EXAMINATION ON THE LAW OF NUISANCE IN UGANDA'S JURISPRUDENCE: PUBLIC NUISANCE AS A CASE STUDY.

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DECLARATION

I **ISABIRYE EMMANUEL** Hereby declare that the work presented in this book is original unless otherwise stated. It has never been presented before in any institution of learning either in part or full, for any academic award, publication or otherwise.

SIGINATURE ..... DATE 6/7/2019

APPROVAL

I certify that Mr. **ISABIRYE EMMANUEL** carried out this research under my supervision and has submitted with my approval as the University Supervisor.

Signature .....

Date.....6/7/2019.....

MR. WANDERA ISMAIL

UNIVERSITY SUPERVISOR.

DEDICATION

I dedicate this piece of work to my parents, **Mr Tutyo David** and my Mother **Mrs. Namususwa Harriet** and with great joy I also take this opportunity to recognize my mentor Counsel. Peter Gate You have been my parent, brother, guardian, for all this time, you have never made me feel like I were a burden but rather a blessing, God Bless your life.

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List of cases Cases

Arima Nantongo & Others vs Hiral Mohammed [1974] E.A 557; [1975] HCB 21 · Arima Nantongo & Anor vs Hiral Mohammed [1974] HCB 181 · Tindarwesire vs Kabale Town Council [1980] HCB 33 · Kitamirike vs Mutagubya [1965] EA 401 · Gillingham Borough Council vs Medway Dock Co Ltd [1992]3 ALLER 923

Former Uganda vs Mp Arua municipality

In Gillingham Borough council vs Medway (Chatham) Dock Co Ltd & Others (1991) Buckley

Kelsey v. Chicago R.I. & P.R. Co., 264 Minn. 49, 117

Uganda v Nabakoza & Ors

Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others 2010 (8) BCLR 785 (Voortrekker case); and Growth point Properties Ltd v SA Commercial Catering and Allied Workers Union 2011 (1) BCLR 81 (KZD) (Growth point Properties case)

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ABSTRACT.

The general objective of the study is to examine the law on Nuisance in Uganda jurisprudence public Nuisance as a case study It evolved into a low level criminal charge, and then, after the passage of time, into an action allowing either criminal indictment or public injunctions. Still later, private citizens were allowed, in limited circumstances, to sue for damages for the same conditions that gave rise to public actions. Public nuisance, which entails judicial enforcement, had been effectively displaced by the police power, which implies legislative and administrative action. Given accumulated ambiguities about what it means to call something a public nuisance, it was time to begin phasing this law out.

The more fundamental objection is that public nuisance never was, and ought not to be, regarded as a tort. It is a public action, and as such should be subject to the control and direction of the legislature. Given the confusion sown by the Restatement, existing statutory authority condemning activity as a "public nuisance" should be interpreted non-dynamically, as ratifying understandings of that term when the law was enacted. For the future, legislatures should avoid speaking of public nuisances, and should instead spell out what is prohibited, the sanctions for violation, and which entities have authority to enforce the law.

The notion of public nuisance applied in this way is unconstitutional. However, according to van der Walt, „this does not mean that evictions based on a lack of compliance with planning laws or on public nuisance cannot or should not take place, but it does mean that such evictions have to be treated with great care and a healthy shot of scepticism and hesitance."

The courts should in future, when dealing with an alleged public nuisance, always distinguish between a private and public nuisance to avoid using the two distinct species of nuisance interchangeably.

CHAPTER ONE

1.0 Introduction

This chapter discusses the background to the study, problem statement, and objectives to the study, research questions, and scope of the study, methodology and significance of the study.

1.1 Background to the Study.

Public nuisance laws have developed over centuries of English and U.S. court decisions (common law). In addition, state and local governments determine through state statutes and/or local ordinances what are considered nuisance activities for a particular jurisdiction[1].

