5-2019

From Nuisance to Environmental Protection in Continental Europe

Vanessa Casado-Pérez
Texas A&M University School of Law, vcasado@law.tamu.edu

Carlos Gomez Liguerre
carlos.gomez@upf.edu

FROM NUISANCE TO ENVIRONMENTAL PROTECTION IN CONTINENTAL EUROPE

VANESSA CASADO PEREZ* & CARLOS GOMEZ LIGUERRE†

INTRODUCTION

Neighboring relationships are prone to conflict. The use of an estate has effects on the one next to it. A doctor may be bothered by the noise coming from a confectioner's business.[1] The more heterogeneous the uses of the pieces of property are, the more likely conflicts are to arise. While individuals have always had the capacity to affect the enjoyment of their neighbors, the situations became more complex with the advent of industrialization, which put residential and industrial users in close proximity.

Historically, the law of nuisance has been used to solve these conflicts. Nuisance law combines property and liability rules leading to injunction and damage remedies.[2] Today, regulation has been added to the mix of solutions

*. Associate Professor, Texas A&M School of Law. Research Associate Professor, Texas A&M Department of Agricultural Economics. Affiliated Researcher, The Bill Lane Center for the American West, Stanford University. E-mail: vcasado@law.tamu.edu.

†. Profesor Titular, Universitat Pompeu Fabra Barcelona. Humboldt Research Scholarship for Experienced Researchers – Alexander von Humboldt Stiftung. E-mail: carlos.gomez@upf.edu. The authors want to thank the organizers of and participants in the Convergence and Divergence in Private Law conference held at the New York University School of Law on November 1–3, 2018. The authors thank Joseph Rebagliati and Steffani Fausone for their excellent research assistance.

1. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

2. This mix of remedies makes the analysis of this legal institution complex. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (W. Page Keeton et al. eds., 5th ed. 1984). Professor Henry Smith states that "[i]n light of these conflicting strains of thought about nuisance, the law of nuisance is widely regarded as a 'mess,' a 'wilderness of law,' a 'legal garbage can,' and a 'mystery.'" Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 970 (2004) (citations omitted). However, Professor Smith believes that there it is not so such a mess but a combination of property rights delineating strategies. *Id.*

to neighbors' disputes. In environmental matters—the litmus test for nuisance—the choices are even more varied. As pollution got more egregious, regulation took the center stage. The increase in the number of parties tested the limits of the institution of nuisance. Regulation initially took the form of permits and licenses for the most egregiously polluting industries, often requiring those industries to adopt some precautions and, thus, reducing the potential nuisances. Second, land use planning mitigated the conflict between uses by regulating whether they were allowed to be in close proximity. Third, countries enacted environmental laws because industrialization brought the potential for smoke and particles to travel beyond the land of the immediate neighbor. Furthermore, even ex post liability has taken a regulatory turn with publicly enforced environmental liability schemes.

Nuisance was the first line of defense against pollution, but today it has been mostly superseded by regulatory schemes.[3] This shift left nuisance with a limited role—solving issues between a small number of close by neighbors—in almost every jurisdiction that lacks figures like public nuisance.[4] While it is foreseeable that two parties will negotiate ex ante to achieve a socially desirable outcome—for example, two parties may establish an easement or servitude between neighboring plots of land precluding potential nuisance[5]—the situation in which large amounts of people or their lands are affected requires a different type of response.

Even though its role has been reduced, private law nuisance regulation has not been static. Not only has the regulatory landscape become more complex, but also, as law and economics literature has analyzed, nuisance

3. The literature is rich on the choice between ex ante regulation or ex post liability as substitutes. For an account on this topic, see STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 277–84 (1st ed. 1987).

4. For a definition of public nuisance, see *Nuisance*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/topic/nuisance#ref59803 (last visited May 17, 2019). For an analysis of public nuisance, see generally John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1972).

5. Richard A. Epstein, *The Economic Structure of Roman Property Law, in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 513, 521 (Paul J. du Plessis et al. eds., 2016).

> To prevent undue complication of the title, the general law restricts the scope of servitudes. It is not possible to place a servitude on a servitude, or subject them to time limitations or specific conditions. Similarly, servitudes can only bind adjacent properties, thus reducing the difficulty of detecting who is in breach, and facilitating (by reducing the number of parties) the renegotiation or termination of the servitude. These restrictions on freedom of contract give greater clarity to third persons without imposing serious economic disadvantages on the initial parties or their successors in title. The practices that are barred are ones that generally do not make economic sense. The added clarity to the relationship allows servitudes to hold their value over time.

Id.

provisions have gone beyond the building blocks of property and liability rules, demonstrating the complexity of current regulation in scenarios of conflicting uses of property[6] and acknowledging the interplay with public regulatory standards.

The codification and evolution of nuisance in civil law jurisdictions illustrates perfectly the evolution just described. This Article analyzes the evolution and complexity of the legal responses to neighboring conflicts in European civil law countries. All of the civil codes analyzed (France, Germany, Spain, the Netherlands, and Catalonia) are based on Roman law rules that are not always clear. The fuzziness of those Roman law rules explains, in part, why the civil codes did not respond homogenously to nuisances, despite this common origin. The first Subsection briefly describes the institution of nuisance in Roman law. Then, this Article describes the original codification of nuisance and the changes in the treatment of this institution. After assessing the initial divergence and the trends towards similar rules across jurisdictions, this Article explains the potential forces of convergence at the European level: the Draft Common Frame of Reference, the E.U. Environmental Liability Directive, and the decisions of the European Court of Human Rights.[7]

I. COMPARATIVE ANALYSIS OF NUISANCE PROVISIONS

A. NUISANCE AND ROMAN LAW: A COMMON ORIGIN

Continental civil law jurisdictions' nuisance regulation has a common origin: Roman law. There are few Roman texts dealing with nuisance. It is clear from the Digest of Justinian ("Digest") that there was an action against someone who interferes with another's property with intention to injure (*innuria*).[8] The response to the most common nuisance situation, in which a landowner injures another's piece of land by using his own land in a purportedly legal way without aiming at affecting the enjoyment of his neighbors, did not have a clear footing in Roman law.[9]

---

6. Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2160–66 (1997).

7. It is important to note that this Article focuses only on regulations and remedies related to nontrespassory invasions on real property, not on noninvasive, aesthetic nuisances.

8. DIG. 47.10.44 (Javolenus, From the Posthumous Works of Labeo 9).

9. *See* JAMES GORDLEY & ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW 167–71 (2006); *see also* THOMAS GLYN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 255–56 (1999); David B. Schorr, *Historical Analysis in Environmental Law*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 1001, 1008 (Markus D. Dubber & Christopher Tomlins eds., 2018); Peter G. Stein, *'Equitable' Remedies for the Protection of*

There was a sense that although private property was absolute, there were some inacceptable interferences. Among interferences, smoke was the one that troubled medieval jurists the most when interpreting the Digest. The Digest explained that an owner of a cheese shop emitting smoke cannot interfere with his neighbor's property, but the owner who emits smoke from a hearth can.[10] Bartolus of Saxoferrato, one of the greatest medieval jurists, suggested that what matters is the amount of smoke and the normal or abnormal character of the activity.[11] The lack of consensus among medieval jurists translated into different provisions in different jurisdictions at the time of codification.

