environmental policy was supposed to be about satisfying human wants[19]. There was to be a rupture between human and nature, between culture and nature, as proposed by the Ancient Greeks. Utilitarianism was mainstream.

The political tone of the paper provoked a push-back from both rationalists and conservative Christians, which joined forces, each for their own reasons, "*to resist attacks on human*

[12] The valley was not lost, actually. If lost in law, the case won in practice. Walt Disney got discouraged and in 1978 Congress added the valley to Sequoia National Park As explained by Nash, 131.
[13] Stone, Trees revisited, op. cit.
[14] R. Nash, op. cit., p. 131.
[15] Idem.
[16] Idem.
[17] Ph. Sands, op.cit.
[18] R. Nash, again, p.133.
[19] M. Sagoff, On Preserving the Natural Environment, The Yale Law Journal, Vol. 84, No. 2 (Dec., 1974), pp. 205-267, p.213.

exceptionalism"[20]. The author had prepared to be considered as a " *born again Pantheist*" . He was surprised to hear that his writings made of him a communist.

In a time where there were no computers nor social media, the paper took some years to cross the Atlantic and more years to reach French-speaking scholars, in the early eighties.

As explained by M.A. Hermitte[21], one of the first discussions in law was proposed by Caballero in its Phd in 1981, who noted that the proposals enshrined in law at the time were necessarily disappointing, due to its indifference to the notion of ecological prejudice[22]: "*seule la reconnaissance de la capacité à agir en justice reconnue aux éléments de la nature pourrait un jour émouvoir le juge* »[23].The proposal was certainly known by Martine Remond-Gouilloud in 1985[24], who evoked ancient mythology and boudhism where nature was personified. Giving standing to Trees, "like being discussed in America", was necessarily an evocation of ancient times. If such attempt could seduce a philosopher, said the author, in no way it could convince a lawyer. The lawyer is educated as an anthropocentrist. Its measure of everything is the relation to humans.

The theory is not discussed into the details but fits with a shared concern of many authors, like Marie-Angèle Hermitte, to give nature a proper legal status. Other than being a resource. Hermitte is convinced that ecosystems should get legal personhood, in order to defend their own patrimonium, their heritage. Only rights can be opposed to concurring rights, according to Hermitte, who discusses the need to attribute rights to ecosystems.[25]

Or is it Michel Serres' s *contrat naturel* in 1990[26] that the idea entered into public discourse in French-speaking circles? Michel Serres did teach in the US in the early eithties. No wonder he got acquainted with and discussed such ideas. Like in the US, philosophers in France were more interested in the idea than lawyers.

This *contrat naturel* opened on passionate discussions in the field of theory of law, with authors like Gutwirth and Ost in Belgium in the early nineties[27], all interested but actually not really seduced by the proposal, the operationalization of which was difficult[28].

Like when it was published by Stone, the idea to get away from the sacred divide between nature and man lead to opposition. Some, like L. Ferry[29], saw the arrival of a green totalitarism. Others feared this would weaken human rights.

Stone, remember, never proposed to get rid of human rights, only to also add nature's rights. Like you have rights allocated both to men and companies.

3. No need

As the discussion went on, the need of what Stone himself call such "strategy" became less acute.

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[20] Stone, response 2012, Naffine, p.113.
[21] M. Hermitte, La nature, sujet de droit ? Annales, Histoire, Sciences Sociales, 2011, 66, 173-212
[22] M.A. Hermitte, « La nature, sujet de droit ? », Annales. Histoire, Sciences Sociales, vol. 66, no. 1, 2011, pp. 173-212.
[23] F. Caballero, Essai sur la notion juridique de nuisance, Thèse, LGDJ, 1981.
[24] M. Rémond-Gouilloud, Ressources naturelles et choses sans maître, recueil Dalloz, 1985, repris dans L'homme, la nature et le droit, 1988.
[25] M.A. Hermitte, « Pour un statut juridique de la diversité biologique », RFAP, 1990, n° 53.
[26] M. Serres, Le contrat naturel,
[27] In Images et usages de la nature en droit, Ph. Gérard, F. Ost & M. van de Kerchove (ed), Publications des FUSL, 1993.
[28] See also F. Ost, La nature hors la loi, L'écologie à l'épreuve du droit, ed. O.Jacobs, 1995 ; S. GUTWIRTH, « Trente ans de théorie du droit de l'environnement : concepts et opinions », Environnement et société, 2001, n°26.
[29] L. Ferry, Le nouvel ordre écologique, Grasset, 1992.

There were other possibilities, less fishy[30] as he said himself, to provide answers to its main questions.

The most important part of Stone's writing is for me not so much about whether Trees should have standing but about how immature the law was in its relation to nature and which were the large gaps to be filled.