According to Church and Church, a public nuisance can be defined as „an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large."[2] In other words, the aim of the remedy based on the doctrine of public nuisance is to

[1] Victor E. Schwartz & Phil Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort, 45 Washburn L.J. 541 (2006).
[2] Church J & Church J „Nuisance" in Joubert WA, Faris JA & Harms LTC (eds) LAWSA 19 (2006) 115-145 par 163.

protect the health and safety of the general public. In the Intercape case all the unreasonable interferences complained of, such as litter and noise, could constitute either a private or public nuisance. However, blocked roads and violence on public streets are usually associated with a public as opposed to a private nuisance. The court nevertheless found it difficult, and also unnecessary, to determine whether a private or public nuisance was established in this case. As a result, the court used the terms „private nuisance" and „public nuisance" interchangeably, without distinguishing between these two species of nuisance.

Nuisance laws have evolved over time and will continue to do so. With more and more people living and working closely in our cities, individuals have a greater opportunity to impact the living conditions of their neighbors. Changes in industrial and commercial practices also lead to different beliefs on what are appropriate uses of property, real and personal, and what is not proper. Public nuisances negatively impact a community perhaps the city at large,

or an otherwise significant area such as a neighborhood. Public nuisance laws address both intentional acts and negligent conduct[3].

In Massachusetts v. EPA, a closely divided Court held that Massachusetts had standing to challenge EPA's refusal to regulate tailpipe emissions of greenhouse gases from motor vehicles. Although the case was brought under the Clean Air Act, the Court's constitutional standing analysis drew upon public nuisance themes[4]. The Court opined that a state such as Massachusetts, speaking through its public officials, is entitled to "special solicitude" in determining whether standing requirements have been met.[5] This suggestion echoes one of the features of public nuisance law, namely, that the state's public officials always have standing to bring public nuisance actions. In intimating a similar understanding for Article III standing purposes, the Court analogized to and quoted at

[3] Kelsey v. Chicago R.I. & P.R. Co., 264 Minn. 49, 117 N.W.2d 559 (1962).
[4] Connecticut v. American Electric Power Co., 582 F.3d 309 (2d Cir. 2009).
[5] Id. at 520.

length from an original jurisdiction decision applying public nuisance law, Georgia v. Tennessee Copper Co.[6]

1.2 Problem statement

Public nuisance is currently used mostly to regulate nuisances that affect the public. It is mainly provided for in legislation (statutory nuisance) to regulate public nuisances,[7] where a specific action or situation poses a threat of or where actual harm already occurred to the broader public. The local authorities have to institute proceedings for the abatement of a public nuisance.[8] However, there has to be extraordinary circumstances in order to use the Common Law notion of public nuisance to apply for an interdict to abate a nuisance that is largely regulated by legislation already. Such extraordinary circumstances were not proved in the cases referred to. Reliance on the doctrine of public nuisance in these cases is therefore questionable. But the use of public nuisance law to

[6] 206 U.S. 230 (1907), discussed 549 U.S. at 520

[7] Atmospheric Pollution Prevention Act 45 of 1965; National Environmental Management Act 107 of 1998; Civil Aviation Offences Act 10 of 1972; Health Act 63 of 1977

[8] Church J & Church J „Nuisance" in Joubert WA, Faris JA, Harms LTC (eds) LAWSA 19 (2006) 115-145 par 211

address a laundry list of social ills ranging from smoking to handgun violence to climate change raises more fundamental issues about the very concept of a public nuisance. In its modern incarnation, as reflected in the Restatement (Second) of Torts, public nuisance is assumed to be a tort, which in turn means courts have inherent authority to hear these actions as part of their powers as common law tribunals.

1.3 General Objective of the study.

The general objective of the study is to examine the law on Nuisance in Uganda jurisprudence public Nuisance as a case study.

1.4 Specific Objectives

i. To examine the history of public nuisance and its adoption in Ugandan law

ii. To find out the resentments that makes Public Nuisance a Tort.

iii. To find out the arguments for public Nuisance law in Uganda.

1.5 Research Questions

i. How did public nuisance as a tort emerges and its adoption in Ugandan law?

ii. What resentments make Public Nuisance a Tort?

iii. What are the arguments for public Nuisance in Uganda

1.6 Scope of the Study

This work is only concerned with examine the law on Nuisance in Uganda jurisprudence public Nuisance as a case study, history of public nuisance and its adoption in Ugandan law and the arguments for public Nuisance in Uganda.