B. EVOLUTION: FROM PROPERTY TO TORTS

While there was discussion about the limits of property in Roman law, the civil codes adopted a very broad vision of property as stated in article 544 of the French Civil Code of 1804: "[p]roperty is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes."[12] The same trend can be observed in article 348 of the Spanish Civil Code[13] and in section 903 of the German one.[14] But this trend continues even today; the Catalan Civil Code, the most recent of continental Europe, still captures the same idea.[15]

Even though property was deemed absolute, European civil codes did not absolutely ignore negative externalities caused by a use of a piece of real estate property to neighboring ones. European civil codes regulate the equivalent of the tort of nuisance in two ways: as an action protecting property by injunction and as a tort action for damages.[16]

Property, *in* NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY 185, 194 (Peter Birks ed., 1989).

10. DIG. 8.5.8 (Ulpian, Edict 17).

11. *See* GORDLEY & TAYLOR VON MEHREN, *supra* note 9, at 169–70.

12. THE CODE NAPOLEON; OR, THE FRENCH CIVIL CODE art. 544, at 150 (A Barrister of the Inner Temple trans., 1827) [hereinafter THE NAPOLEONIC CODE OF 1804], http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf (providing a translation of the French Civil Code of 1804).

13. CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 348 (Spain), *translated in* MINISTERIO DE JUSTICIA, SPANISH CIVIL CODE 70 (Da Sofía de Ramón-Laca Clausen trans., 2013).

14. "The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence." BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 903, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3704 (Ger.).

15. "Property acquired legally grants to the owners the right to the full use of the properties that constitute its object and to possess and dispose thereof." CODI CIVIL DE CATALUNYA art. 541-1, *translated in Law 5/2006, of 10 May, on the Fifth Book of the Civil Code of Catalonia, Relating to Real Rights*, PARLAMENT DE CATALUNYA 23, https://www.parlament.cat/web/documentacio/altres-versions/lleis-versions/index.html (last visited May 17, 2019).

16. The structure of these legal claims resembles the order suggested by Smith, *supra* note 2, at

The regulation against nontrespassory invasions is understood primarily as a regulation between neighboring owners, and solutions are sought first in the realm of property. As a result of their common Roman law origins, European civil codes approach property holistically.[17] In this first building block—the property one—nuisance is configured as a sub-type of trespass, with the difference being that intrusion, instead of being physical, is produced by intangible substances.[18] The European civil codes incorporate rules that seek to solve the problem of *immissions* (nontrespassory invasions) ex ante through the constitution of easements, which allow the owner of an estate to carry out annoying activities and force the owner of another estate to put up with them. The easement can be constituted by agreement between the affected parties or by law. The basic ex post remedy against a nuisance is the action of cessation (from the Roman law *actio negatoria),*[19] with which the affected owner can paralyze the activities that are not covered by a servitude, similar to the remedy of injunction. This action is both an action and remedy. The right of damages has, in this first building block, a residual position.

Property rules, however, do not work that well when the owners are no longer contiguous and when the victims of the *immission* are many and cannot be identified ex ante.[20] As a result of the industrialization and the

978–81, according to which the availability of different remedies depends on the level of information shared by the affected parties. The choice between property or liability rules, as the choice between exclusion and governance as strategies to delineate property rights, depends on the cost of information. Accordingly, nuisance has components of both liability and property rules.

17. This holistic approach differs from the more fragmented common law one. Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 7 (2012). According to these authors, the differences are not relevant. The divergence is just explained by a different system of property delineation. *Id.* at 5–6; *see also* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S457 (2002) [hereinafter Smith, *Exclusions Versus Governance*].

18. The difference between trespass and nuisance is far from clear, as it happens in the common law. "The distinction between liability in trespass to land, nuisance, and *Rylands v. Fletcher* is extremely fine and varies from jurisdiction to jurisdiction within the Common Law." KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 606 (Tony Weir trans., 3d rev. ed.1998).

19. HERBERT HAUSMANINGER & RICHARD GAMAUF, AM. PHILOLOGICAL ASS'N, A CASEBOOK ON ROMAN PROPERTY LAW 232 n.34 (George A. Sheets trans., Oxford Univ. Press 2012) (2003); *see also* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 910 (Oxford Univ. Press 1996).

20. The growth in the number of victims increases transaction costs to the potential tortfeasor because it would need to reach an agreement with each of the victims as to the best way to compensate them. In such a scenario, liability rules are better. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1108–09 (1972); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 62–66 (9th ed. 2014). *But see* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 690, 729–30 (1973). For Professors Louis Kaplow and Steven Shavell, the choice

proliferation of highly polluting industrial activities, the scenario just described with multiple parties affected became commonplace. At that time, in the late nineteenth to early twentieth century, a second phase started where tort law and its ex post remedies supplemented the property protection in continental European legal traditions. Liability rules were applied to nuisance cases by either extending the rules of the law of torts or by jurisprudential doctrines, such as abuse of rights, which require reparation of the damage caused even though it is caused in the exercise of a pre-existing right. Some jurisdictions extended the general fault-based torts and, in other jurisdictions, strict liability provisions were enacted.[21] As we shall see, the idea of strict liability was difficult for European civil codes to embrace,[22] but the problems that nuisance tackles fit better in a strict liability framework. In fact, strict liability is preferable to forms of negligence because it affects the incentives of the polluter in relation to both precautions and the level of activity.[23]

In a third phase, even tort law proves to be insufficient. Administrative regulations start by regulating dangerous activities to health and the environment, becoming the benchmark for the standard of care. In most cases, those activities that have been authorized according to administrative regulations cannot be enjoined.[24] The estate owner affected by another's activity can only request compensation for the damages he suffered. The role of liability rules has, thus, been reinforced in this phase dominated by

---

between a property or a liability rule lies not only on the existence of transaction costs but also on the existence of imperfect information in relation to the potential damages (of the tortfeasor, the victim, and the judge deciding the case). *See* Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 719 (1996). For a general explanation, see Keith N. Hylton, *The Economics of Nuisance Law*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 326, 323–43 (Kenneth Ayotte & Henry E. Smith eds., 2011). Professor Smith defines two strategies to delineate property rights: exclusion and governance. The cessation action belongs to the former, with the rest of nuisance to the latter. Nuisance is thus a hybrid. *See* Smith, *supra* note 2, at 991. For a general account of exclusion versus governance as methods of delineating property rights, see Smith, *Exclusions Versus Governance*, *supra* note 17, at S457–67.

21. For a comparative survey, see Jean Limpens et al., *Liability for One's Own Act*, *in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS pt. I, 119–25 (André Tunc ed., 1983).

22. *See* Gerhard Wagner, *Comparative Tort Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1003, 1029–34 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

23. Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 7 (1980).

24. Administrative agencies displace owners as first-order decisionmakers who can choose any use they want for their properties. This governance rule comes accompanied by a displacement of injunction as an available remedy. The right of the neighbor not to be interfered with by the use of someone else's plot of land is now protected only by a liability rule. This does not mean though that property rules protecting entitlements via injunction do no longer exist. They still apply to all situations in which uses do not require an administrative authorization. For an analysis of the trade-offs between property and liability rules, see Smith, *supra* note 2, at 1047–48.

administrative rules.