Those questions helped to advance the law:

- Access to justice for NGOs and the representation of nature in court became one of the main issue in environmental law in the following decades, culminating with the adoption of the Aarhus Convention in 1998[31]. The message had got though: nature had no voice and no defender. This needed to be solved;

Or still highlight the persisting gaps

- On the need to care for the damage to the environment for its own sake. Here, the evolution was more difficult, slow, chaotic. The relation to nature evolve very strangely, under the impulse of economic doctrines which seem driven by a kind of revisited utilitarianism. Nature is interesting not for its own sake but because it provides services, both to men and to itself.

- On compensating nature. Also a strange move here. Rather a displacement of the possibility of restoration. Very much at odds with the power of a right holder. Here evolution in an opposite direction. Nature no more than a resource, a fungible asset.

4. Revival or new

In Britain, the reception by lawyers seem to have been more enthusiast than in France. Stone's original paper is described by authors in Britain like Anna Grear as "*the most refreshing re-imagination of possible worlds other to have emerged from legal scholarship in the past 40 years"*[32].

Philippe Sands note that *Should Trees have standing* dealt with an issue of even greater importance today than when it was written[33].

Rights of nature are today very fashionable and topical – a bit like climate litigation or the return of the commons[34].

Like in the seventies, they get a lot of media attention.

They are now recognized, in law, in Latin America, New-Zealand, India. Rights of nature are making bestsellers in France, like the writings of Valerie Cabanes[35].

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[30] Commenting Warnock.

[31] UNECE Convention, 1998 on on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

[32] A. Grear, 'Should Trees Have Standing: 40 Years on' (2012) 3 J Hum Rts & Env't 1

[33] Ph. Sands, op.cit.

[34] D. Misonne, « Une nature hors du commun « (theater play), in Cartuyvels Yves & al. (ed), Le droit malgré tout, USL-B, 2018, pp 709-733.

[35] V. Cabanes, Un nouveau droit pour la terre, Le seuil, 2016.

Stone does (did) not himself consider that there is a causal chain between what he wrote and what is happening today.

“Ideas flip flap back and fourth”, he said in a recent interview one can watch on YouTube[36]. “But the regain of interest demonstrates that more and more people are interested in environmental protection issues”. And he finds “gratifying” that more people are discussing the topic today.

But there was a link.

Rights of Nature did not settle just per chance in the Ecuadorian Constitution in 2008, the first country in the world to declare in its constitution that nature is a legal person.

The preparatory work was made with the support of the Community Environmental Legal Defense Fund (CEDLF), a fervent admirer of Stone’s proposal[37], a Pennsylvania-based non-governmental organization providing legal assistance to governments and community groups, seeking to “*change the status of ecosystems from being regarded as property under the law to being recognized as rights-bearing entities.*” [38]

There is also another link.

Le monde est-il enfin Stone, asked David in 2012[39] ?

s society ripe enough to admit an evolution that echoes very ancient approaches, even if not at all for the same reasons? Not paganism, not religion, but changing its regard on nature because it matters?

When visiting the Brancusi exhibition at Bozar in Brussels, recently (in 2019), I could not but realize that law, like Art, can be inspired by a return to the primitives. Without this being considered as a way backwards, even I sometimes, again like in Art, these moves forward shall first often be described as ridicule. This might on the contrary be considered as the ultimate modernism.

Conclusions

I want to conclude by sharing thoughts on two aspects:

- The circulation of ideas across the world is something I find fascinating.

The idea of allocating rights to nature was already floating in the air when Stone wrote its paper.

Perhaps did he got the inspiration of its title from an Irish case of 1932 on the validity of a testament to the benefit of a dog, a judge mentioned that life means life of humans being, “not of animals *or trees in California*”[40].

[36] https://www.youtube.com/watch?v=eV9JmQwFXg0
[37] Confirmed by David.
[38] D. Shelton « Nature as a legal person », VertigO - la revue électronique en sciences de l'environnement [En ligne], Hors-série 22 | septembre 2015.
[39] V. David, « La lente consécration de la nature, sujet de droit. Le monde est-il enfin Stone ? », Revue juridique de l’environnement, vol. 37, no. 3, 2012, pp. 469-485.
[40] Kelly v. Dillon, 1932, mentioned by Stone in its 1972 paper, also referring to Murphy, Has nature any right to life? 1971.

Scholars did already discuss nature's rights before[41], in essays which did not attract attention. What made of Stone's work a landmark essay is, to my opinion, its clinical approach to the subject matter, very rational, very logic, very nuanced, while also determined. He also pinpointed the deficits of the law, at the eve of decades to come that will truly fashion modern environmental law.

- The educative role of the law

There is no regret to have I think. The are different ways to reach a goal.

There a different ways to miss a goal.

But Stone is interesting when he tells us that a change in the discourse of law can make all the difference because it could impact consciousness.

What is the lessons of environmental law?

I am afraid it remains fundamentally unclear.

While rights of nature hit a chord.

This is surely the reason why they look and are so attractive today.

[41] Especially in other disciplines, like mentioned by Nash, who quote a Clarence Morris' "nature's legal rights" in 1964. Even before, in France, a paper of 1909 quoted by Descola (Les natures en question) discusses the possibility and need to extend legal personhood to non-humans.