1.7 Research Methodology

This study was basically qualitative and library-oriented. It is mainly desktop research and this will include review of relevant literature such as statutes, text books and journal articles. The researcher will

access material and data from statutory bodies and specialized institutions and relevant government ministries.

1.8 Literature review

Designed to protect: the right of the general public. The description of the nature of the right has held constant from Bracton, to Hawkins, to Prosser[9] public nuisance as an interference "with a right common to the general public." So on this point, there is no disagreement. Tort actions, as generally understood, are nearly always designed to protect private rights, not rights of the general public. Actions for personal injury, assault and battery, malpractice, defamation, and violations of privacy are interferences with rights of particular persons. Actions for damage to property, trespass, and fraud are interferences with particular rights of property. In all these cases tort law seeks to protect and vindicate what are

[9] Bracton described a public nuisance as "a nuisance by reason of the common and public welfare." Henry de Bracton, 3 Bracton on the Laws and Customs of England 191, f. 232b (Samuel E. Thorne ed. 1977). According to Hawkins, a public nuisance is "an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires." I WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 197, ch. 75, § 1 (photo. reprint 1978) (1716) . Prosser states that "[t]he crime [of public nuisance] comprehends a very miscellaneous and diversified group of petty offenses, all based on some interference with the interests of the community, or disruption of the comfort or convenience of the general public." William L. Prosser, Private Action for Public Nuisance, 52 VA. L. REV. 997, 1000 (1966).

conventionally regarded as private rights. The government, of course, can and sometimes does sue in tort.[10] But when it does it is to recover damages for injuries to particular government-owned assets government property, as distinct from a right belonging to the public as a whole.

The distinction between public and private rights is admittedly a variable one. "Public right" means different things in the context of the public trust doctrine, than it does in the law of eminent domain, than it does if we are asking whether a particular regulation is a legitimate exercise of the police power.[11] Historically speaking, however, the reference to "rights common to the general public" in public nuisance law has had a reasonably clear meaning, and it is a meaning that is readily distinguishable from the types of interests protected in tort.

[10] Restatement (Second) of Torts, § 821B(1).
[11] For an overview of different conceptions of public rights, see Thomas W. Merrill, Private Property and Public Rights, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Kenneth Ayotte and Henry E. Smith. Eds. 2011) (forthcoming).

When the cases speak of an interference with a right common to the general public, what they mean is that the offending condition is what we might call, borrowing an economic concept, a "public bad." That is to say, the condition produces undesirable effects that are no excludable and nonrivalrous. The undesirable effect, given existing technology, cannot be limited to particular members of the community or particular parcels of property it is nonexcludable.

And the undesirable effect does not dissipate as it spreads it is nonrivalrous. As the Rhode Island Supreme Court observed in concluding that the presence of lead based paint in private homes should not be regarded as a public nuisance, "a public right is the right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights of way.'"[12]

In sharp contrast, the typical tort is a "private bad." It affects particular members of the community or particular parcels or items of property, but not others. And the typical tort has effects that

[12] State v. Lead Industries Assn., 951 A2d 428, 448 (R.I. 2008) (citations omitted).

diminish with distance from the point of original application of the wrongful conduct. This is often reflected in ideas about proximate or intervening cause. If the injury is too "remote" from the defendant's conduct, then it is not deemed to be tortuous.[13]Here, it is worth pausing to emphasize the distinction between a public and a private nuisance. A public nuisance is an injury to the entire community. A private nuisance which is clearly a tort is an injury to the use and enjoyment of particular land. [14]Thus, public nuisance protects public rights, whereas private nuisance protects private rights. Insofar as the gas diminishes the use and enjoyment of particular tracts of land, it is actionable as a private nuisance. Insofar as the gas makes it impossible to use public roads, parks or buildings, it is a public

[13] RESTATEMENT (SECOND) OF TORTS § 431 (1965) ("The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."); RESTATEMENT (THIRD) OF TORTS § 29 (Proposed Final Draft No. 1, 2005) ("An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.").