Remedies offer the most succinct way to summarize the evolution of nuisance. Initially, injunction (cessation action) was the main remedy. Then, jointly with injunction, damage compensation entered the picture. Finally, damage compensation became the main private law remedy because the tortfeasor may have had to pay compensation but the tortfeasor did not need to stop the action if it was protected by an administrative license.[25]

C. COUNTRY PROVISIONS

This Section describes the different provisions. As noted, the original codification of nuisances in the different civil codes was not homogenous even though all traditions stem from Roman law. The lack of homogeneity across jurisdictions could also be explained by the date of approval and the stage of industrialization of different countries at the initial point of codification. The civil codes, which codify all of private law, of different countries were approved at different points in their history, from the 1800s to the early 2000s. Some codes were approved during the first industrial revolution, which ended in the early 1800s; others in the midst of the second industrial revolution in the late 1800s and early 1900s; and others around the mid-1900s when zoning was introduced. The differences, as shall be seen, do not exactly track the different levels of industrialization. It would be expected that a higher level of industrialization at the time of codification translated into a more fine-grained nuisance provision. In a more refined version of such a hypothesis, those countries where industrialization is mature may give a clearer response to nuisance. Before, while on their way to industrialization, the marginal value of the *immission* is high enough that the willingness to stop it may be lower.[26] But as industrialization advances, the marginal benefit of more industrial activities declines, and thus, conflicts may be solved favoring the nonindustrial actor.[27] This is reflected in the jurisprudence of the German courts, which updated its interpretation of the nuisance provisions.[28] The latter illustrates that the legislator was not the

25. Professor Saul Levmore has described an evolution of remedies from a property rule to a liability rule. The continental European process does not fit into any of the typologies proposed by Professor Levmore. In the case of nuisance, European regulation has changed from a property rule (A stops B) to another damage compensation rule without the need to stop the activity (B pays A, but B can continue his activity provided that B complies with the administrative authorization of the activity). Levmore, *supra* note 6, at 2156; *see also* Smith, *supra* note 2, at 970.

26. Kenneth S. Abraham, The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview, 41 WASHBURN L.J. 379, 384 (2002).

27. *Id.*

28. *See infra* Section I.C.2.

only driving force of change in nuisance provisions: courts also played an important role, which is not a common feature in civil law. Finally, convergence has been prompted by the preeminent role of administrative regulation on nuisances that may affect a large number of estates: jurisdictions are converging toward highly complex nuisance regulations.[29]

The following Subsections explore the regulation in five different jurisdictions, and Section I.D summarizes the threads underlying European regulation.

1. France

The broadest regulation of the protection of the right to enjoy one's property can be found in the oldest regulation of the ones analyzed: the Napoleonic Code of 1804. The French Civil Code states the following in its article 544: "[p]roperty is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes."[30]

In fact, the preparatory works of the Code make no mention of nuisance.[31] Thus, to challenge a nuisance situation, the only option was the general damage action, which is a fault-based liability clause in article 1382 of the Code: "[e]very action of man whatsosever which occasions injury to another, binds him through whose fault it happened to reparation thereof."[32]

The traditional nuisance scenario does not often fit a framework based on fault, though. Thus, it was up to the French judges to find a solution to neighboring problems. They used an "*abus de droit*" framework, particularly for interferences created with the aim to affect the neighbor.[33] If property were absolute, abusing only one's own rights would be the source of liability. Later, French judges also created the doctrine of "*troubles de voisinage*" (neighbors' problems) when a use of land was unduly offensive.[34] The analysis of "*troubles de voisinage*" is based on the idea that one who profits from an activity that his neighbor does not and imposes harm on him should

29. Georg von Wangenheim & Fernando Gomez, *Conflicts of Entitlements in Property Law: The Complexity and Monotonicity of Rules*, 100 IOWA L. REV. 2389, 2391–95 (2015).

30. THE NAPOLEONIC CODE OF 1804, *supra* note 12, art. 544, at 150.

31. GORDLEY & TAYLOR VON MEHREN, *supra* note 9, at 170.

32. THE NAPOLEONIC CODE OF 1804, *supra* note 12, art. 1382, at 378.

33. James Gordley, *Disturbances Among Neighbours in French Law*, *in* 2 THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS 65, 84–85 (James Gordley ed., 2010).

34. *Id.* at 69; *see also* Thierry Kirat, *Les conflits liés au voisinage. L'effet des relations juridiques sur la construction institutionnelle de l'espace*, *in* PROXIMITES ET CHANGEMENTS SOCIO-ECONOMIQUES DANS LES MONDES RURAUX 243, 249–50 (2005) (Fr.).

compensate his neighbor for the harm. Nonetheless, if the neighbor has chosen a particularly sensitive activity, he should not be compensated. This judge-made law is still in place, but it has been complemented by regulation mitigating nuisances. For example, the Planning Code prohibits issuing a building permit if a structure "may be exposed to grave nuisance . . . , and in particular, those due to noise."[35] This rule is not tailored to the particular situation and has no standard of unreasonableness. But judges have not been the only source of change. For example, the French Code of Construction and Housing allows the "coming to the nuisance" defense.[36]

In March 2017, the Ministry of Justice of the French Government issued a draft bill amending the tort provisions in the Civil Code (*Projet de Réforme de la Responsabilité Civile*).[37] The Project aims to modernize the tort provisions (extra-contractual liability) in the Civil Code, pushing the agenda set by Ordinance n°2016-131 of February 10, 2016 for the reform of contract law, the general regime of obligations and proof of obligations.[38] The proposed text includes a nuisance provision.

> The Project would amend article 1244 of the Code as follows:
>
> The owner, lessee, holder of a title whose principal object is a permission to occupy or exploit land or a building, or a person who commissions work on land or enjoys the latter's authority, who causes a nuisance exceeding the normal inconveniences of being neighbours, is liable strictly for the harm resulting from the nuisance.
>
> Where a harmful activity has been authorised by an administrative means, the court may, however, award damages or order reasonable measures permitting the nuisance to be stopped.[39]

---

35. CODE DE L'URBANISME art. R111-3 (Fr.), *translated in* Gordley, *supra* note 33, at 79.

36. CODE DE LA CONSTRUCTION ET DE L'HABITATION art. L112-16 (Fr).

37. Projet De Reforme De La Responsabilite Civile [Reform Bill on Civil Liability], (proposed Mar. 13, 2017) (Fr.), http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf, *translated in* Reform Bill of Civil Liability (proposed Mar. 13, 2017), http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf. Previously, other proposed amendments by Terre, Catala, and Béteille also included nuisance provisions intended for inclusion in the code as an anchor for the "troubles of neighbors." Clément Bizet, *Les troubles du voisinage: définition et régime, in* AVANT-PROJET DE LOI RÉFORME DE LA RESPONSABILITÉ CIVILE 21, 22, 24 (2018), https://hal-univ-paris10.archives-ouvertes.fr/hal-01793099/document.

38. Ordonnance 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Feb. 11, 2016, No. 26.

39. Projet De Reforme De La Responsabilite Civile art. 1244.

2. Germany

Almost a century after the approval of the Napoleonic Code, the German Civil Code ("BGB"), approved in 1896 (coming into force in 1900), regulated ownership with more limitations than its French counterpart in section 1004:

> If ownership is impaired in any other way than by deprivation or withholding of possession, the owner may require the disturber to remove the injury. If a continuance of the injury is to be apprehended, the owner may apply for an injunction.
>
> The claim is barred if the owner is bound to submit to the injury.[40]

Even before the BGB, German courts had ruled on neighbors' disputes applying standards of strict liability. In fact, up until 1883, industrial users were always at the losing end. In 1883, the Supreme Court of the Empire (*Reichsgericht*) adopted the locality rule, around the same time as industrial interests grew in importance. The interpretation of this provision in the early years of the twentieth century was clearly favorable to the developing industry: instead of defining locality as the surrounding area, courts looked at the situation in other cities.[41] This locality rule was incorporated in section 906 of the BGB, showing this slightly more limited conception of ownership. Section 906 expands the type, although not the choice necessarily, of remedies available. Instead of an injunction, if damages resulted from a nuisance that the plaintiff had to tolerate, the defendant would have to pay permanent damages. Section 906 of the current BGB provides the following:

> (1) The owner of a plot of land may not prohibit the introduction of gases, steam, smells, smoke, soot, warmth, noise, vibrations and similar influences emanating from another plot of land to the extent that the influence does not interfere with the use of his plot of land, or interferes with it only to an insignificant extent.
>
> . . . (2) The same applies to the extent that a material interference is caused by a use of the other plot of land that is customary in the location and cannot be prevented by measures that are financially reasonable for users of this kind. Where the owner is obliged to tolerate an influence under these provisions, he may require from the user of the other plot of land reasonable compensation in money if the influence impairs a use of the

40. The German Civil Code art. 1004, at 226 (Chung Hui Wang trans., 1907), https://archive.org/details/germancivilcod00germ/page/n3 (providing a translation of the original German Civil Code).

41. Andreas Thier, *Disturbances Between Neighbours in Germany 1850-2000*, *in* 2 THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS, *supra* note 33, at 87, 93.

> owner's plot of land that is customary in the location or its income beyond the degree that the owner can be expected to tolerate.[42]
>
> In 1994, this text was added to paragraph (1):
>
> An insignificant interference is normally present if the limits or targets laid down in statutes or by statutory orders are not exceeded by the influences established and assessed under these provisions. The same applies to values in general administrative provisions that have been issued under section 48 of the Federal Environmental Impact Protection Act [Bundes-Immissionsschutzgesetz] and represent the state of the art.[43]

This legislative amendment goes in line with codifying the complex rules that Professors Georg von Wangenheeim and Fernando Gomez analyzed[44] or the broader pliability rules (a combination of property and liability rules) that Abraham Bell and Gideon Parchomovsky introduced.[45] In its current reading, section 906 is a great example of how legislation has tried to resolve the tension between the public interest and the principle of free enjoyment of one's property. In other words, it shows the connection between administrative law and nuisance. The effect of embracing administrative law solutions for environmental issues and neighbor relations reduces the remedies toolkit. This scheme is reflected today not only in the 1994 version of the BGB but also in a provision of the 1974 Federal Act for the protection against emissions.[46] Like the BGB, this Act excludes injunctions (*actio negatoria*) and only allows for requiring precautions or compensation for both harm to one's property and lost income if it stems from an activity that has been licensed by the administration. This concept of denial damage is gaining terrain.

Nonetheless, this displacement of injunctions was also not an innovation in Germany. Since 1869, when the Industrial Code for the North German Federation was issued, case law has recognized it. The Industrial Code established that there was no injunction if the activity emitting the

---

42. Bürgerliches Gesetzbuches [BGB] [CIVIL CODE], § 906, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

43. *Id.* § 906, para. 1, sentences 2–3.

44. *See generally* von Wangenheim & Gomez, *supra* note 29 (analyzing the interaction between private law rules and public law regulatory standards).

45. *See generally* Abraham Bell & Gideon Parchomovsky, *Pliability Rules,* 101 MICH. L. REV. 1 (2002) (discussing contingent rules and entitlements, that is rules that protect the holder of a property entitlement or liability rule, depending on whether some condition has been met or not).

46. Bundes-Immissionsschutzgesetz [BImSchG] [Federal Immission Control Act], Mar. 15, 1974, BUNDESGESETZBLATT, TEIL I [BGBL I] at 721, last amended by Gesetz [G], July 18, 2017, BGBL I at 2771, art. 3 (Ger.), https://www.gesetze-im-internet.de/bimschg/BJNR007210974.html#BJNR007210974BJNG000103360.

nuisance had a license.[47] This defense was extended by courts to all cases where there was a permit[48] or, more recently, when the activities were deemed in the public interest.[49] Once again, in this realm, courts went beyond the text. Courts have connected the locality rule and administrative operating licenses rule that "a facility not licensed by the administration could not be judged as customary in a place."[50] Courts have also affected the relationship between administrative statutes and nuisance when judges have encountered cases in which there was a violation of emissions administrative standards. While the violation does not automatically trigger the application of nuisance because the link between the damage and the violation needs to be proven, courts have reversed the burden of proof.[51]

3. Spain

The Spanish Civil Code of 1889 is thought to be influenced by the French Napoleonic Code, but its nuisance regulation is far more specific than the French one, perhaps because it was approved almost a century later. The specific regulation of article 590 of the Spanish Civil Code suggests that there is not a clear correlation between industrial development and the intricacies of the nuisance regulation because Germany was equally, if not more developed, than Spain and both their codes give specific responses to nuisance.

The detailed regulation in the Spanish Civil Code may be explained by the existence of a historical regulation of nuisance. In Spain, there were references in the Partidas of Alfonso X (The Wise) and in el Fuero Real,[52]

47. Gewerbeordnung für den Norddeutschen Bund [Trade Regulations for the North German Confederation], June 21, 1869, § 26 (current version at Gewerbeordnung [GewO], as amended Gesetz [G], Nov. 29, 2018, BGBL I at 2666, tit. II, https://www.gesetze-im-internet.de/gewo/BJNR002450869.html#BJNR002450869BJNG000202301 (Ger.)).

48. For an example of a case in which a court considered that neighbors had to tolerate the sparks from a railway because the railway had a permit, see Reichsgericht [RG] [Federal Court of Justice] Sept. 20, 1882, ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 265 (267), 1882 (Ger.).

49. Thier, *supra* note 41, at 95.

50. *Id.* at 97, 99 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 30, 1998, 140 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 1 (6), 1999 (Ger.)). Building licenses are only one factor to consider when analyzing the customary nature of an activity, though. The role of courts in the expansion of strict liability emanating from section 906 of the BGB did not end here. Courts have applied section 906 of the BGB to cases in which there was an illegal use of land and which would result in a negligence claim if the defendant had acted with fault. *Id.* at 102 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 2, 1984, 90 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 255 (262) (Ger.)).

51. *Id.* at 100.

52. Aniceto Masferrer, *Relations Between Neighbours in Spanish Law 1850–2000*, *in* 2 THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS, *supra* note 33, at 173, 177.

both from the thirteenth century. In the early nineteenth century, a legal text (the *Novisima Recopilacion*), while not properly regulating nuisance, established rules about fire prevention or location of industries that demonstrate the concerns regarding nuisance.

This legal tradition is embodied in article 590 of the Spanish Civil Code, which is located in the property part of the Code. It reads as follows:

> Nobody may build near a wall belonging to another or a party wall wells, drains, aqueducts, ovens, forges, chimneys, stables, deposits of corrosive materials, artefacts which moved by steam engine, or machines which, by themselves, or as a result of their products are dangerous or harmful, without keeping the distances provided in applicable regulations and local customs, and without performing the necessary protective works, subject to the conditions provided by the same regulations as to the manner of performing them.
>
> In the absence of regulations, the precautions deemed necessary to prevent any damage to the neighbouring properties or buildings shall be taken, after the issuance of an expert report.[53]

Again, the Spanish Civil Code offers a more detailed regulation in article 1908 in the part dedicated to torts. It specifically targets situations that may amount to a nuisance and adopts a strict liability rule. A codified strict liability rule in the late nineteenth century was not common. Article 1908 reads as such:

> Likewise, the owners shall be liable for damages caused:
>
> 1. By the explosion of machines which have not been taken care of with due diligence, and by the inflammation of explosive substances which have not been put in a safe and suitable place.
>
> 2. By excessive fumes which are harmful to persons or properties.
>
> 3. By the fall of trees placed on transit spaces, unless it results from force majeure.
>
> 4. By the emanations of drains or deposits of infectious materials which have been built without observing precautions appropriate to their location.[54]