[14] RESTATEMENT (SECOND) OF TORTS § 822 (1979) (limiting private nuisance action to one who has an "interest in the private use and enjoyment of land").

nuisance, because it has interfered with rights common to the entire community.[15]

The classic example of a public nuisance is what used to be called a purpresture blocking or obstructing a public road or navigable waterway.[16] The right to use a road or navigable stream has always been understood to be a public right, in the sense of a privilege enjoyed by all members of the community. The blockage is therefore an injury common to the general public. It does not matter whether the road or the waterway is actually used by everyone or indeed by anyone at all. The point is that it is available to all members of the community, and this open access feature provides a right common to all. We might say that a public highway or waterway has, at a minimum, an option value for all members of the public, and the interference with this option value is a public

[15] In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), Justices Holmes and Brandeis debated, among other things, whether a Pennsylvania statute designed to limit the risk of surface subsidence from mining coal was a public nuisance regulation. Justice Holmes said damage even to a large number of private houses would not be a public nuisance, because the damage would not be "common or public." Id. at 413. Justice Brandeis countered that the statute also protected against subsidence damage to public buildings, streets, and utility lines, which meant that it qualified as a form of public nuisance regulation. Id. at 421–422 (Brandeis, J., dissenting).

[16] Restatement (Second) of Torts § 821B. cmt. a.

bad, in the sense that the injury to the option value is no excludable and nonrivalrous.

Historically, there have been two exceptions to initiation of public nuisance actions by public authorities. The first exception, which is no longer of any significance, allowed private citizens to engage in self-help to abate a public nuisance in certain circumstances.[17] Suppose the defendant's wagon broke down in the highway, blocking traffic. If the defendant failed to remove the wagon, and public officials took no action, then a private citizen was privileged to use self-help to remove the wagon. There is evidence the privilege was available for only a limited period of time, after which presumably the public authorities would take action.[18] The privilege of self-help abatement, like other forms of offensive self-help, such

[17] The assize of nuisance (a precursor of private nuisance) permitted self-help abatement, Jeff L. Lewin, Compensated Injunctions and the Evolution of Nuisance Law, 71 IOWA L. REV. 775, 779 (1986), provided the victim of the nuisance acted immediately. William A. McRae Jr., The Development of Nuisance in the Early Common Law,
1 U. FLA. L. REV. 30, 33 (1948). Whether a similar rule applied in public nuisance actions brought in local sheriff's courts is unclear. Some American courts later assumed that self-help abatement was also available for public nuisances. See State v. Keller, 189 N.W. 374, 375 (Neb. 1922) ("At common law, either by official authority or when a person was acting in his individual capacity, there was the right to abate a public nuisance without a hearing and without a notice"); Gaskins v. People, 84 Colo. 582, 587 (1928) ("A private individual may abate a public nuisance without judicial proceedings if he has suffered special injury.").

[18] C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 9 (1949) (stating that the period of self help abatement was limited to four days).

as forcibly evicting a tenant in default, has effectively disappeared.[19] The growth of public enforcement resources, and the perception that public enforcement is less apt to be abused or to lead to violence, has eliminated recourse to offensive self help, either through legislative prohibition, judicial expressions of hostility, or both.[20]

The second exception has proved more durable. This was the understanding that not only public officials, but also private persons who suffer "special injury" an injury different in kind and not merely in degree from the public injury are entitled to prosecute public nuisance actions. This exception is widely recognized, and is enshrined, once again, in the Restatement of Torts.[21] But it rests on a classic confusion between standing to sue and cause of action. Just because one has standing to invoke the power of the courts, it does not follow that one has a cause of action. Eliminating the confusion

[19] Defensive self help, such as installing locks and burglar alarms to protect property, is of course widespread and uncontroversial.

[20] Courts have said self-help abatement is limited to situations of "urgent or extreme necessity"and only if the action will not breach the peace. Cook Industries v. Carlson, 334 F.Supp. 809, 815 (D.C.Miss.. 1971). Further, the actor "assumes all liability for exceeding the right." Id.

[21] Restatement (Second) of Torts § 821C(1).

would change the outcome of relatively few cases, and would bring the nature of the public nuisance action more clearly into focus.

1.9. Significance of the Research

The study may be of great benefit to Ugandan Judicial system in initiation of public nuisance actions by public authorities.