In Spain, too, the role of courts has been central. While scholars of other jurisdictions perceive courts as moving in a single direction, Spanish courts have used different tests. As a recent Supreme Court decision states: "[t]he response of the Spanish legal regime and its complementary case law to the problem of harm caused to an individual by *immissions* that today we would

53. C.C. art. 590 (Spain), *translated in* MINISTERIO DE JUSTICIA, *supra* note 13, at 107.
54. *Id.* art. 1908.

label as 'environmental' has not been homogeneous."[55] Echoing Roman law, the requirement of intention dominated some nuisance cases even though article 1908 does not require fault. From there, courts incorporated the French doctrine of abuse of rights, which was incorporated in the Spanish Civil Code in 1974,[56] during the dictatorship years. When the doctrine of abuse of rights fell short, courts looked to other European countries, namely Germany, for a model to follow. There, the distinction between nuisances that must be tolerated and those that must not hinges on the abnormal use of the property.[57] The confusion in the jurisprudence has been such that while there is no requirement of fault to request an injunction, courts have applied fault principles when an action for damages caused by nuisance has been brought.[58] In some of the cases in which they required fault when they should not have, the courts paid lip service to negligence by setting the bar of diligence extremely high, even in cases where the activity was subjected to a license and public regulation had been complied with.[59]

4. Netherlands

In the Netherlands, the discussion under the old Civil Code from 1838, which preceded the industrial revolution starting around 1850, traced a similar path to the one in French private law. Initially, the approach focused on the idea of property and the abuse of rights under article 625 of the old Civil Code, which determined that an owner could not use his property in a way that caused nuisance to others.[60] This was criticized because it treated article 625 as a basis for liability beyond the general negligence provision of article 1401, which read: "[e]very unlawful act which causes damage to another obliges the person by whose fault that damage was caused to compensate it."[61] When the focus shifted to article 1401, the role of article 625 was interpreted to be merely that there was no defense against liability based on exercising one's own property right.[62] The unlawfulness of article

55. S.T.S., May 31, 2007 (R.J., No. 589, p. 3431) (Spain).

56. De Bases para la modificación del título preliminar del Código Civil ch. 3, art. 7, para. 2 (B.O.E. 1974, 163) (Spain).

57. Masferrer, *supra* note 52, at 186–90.

58. *Id.* at 190–91.

59. *Id.* at 191.

60. Art. 2:625 BW (OUD) (Neth.); A.J. Verheij, *Fault Liability Between Neighbors in the Netherlands 1850–2000*, *in* 2 THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS *supra* note 33, at 107, 110.

61. Elizabeth van Schilfgaarde, *Negligence Under the Netherlands Civil Code—An Economic Analysis*, 21 CAL. W. INT'L L.J. 265, 272 (1991) (alteration in original) (quoting Art. 3:1401 BW (OUD) (Neth.)).

62. Verheij, *supra* note 60, at 110–11.

1401 required either a violation of a statutory duty or the infringement of a right. In nuisance actions, Dutch courts expanded the traditional grounds for unlawfulness by adopting a proper social conduct test to determine when the nuisance was unlawful and, as a consequence, negligent. Based on this test, in 1919, the Dutch Supreme Court accepted noise as a violation of a property right.[63] The same 1919 decision made clear that holding a license did not give those creating a nuisance immunity from a tort action. In this case, the legislature responded faster than the courts. The Industrial Nuisance Act of 1875[64] adopted a complex licensing system and an expansive view of nuisance by declaring that the denial of a license could be based on one of the following grounds: "(1) danger; (2) damage to property. . . ; and (3) serious nuisance, e.g. nuisance that makes a house partially or entirely impossible to live in and spreading of waste or disgusting smells."[65]

One of the scholars who defended the assertion that article 1401 was the provision applicable to nuisance cases was a drafter of the new 1992 Civil Code, and accordingly, the social conduct test is still the controlling approach. The new Civil Code, though, has more specific provisions. Article 5:37 reads as follows:

> The owner of immovable property may not, to a degree or in a way that is unlawful according to Article 6:162 of the Civil Code, cause nuisance to owners of other immovable properties by instigating sounds, vibrations, smells, smoke or gases or by denying these owners daylight or fresh air or by taking away the support of buildings or constructions.[66]

The reference to article 6:162[67] is still a reference to negligence,

63. HR 31 januari 1919, NJ 1919, 161 m.nt Molengraaff (Lindenbaum/Cohen) (Neth.); *see also* Verheij, *supra* note 60, at 118–19.

64. Verheij, *supra* note 60, at 128–29. Professor A.J. Verheij describes that from 1850 to 1880, domestic industry developed thanks to steam engines, railroads, and trade. *Id.* at 129. In 1880, the development of heavy industry started. *Id.*

65. Verheij *supra* note 60, at 125 (discussing Wet Tot Regeling Van Het Toezicht Bij Het Oprigten Van Inrigtingen, Welke Gevaar, Schade Of Hinder Kunnen Veroorzaken 10 junij 1875, S. 1875, 95 (repealed 1952) (Neth.)).

66. Art. 5:37 BW (Neth.), *translated in Dutch Civil Code: Book 5 Real Property Rights*, DUTCH CIV. L., http://www.dutchcivillaw.com/civilcodebook055.htm (last visited May 18, 2019).

67. Article 6:162 reads as follows:

> 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
> 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.
> 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

Art. 6:162 BW (Neth.), *translated in Dutch Civil Code: Book 6 the Law of Obligations*, DUTCH CIV. L., http://www.dutchcivillaw.com/civilcodebook066.htm (last visited May 18, 2019).

showing the difficulty that civil law jurisdictions had in accommodating strict liability. The interpretation of the unlawfulness of the conduct depended on the definition of proper social conduct in Dutch case law. The test for proper social conduct is a multifactor test, which allows courts room to adapt the rule to the particular circumstances, such as the locality.[68]

While negligence still plays a role, its role has been diminished by the advent of explicit strict liability in many instances, such as the collapse of real property (article 6:174),[69] or the damage caused by dangerous substances (article 6:175).[70] The latter incorporates administrative standards to define when a substance is dangerous, and thus, the article applies. The switch between a property rule and a liability rule—that is, between injunction and damages—is not based on an administrative standard in the Dutch Civil Code. It is based on the public interest; the court will assess if a nuisance must be tolerated, although with compensation, based on compelling reasons of public interest (article 6:168).[71] Administrative regulations define what is in the public interest, but the Dutch Civil Code allows courts to look beyond regulations.

5. Catalonia

One of the most recent civil codes, the Catalan Civil Code of 2006, has a more detailed regulation. It includes a cessation action on articles 544-5[72] and 544-6,[73] and then it devotes two articles to regulate what legal (article

68. Verheij, *supra* note 60, at 116.

69. Art. 6:174 BW (Neth.), *translated in Dutch Civil Code: Book 6 the Law of Obligations*, *supra* note 67. The Dutch Supreme Court refused to apply this provision to a case in which, as a result of the collapse of a building, asbestos particles had affected the premises of the neighbors. Verheij, *supra* note 60, at 122.

70. Art. 6:175 BW (Neth.), *translated in Dutch Civil Code: Book 6 the Law of Obligations*, *supra* note 67.

71. *Id.* art. 6:168.

72. Article 544-5 reads as follows:

> Negatory action is not appropriate in the following cases:
> a) If the disturbances or emissions it is intended to put an end to or future disturbances or emissions that it is claimed to prevent do not prejudice any legitimate interest of the proprietors in their property.
> b) If the proprietors must support the disturbance due to a provision of this code or due to legal businesses.

CODI CIVIL DE CATALUNYA art. 544-5, *translated in Law 5/2006, of 10 May, on the Fifth Book of the Civil Code of Catalonia, Relating to Real Rights*, *supra* note 15, at 31.

73. Article 554-6 reads as follows:

> 1. Negatory action is aimed at the protection of the freedom of domain of the real estate property and the re-establishment of the thing to the state prior to a legal or material disturbance.
> 2. In the exercise of negatory action, the corresponding indemnification for the damage and prejudice produced can be claimed. In this case, the actors do not have to prove the illegitimacy of the disturbance.

Id. art. 544-6.

546-13) and illegal (article 546-14) nuisances are, paying close attention to the role of regulation, as well as the economic benefits of the conflicting activities. It is worth noting that before the codification in 1990, the Catalan Parliament passed an act on nuisance with very similar regulations regarding the connections with administrative regulations. Both recognize that even though an activity may comply with existing regulations, it may still be a nuisance if damage occurs and the damage caused should be compensated. Both also established the nonrebuttable presumption that if an activity exceeds the legal limits set in specific legislation, the activity is a nuisance. It also regulates a situation reminiscent of the famous U.S. case, *Boomer v. Atlantic Cement Co.*[74] The Catalan Civil Code allows an activity to continue while compensating for past and future damages if the cessation of said activity will have dire economic consequences. The nuisance provisions seem to align with the current regulation in section 906 of the BGB and, in general, with the trend toward the incorporation of administrative law in private law analysis.

> 1. The proprietors of an estate must tolerate emissions coming from a neighbouring estate that are innocuous or that cause prejudice that is not substantial. In general, prejudice is considered substantial when it exceeds the limit or indicative values established by the laws or regulations.
>
> 2. The proprietors of an estate must tolerate emissions that cause substantial prejudice if they are the result of the normal use of the neighbouring estate, according to the regulations, and if putting an end to them involves an expenditure that is economically disproportionate.
>
> 3. In the case referred to in Section 2, the proprietors affected have the right to receive indemnification for damage caused in the past and economic compensation, set by common agreement or judicially, for any that may be caused in the future if these emissions excessively affect the produce of the estate or its normal use, according to local custom.
>
> . . . 5. Substantial emissions that come from administratively authorised installations give the neighbouring proprietors affected the right to request the adoption of technically possible and economically reasonable measures to prevent the damaging consequences and to request indemnification for the damage caused. If the consequences can not be prevented in this way, the proprietors have the right to economic compensation, established by common agreement or judicially, for damage that may occur in the future.[75]

---

74. *See generally* Boomer v. Atl. Cement Co., 257 N.E.2d 870 (1970) (allowing for permanent damages when the harm suffered is small compared to the cost of removing the nuisance).

75. CODI CIVIL DE CATALUNYA art. 546-14, *translated in Law 5/2006, of 10 May, on the Fifth Book of the Civil Code of Catalonia, Relating to Real Rights supra* note 15, at 38–39.

D. COMPARATIVE ANALYSIS

First, although every continental civil code analyzed has a common origin in Roman law, the lack of clarity in Roman norms still seeped into the codification. Moreover, as mentioned, it cannot be said that their Roman origins translated into convergence at the time of codification. Similarly, the divergence at the outset cannot be explained by the different levels of industrialization. The hypothesis was that differences between nuisance provisions included in the civil codes traced the economic development of the particular country. The idea behind such a hypothesis is that those rules enacted at the beginning of industrialization coupled with development of urban areas would be more detailed because the conflicts between neighboring activities would be more acute, particularly in the absence of zoning and other public regulations. Germany and Spain approved their civil codes at roughly the same time, and while Germany had a higher level of industrialization, its provisions do not necessarily reflect this. An alternative hypothesis could be that at the beginning of industrialization, while conflicts were acute, institutional actors felt the need to be lenient toward those industrial activities imposing on their neighbors given that the social benefits they brought were high. Thus, jurisdictions would pay more heed to nuisance once industrialization was mature, and the marginal benefit from an industrial activity may not exceed the marginal harm to a nonindustrial actor.[76] Broad nuisance provisions may suggest that these adaptations could occur at the judicial level.

Second, while nuisance provisions did not change much in the codes until the 1990s, their interpretations have. Judges have been very important driving forces of evolution and convergence in nuisance law toward strict liability.

Third, the evolution of nuisance provisions where they have been amended or where recent provisions have been enacted acknowledges the complexity of the current framework regulating relations between neighbors increasingly dominated by public law. Borrowing Professor Mark Geistfeld's title, it can be said that the newest provisions make explicit the role of tort law in the age of statutes.[77] As a result, these provisions are more complex.

There are two main tenets of this relationship between tort and administrative regulation. First, some regulations specifically state that if

76. *See* Abraham, *supra* note 26.

77. *See generally* Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957 (2014) (explaining the relationship between tort law and statutes).

there is damage and the defendant has violated the pertinent administrative regulations, it will be assumed that the damage is substantial enough that the nuisance does not need to be tolerated.[78] Even in the absence of such an explicit regulation, if damage exists, there would be a strong presumption against the defendant before the courts. Second, complying with the administrative regulation does not mean that nuisance is excluded if there is damage, but rather the remedy changes, as will next be described. As Professors Georg von Wangenhein and Fernando Gomez pointed out, nuisance rules today are a combination of property and liability rules, and the switch between the two types of rules is provided by a regulatory standard.[79] While administrative regulation could explicitly preempt nuisance actions by declaring an activity a legal nuisance,[80] thus requiring the landowner affected to endure it, the avenue most commonly taken by European jurisdictions is that even when in compliance with the regulation, damages and preventive measures, but not injunctions, are available.[81] The impact of the coordination with administrative standards on Coasean bargaining remains to be analyzed. If an actor needs to comply with a regulation, the option of paying the party supporting a higher level of interference becomes less attractive because the actor will also face a fine.[82]

II. FORCED CONVERGENCE AT THE EUROPEAN LEVEL?

All the civil law jurisdictions analyzed are part of the European Union and parties to the European Convention on Human Rights. As a result, there could be transnational forces of convergence, defining either nuisance rules themselves or the realm in which private nuisance can operate.

This Article analyzes three potential sources of convergence. First, while there has not been a binding harmonization of private law and, thus,

78. This aligns with the rule 1P (B stops A up to a point, and A pays damages associated with its lawful operation) that Professor Levmore describes in his work, which enhances the seminal article by Judge Guido Calabresi and Professor A. Douglas Melamed on this topic. Levmore, *supra* note 6, at 2149; *see also* Calabresi & Melamed, *supra* note 20, at 1092–93.

79. Von Wangenheim & Gomez, *supra* note 29, at 2392, 2398.

80. A partial and indirect way to declare something a legal nuisance is by allowing the "coming to the nuisance" defense because it allows certain activities to continue if they were in the area before the plaintiff. This is what Article L.112-16 of the French Construction and Housing Code does. CODE DE LA CONSTRUCTION ET DE L'HABITATION [FRENCH CONSTRUCTION AND HOUSING CODE] art. L112-16 (Fr.).

81. "Corrective justice is, therefore, attenuated in a regulatory system." Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 101 (1979).