This research report will also benefit researchers, who will use it for reference purposes in future studies.

The study will help policy makers, both in the respective government departments and/or parastatals do a better job by making them realize and/or understand some of the best strategies and directives to employ in their job of policy-making.

CHAPTER TWO

Historical overview of public nuisance

2.1 Definition of Public Nuisance

Historically, a public nuisance, defined as "the doing or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public,"' [22] has encompassed such actions as the blocking of a public highway. As Prosser noted, at common law a public nuisance "was always a crime, and punishable as such," even where tort liability arose. [23] Indeed, until 1536, private actions for public nuisance were disallowed on the grounds that "only the king and certainly no common person" could have a remedy because of a crime. [24] That year, however, a divided court allowed a private tort action for a public nuisance in a case where the defendant blocked the King's highway and impeded the plaintiff's access "to his close."' [25]In the court's language, "where one man has greater hurt or

[22] Commonwealth v. South Covington Ry., 181 Ky. 459, 205 S.W. 581 (1918).
[23] Prosser, supra note 1, at 997-99.
[24] Ibid
[25] Ibid

inconvenience than any other man had,... then he who had more displeasure or hurt, etc., can have an action to recover his damages that he had by reason of this special hurt."8 Under this rule, a private plaintiff could bring an action for public nuisance only if the plaintiff could show particular, personal damage not shared in common with the rest of the public.

[26]Prosser concluded that the courts adopted this "special injury" rule for several reasons. First, even after the rights of the English crown passed to the general public, the notion remained that private persons should not be allowed to vindicate rights historically in the province of the sovereign.' Second, courts sought to protect defendants from harassment and at the same time to limit the number of complaints about public matters from a multitude of persons claiming injury." Finally, the courts refused to be burdened with claims for what they perceived to be trivial or theoretical damages.

[26] Ibid

2.2 Origin of Public Nuisance

Public nuisance originated in English law during the 12th century as a tort-based crime called „tort against the land" and was used to protect the Crown against infringements. A public nuisance was primarily a criminal wrong, but it was later developed to accommodate plaintiffs with monetary compensation. Plaintiffs had to prove special or particular damage, as was decided in Sowthall v Dagger.[27] This remedy was a tort and known as the „special injury rule."[28] At the time the term When reference is made to Roman-Dutch common law it will be written in the lower case, while if reference is made to English Common Law, the letters will be capitalized.

Public nuisance, as a criminal wrong, was applied in the case of purprestures, a French term denoting an enclosure. Purprestures

[27] [1536] YB 27 Hen 8f 27 pl 10. In the case the defendant obstructed the King"s highway, which prevented the plaintiff from reaching his close. The plaintiff then sued for the damages. Baldwin J refused to allow the action on the basis that the damage suffered by the plaintiff could not have been a common nuisance to all Her Majesty"s subjects. However, Fitzherbert J dissented and was of the opinion that when a plaintiff can prove special or greater damage other than the damage to the public at large, he had a valid cause of action to claim compensation.
See Milton JRL The concept of nuisance in English law (1978) 145.

[28] There were many plaintiffs who successfully relied on the „special injury rule" after the dissenting judgement of Fitzherbert J. Examples include: Maynell v Saltmarsh [1664] 1 Keb 847; Hart v Basset „public nuisance" did not exist, nor did it have any legal meaning.

were interferences such as unlawful obstruction of highways, rivers and encroachments which caused injury or an unreasonable inconvenience upon royal lands. This suggests that a differentiating factor is that the effects of public nuisance are felt on public land or in public spaces, not primarily or just on private land. The court of the sheriff's tourn was a criminal court that prosecuted perpetrators accused of intruding on royal domain. The sheriff's duty was to represent the King and ultimately preserve public peace and order.[29] During the reign of King Edward III in the 14th century the notion of public nuisance was extended to the public through the protection of individual rights to use public property, such as having a safe passage on public roads[30] and the abatement of noise and smoke in a market. Again, it can be said that public nuisance only applied on public land or in public spaces.

[29] Milton JRL The concept of nuisance in English law (1978) 21.
[30] Schwartz VE & Goldberg P „The law of public nuisance: Maintaining rational boundaries on a rational tort" (2006) 45 Washburn Law Journal 541-583 541.

2.2 Early forms of public nuisances

In the early 15th century the court's leet succeeded the court of the sheriff's tourn and continued prosecuting those accused of unreasonably interfering on the King's land.[31] However, apart from the abovementioned nuisances, the court leet developed separate distinct nuisances (especially nuisances affecting the public health) such as dung heaps, refuse, ashes and soil.[32] These nuisances were different from those prosecuted in the court of the sheriff's tourn, namely encroachment on walls, gates and hedges on royal domain. More forms of nuisances, such as domestic waste (such as urine) flung from windows, or butchers disposing of feathers, horns and offal in streets, that were previously unknown were prosecuted and classified as common nuisances.[33] The introduction of these nuisances shaped the development of public nuisance for the betterment of public health, morality and ultimately public welfare. The court defined these nuisances as ad commune

[31] Milton JRL The concept of nuisance in English law (1978) 75, 154.
[32] Milton JRL The concept of nuisance in English law (1978) 75.
[33] Milton JRL The concept of nuisance in English law (1978) 76.

nocumenta, meaning „common nuisance",[34] later to be known as „public nuisance', as it is known today.

The public could lodge a complaint of a public nuisance to the sheriff or later the Attorney-General, but nobody was allowed to institute proceedings for the abatement of a public nuisance on their own. The idea was that a common nuisance was a complaint by the King brought on behalf of the public.[35]

In the beginning of the 18th century Hawkins published the first comprehensive book on criminal law entitled Pleas of the Crown. More importantly, Hawkins recognised the idea that common or public nuisance existed in terms of the Common Law. Hawkins defined a common nuisance as follows: „a common nuisance may be defined to be an offence against the public, either by doing a thing

[34] Spencer JR „Public nuisance – A critical examination" (1989) 48 Cambridge Law Review 55-84 60.
[35] Spencer JR „Public nuisance – A critical examination" (1989) 48 Cambridge Law Review 55-84 83.

which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires."[36]

Bacon, in his book entitled New abridgement of the law (1736-1766),[37] gave a more detailed list of offences prosecuted under the heading of common nuisance. These included gaming and bawdy houses, all common stages for rope-dancers, obstruction of a highway (by ditches, hedges, gates, logs), diverting navigable rivers, and setting up of brew houses, glass-houses, chandler's shops and swine sties in areas where these places would cause an inconvenience to the public.[38] This illustrate that public nuisance affected any person subject to contact with an unreasonable interference originating from a public space or public land. In Blackstone's Commentaries (1765)[39] he added another nuisance to Bacon's list, namely that of offensive trades and manufacturers

[36] Hawkins W Pleas of the crown (1st ed 1716) Book 1, Chapter LXXV, Sect 1. However, according to Milton, Hawkins"s definition of a common nuisance is too wide and vague as it includes many other offences that should not be regarded as a common nuisance. See Milton JRL The concept of nuisance in English law (1978) 157.
[37] Bacon M A new abridgement of the law (3rd ed 1768).
[38] Milton JRL The concept of nuisance in English law (1978) 158. See further Holdsworth WS A history of English law (1903-1966) 169.
[39] Blackstone W Commentaries on the laws of England (20th ed 1841) 187.

that are detrimental to the public. An example would be R v Pierce,[40] where the defendant, who owned a soap boilery, constituted a nuisance while exercising his trade[41].

At this point the interchangeable use of the words „common" and „public" nuisance has to be clarified. During the 18th and 19th centuries the notions of common and public nuisance were used interchangeably. It was later established that both terms had the same meaning. According to Spencer, „when the word "common" began to mean "ordinary", rather than "of the community", they were usually called public nuisances instead."[42]

All the above-mentioned nuisances were petty crimes that caused an unreasonable interference with the public health, safety and welfare of the community at large.[43] According to Milton, the judges in the 18th and 19th century introduced new forms of common or public nuisances, discussed under the following heading, by

[40] Another example can be found in R v Pappineau [1762] 2 Str 678, where the defendant was found guilty of a public nuisance „in that he kept stinking hides near a public highway." See Milton JRL The concept of nuisance in the English law (1978) 163.
[41] [1683] 2 Show 327.
[42] Spencer JR „Public nuisance – A critical examination" (1989) 48 Cambridge Law Review 55-84 58.
[43] Milton JRL The concept of nuisance in English law (1978) 60.

expressing more sophisticated public interests[44] derived from the idea of obstruction or annoyance of a public highway. The significant case law during the 18th and 19th centuries introduced two important forms of nuisances, namely smells or odours and noise.