82. Fines affect ex ante decisions on investments. *See generally* Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001) (explaining the role that different ex post rules, including fines, can have on ex ante decisions despite easy bargaining and the distributive effects of the ex post rules).

there is no European nuisance, the Draft Common Frame of Reference ("DCFR"), which offers a sort of uniform civil code for European countries, will be briefly discussed. The DCFR can offer a sense of what direction jurisdictions will take in the future, a focal point for convergence of sorts. Next, this Article covers the Environmental Liability Directive. All countries analyzed above need to implement the Directive. Given the subject matter of the Directive, it has a clear impact on nuisance. It has a potential impact in two ways. First, for those regulations that incorporate the administrative standard to assess whether the interference is substantial, the standard is now homogeneous because it is set at the European level. Second, it establishes a public liability regime, and thus may compete with private nuisance actions. Finally, this Section reviews the decisions of the European Court of Human Rights that have considered nuisances a violation of a person's right to respect for his private and family life as well as his home. National authorities that fail to respond to nuisances promptly and adequately may be found in violation of the European Human Rights Convention. As a consequence, national authorities may reduce even further the need for nuisance provisions to play a complementary role, although its existence clearly plays such a role and contributes to deterrence.

A. THE DRAFT COMMON FRAME OF REFERENCE

In 2009, the European Commission published the DCFR.[83] The DCFR is similar to the Uniform Commercial Code and the Restatement in the United States, without being either.[84] Although it has been described a "European Civil Code in all but name,"[85] it is not yet that. It sets up the minimum common denominator across the private law of European countries that should facilitate the future unification of private law at the European level to strengthen the common market, but there is not yet anything to restate. The DCFR aims to serve as a model for both future European Law and future national law as it also identifies the best legal solutions.[86]

---

83. Frank Emmert, *The Draft Common Frame of Reference (DCFR)—The Most Interesting Development in Contract Law Since the Code Civil and the BGB*, 2 CUADERNOS DE LA MAESTRÍA EN DERECHO 7, 12 (2012). For further discussion on international tort law and the DCFR, see generally WALTER VAN GERVEN ET AL., CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW (2000); Gerhard Wagner, *The Law of Torts in the DCFR*, *in* THE COMMON FRAME OF REFERENCE (Gerhard Wagner ed., 2009).

84. Emmert, *supra* note 83, at 11–12; Nils Jansen & Reinhard Zimmermann, *"A European Civil Code in All But Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference*, 69 CAMBRIDGE L.J. 98, 101–02 (2010).

85. Jansen & Zimmerman, *supra* note 84, at 100.

86. The DCFR also aimed to provide an optional set of rules that parties could choose when

Article VI.-3:206 of the DCFR (*Accountability for damage caused by dangerous substances or emissions*) states the following :

> (1) A keeper of a substance or an operator of an installation is accountable for the causation by that substance or by emissions from that installation of personal injury and consequential loss, loss within VI.-2:202 (Loss suffered by third persons as a result of another's personal injury or death), loss resulting from property damage, and burdens within VI.-2:209 (Burdens incurred by the State upon environmental impairment), if:
>
> (a) having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance it is very likely that the substance or emission will cause such damage unless adequately controlled; and
>
> (b) the damage results from the realisation of that danger.
>
> . . . (3) "Emission" includes:
>
> (a) the release or escape of substances;
>
> (b) the conduction of electricity;
>
> (c) heat, light and other radiation;
>
> (d) noise and other vibrations; and
>
> (e) other incorporeal impact on the environment.
>
> . . . (5) However, a person is not accountable for the causation of damage under this Article if that person:
>
> (a) does not keep the substance or operate the installation for purposes related to that person's trade, business or profession; or
>
> (b) shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.[87]

The DCFR targets only harm to people or property, not pure ecological damage. As such, diminished revenues by a restaurant as a result of the loss of an environmental amenity do not fall under this article. The scope is limited to: (1) substances—solid, liquid, or gas—that are objectively dangerous, either by nature or because they are kept in large quantities; and (2) emissions—a broader concept. The DCFR adopts strict liability for nuisances created by commercial or industrial activities. Non-professional parties, according to the comments to the DCFR, may still be liable but under a negligence rule.[88] According to article 3:102 of the DCFR, a person is

---

negotiating an agreement, particularly in contract law. Reinhard Zimmermann, *The Present State of European Private Law*, 57 AM. J. COMP. L. 479, 510 (2009). However, its provisions could also serve as the baseline to negotiate potential settlements between neighbors in nuisance cases. *Id.* at 510–11.

87. STUDY GRP. ON A EUROPEAN CIVIL CODE & RESEARCH GRP. ON EC PRIVATE LAW (ACQUIS GRP.), PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW 3396 (Christian von Bar et al. eds., 2009), https://www.law.kuleuven.be/personal/mstorme/european-private-law_en.pdf.

88. *Id.*

negligent when he "does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the person suffering the damage from that damage."[89] Furthermore, under the DCFR, compliance with public regulation standards offers a defense, an issue not admitted in every jurisdiction. The DCFR may be a force of convergence in the future if either the European Union decided to enact these provisions or if countries used it as a focal point for future reforms of their civil codes. As of today, it shows the tension between negligence and strict liability that many European jurisdictions face when regulating nuisance and the need to acknowledge the preeminence of administrative regulations.

B. E.U. ENVIRONMENTAL LIABILITY REGULATION

1. Directive

It is impossible to fully grasp the role of nuisance in European law without understanding the European Directive 2004/35, of 21 of April, on environmental liability with regard to the prevention and remedying of environmental damage.[90] This Directive aims at protecting public property or common goods that are not covered by civil code rules protecting private property and at solving the collective action problem normally associated with such environmental damage. Furthermore, the transboundary character of many environmental issues made the common regulation necessary. The Directive adopts the "polluter pays" principle[91] and specifically states that it is complementary to the national regulations. For the purpose of this piece, article 3(3) states: "[w]ithout prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage."[92]

The content of article 3(3) leaves national nuisance provisions intact, and it is surprising for two reasons. First, Directive 2004/35 deviated from

89. *Id.* at 3274.

90. Directive 2004/35, of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, 2004 O.J. (L 143) 56 (EU) [hereinafter Directive on Environmental Liability].

91. Article 3(1) of the Directive sets a strict liability standard for those activities it considers particularly dangerous. *Id.* at 60. The list of activities can be found in Annex III of the Directive. *Id.* at 70–71. In all other cases—that is, on cases of environmental damage caused by activities not considered dangerous per se—liability is based on fault. For an analysis of the effect of strict liability and fault liability on the prevention of environmental damage, see MICHAEL FAURE & GÖRAN SKOGH, THE ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY AND LAW 241–61 (2003).

92. Directive on Environmental Liability, *supra* note 90, at 61.

the content of the White Paper[93] that started the legislative process for this Directive. In that White Paper, the Commission pointed at the need to create a level playing field for all the actors subject to E.U. environmental liability.[94] Given that the European Union embraces the complementarity between private and public enforcement, the lack of harmonization of private remedies is surprising because the Directive was expected to follow the steps of other European regulations, such as defective products.[95] It is remarkable that something similar happened in the case of waste regulation. The substantive regulation of waste management in the European Union was accompanied by a proposal of harmonized liability framework, in which compliance with a license to operate was not considered a defense.[96] The proposal was abandoned, and now waste falls under the Environmental Liability Directive.

Second, the European Union is a member of the Aahrus Convention, and it has been argued that the European Union's lack of civil remedies in the environmental liability directive may be in tension with article 9(2)(b) of the Convention, which calls for such remedies.[97] In fact, in 2016, the European Commission in its roadmap, titled "[c]ommunication on access to justice at national level related to measures implementing EU environmental law," expressed the problems that still exist due to the lack of harmonization across member states.[98]

---

93. *Commission White Paper on Environmental Liability*, COM (2000) 66 final (Feb. 9, 2000). A White Paper "launch[es] a debate with the public, stakeholders, the European Parliament and the Council in order to arrive at a political consensus." *Glossary of Summaries*, EUR-LEX, https://eur-lex.europa.eu/summary/glossary/white_paper.html (last visited May 18, 2019).

94. *Commission White Paper on Environmental Liability*, *supra* note 93, at 15.

95. Gerrit Betlem, *Torts, a European* Ius Commune *and the Private Enforcement of Community Law*, 64 CAMBRIDGE L.J. 126, 128–29 (2005). For another example, check the 2004 Intellectual Property Directive, which, following the premise that tort remedies can complement regulation to ensure deterrence, aimed at harmonizing the sanctions, including private enforcement. Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157) 45, 81 (EU).

96. *Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste*, at 15, COM (1989) 282 final (Sept. 15, 1989).

97. Betlem, *supra* note 95, at 132. A similar claim can be made in relation to the European Convention on Human Rights given that articles 6 (right to a fair trial) and 13 (right to an effective remedy) offer a similar, albeit general, protections. *Id.* at 133–35 (analogizing the question of private civil law remedies in the context of the Environmental Liability Directive with the *Muñoz* decision, in which the issue was whether a standard laid by E.U. law was actionable under national tort law).

98. EUROPEAN COMM'N, COMMUNICATION ON ACCESS TO JUSTICE AT NATIONAL LEVEL RELATED TO MEASURES IMPLEMENTING EU ENVIRONMENTAL LAW 2 (2016), http://ec.europa.eu/smart-regulation/roadmaps/docs/2013_env_013_access_to_justice_en.pdf.

2. Countries' Responses

Each country must incorporate the contents of the Directive 2004/35 into their own national legislation. All national laws incorporating the E.U. regulation go beyond harm to the environment by including provisions that carve out property damages. Those private damages are not dealt with in the special legislation.[99] The statutes seem to set up clear boundaries between environmental damage and other types of damages, closing the door to potential claims of breach of statutory duty because the scope of the norm does not cover those private interests. Instead, private damages are subject to the general nuisance rules. It is difficult to imagine a case in which a court will deny that, provided there is property damage, there is no nuisance when the defendant has been found liable under the environmental liability statutes. A violation of the statute will play a role when ascertaining fault, or where nuisance is governed by strict liability, a violation can be sufficient evidence that the damage reaches the threshold of significance and that such nuisance should not be tolerated.[100]

C. NUISANCE AS A VIOLATION OF HUMAN RIGHTS

An interesting development in this field is the jurisprudence of the European Court of Human Rights ("ECHR"), which considers nuisance a violation of human rights. The ECHR did so in *López Ostra v. Spain*. The plaintiff, López Ostra, lived near the town's waste-treatment plant, which

99. Examples of provisions stating that damages to property are not dealt with by the legislation dealing with pure environmental damage include: Loi 2008-757 du 1er août 2008 relative à la responsabilité environnementale et à diverses dispositions d'adaptation au droit communautaire dans le domaine de l'environnement (1), JOURNAL OFFICEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 2, 2008, p. 12361 (Fr.); Lei n. 19/2014 de 14 de abril Define as bases da política de ambiente, art. XIII, Diário da República n. 73/2014, I Série A. 2400 (2014) (Port.); Environmental Responsibility Law art. V (B.O.E. 2007, 255) (Spain). These provisions prevent the compensation of damages decided by the public authority. The victim is obliged, then, to claim for damages before the courts. The German regulation states such principle clearly when it declares the potential liability of the tortfeasor, although it defers the case to the general courts. The Environmental Liability Act sets forth the following:

> If an environmental impact caused by an installation specified in Annex 1 causes a person's death, injury to his body or damage to his health, or damage to an item of property, the operator of the installation shall have an obligation to compensate the injured person for the resulting damage.

Umwelthaftungsgesetz [UmweltHG] [Environmental Liability Act], Dec. 10, 1990, BGBL I at 2634, last amended by Gesetz [G], July 17, 2017m BGBL I at 2421, § 1 (Ger.), https://www.gesetze-im-internet.de/englisch_umwelthg/englisch_umwelthg.html.

100. Nonetheless in 2005, Professor Gerrit Betlem predicted that a harmonization of E.U. law as a result of the Environmental Liability Directive based on the breach of statutory duty. *See* Betlem, *supra* note 95, at 145–48.

caused odors, fumes, and noise.[101] The Spanish executive authorities were passive and did not respond promptly to stop the nuisance.[102] The ECHR in *López Ostra* expressed that: "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[103]

Accordingly, the Court decided that López Ostra had a right to respect for her private and family life, her home, and her correspondence according to article 8 of the European Convention on Human Rights:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[104]

Courts generally give Spain's authorities room to balance the rights of the individual with the public interest, but in this case, Spanish authorities had gone too far. The Court awarded López Ostra pecuniary damages based on the depreciation of her home and nonpecuniary damages to compensate for her mental anguish.[105] The Kingdom of Spain had to pay 4,000,000 pesetas in 1998 (around 27,719 in U.S. dollars).[106]

The ECHR has had the opportunity to reiterate the same doctrine in two subsequent cases on *immissions*. Both cases were against Spain and about noise nuisances. The cases are *Moreno Gómez v. Spain*[107] and *Cuenca Zarzoso v. Spain*.[108] In the first decision, the Court stated that:

> Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves . . . . Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the

101. López Ostra v. Spain, 303 Eur. Ct. H.R. (ser. A) 39, 39 (1994).
102. *See id.* at 55.
103. *Id.* at 54.
104. *Id.* at 53–56 (quoting European Convention on Human Rights § 1, art. 8).
105. *Id.* at 40.
106. *Id.* at 59.
107. Gómez v. Spain, 2004-X Eur. Ct. H.R. 329.
108. Zarzoso v. Spain, Eur. Ct. H.R. (2018), http://hudoc.echr.coe.int/eng?i=001-180296.

> applicants' rights under paragraph 1 of Article 8, or in terms of an interference by a public authority to be justified in accordance with paragraph 2 of Article 8, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance . . . .[109]

López Ostra, *Moreno Gómez*, *Cuenca Zarzoso*, and other decisions, such as the decision dealing with the noise produced by runaways at Heathrow Airport, should push public authorities to enforce the environmental regulations to prevent and stop nuisances, thus reducing the sphere of private law. There is an obligation of the States that have signed the European Convention on Human Rights to adopt the appropriate administrative measures to prevent nuisances that affect the lives of their citizens.

CONCLUSION: IS THERE STILL A ROLE FOR PRIVATE LAW?

This Article's analysis of the nuisance provisions in several European civil law countries has shown the different stages of the protection against nuisances: from property, to torts, and then to public regulation. At the time of codification, these European countries did not converge even though their traditions all stem from Roman law. Some countries have almost no provision of nuisance; in other countries, fault liability triggers damages that are combined with cessation actions; and yet, others adopted strict liability.

These divergent nuisance provisions still play a role today, albeit a reduced one. European civil law jurisdictions' nuisance provisions reflect the evolution from nuisance problems between two adjacent neighbors to a scenario of nuisance conflicts between heterogeneous users with a high number of potential defendants. Like in the common law, nuisance provisions work well for the former. For the latter, public regulations take the central stage. Recently enacted or amended civil codes converge in the sense that they acknowledge the interplay between private law and public regulation. In many cases, private nuisance is not wholly displaced, but the remedies available to defendants will depend on whether the activity causing a nuisance has been administratively authorized. If it is administratively authorized, the cessation action that leads to an injunction remedy is no

109. *Gómez*, 2004-X Eur. Ct. H.R at 341.

longer available.