Since the reception of the common law remedy of public nuisance into South African law during the late 19th century, it has been applied in what can be categorised as three series of cases: the first series dating from the late 19th century to 1943 (Queenstown Municipality v Wiehan 1943 (EDL) 134); the second series consisting of only one case in 1975 (Von Moltke v Costa Aroesa (Pty) Ltd 1975 (1) SA 255 (C) (the Von Moltke case)); and a third series between 1989 and 2001 (in East London Western Districts Farmers' Association v Minister of Education and Development Aid 1989 (2) SA 63 (A) (East London case) the application for an interdict to abate a public nuisance as a result of an informal settlement was

[44] Milton JRL The concept of nuisance in English law (1978) 165.

granted; Diepsloot Residents and Landowners Association and Another v Administrator Transvaal 1993 (1) SA 577 (T); Diepsloot Residents and Landowners Association and Another v Administrator Transvaal 1993 (3) SA 49 (T); Diepsloot Residents and Landowners Association and Another v Administrator Transvaal 1994 (3) SA 336 (A)). In the Diepsloot trilogy, an application for an interdict preventing the establishment of the formal settlement was denied after the court considered policy considerations; in Rademeyer and Others v Western Districts Councils and Others 1998 (3) SA 1011 (SE), the application for an interdict to prevent the establishment of an informal settlement was denied because the occupiers of the informal settlement were protected as "occupiers" under the Extension of Security of Tenure Act 62 of 1997[45]. In Three Rivers Ratepayers Association and Others v Northern Metropolitan 2000 (4) SA 377 (W) (Three Rivers case)[46], an application for an interdict was granted after the local authority

[45] Van der Walt, A. J. (2005). The state's duty to protect property owners v the state's duty to provide housing: thoughts on the Modderklip case. South African Journal on Human Rights, 21(1), 144-161.
[46] Samuels, A. (2015). Note on the use of the public nuisance doctrine in 21st century South African law. De Jure, 48(1), 183-194.

could not prove that it had taken reasonable steps to prevent a possible public nuisance caused by an informal settlement being established in the vicinity of the properties owned by the members of the Three Rivers Ratepayers Association.

Statutory nuisance systematically replaced the common law notion of public nuisance in South African law, as it did in English law[47]. Because of the implementation of statutory measures that regulate unreasonable interferences affecting the public at large, there was less need for the application of the common law. The implementation of statutory nuisance employed to curb and regulate public nuisance with great success ultimately resulted in a decline in the use of the common law notion of public nuisance in disputes[48].

For the reasons set out above there is a great deal of doubt regarding the legitimacy of applying public nuisance principles in

[47] Chanock, M. (2001). The making of South African legal culture 1902-1936: Fear, favour and prejudice. Cambridge University Press.
[48] Harper, B. P. (2005). Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns. Ga. L. Rev., 40, 661.

South African law. However, from 2009 to 2011 three cases were decided with reference to public nuisance, namely Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others 2010 5 SA 367 (WCC) (Intercape case); 410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others 2010 (8) BCLR 785 (Voortrekker case); and Growth point Properties Ltd v SA Commercial Catering and Allied Workers Union 2011 (1) BCLR 81 (KZD) (Growth point Properties case), which suggests the presence of genuine public nuisance disputes. By genuine public nuisance disputes, I refer to nuisance that affected the public at large and emanated on public land such as, for instance, a street[49]. The aim of the case note is to analyse these three cases and determine whether the notion of public nuisance has a legitimate purpose in 21st century South African law (the Intercape and

[49] Rosen, C. M. (2003). 'Knowing'industrial pollution: Nuisance law and the power of tradition in a time of rapid economic change, 1840-1864. Environmental History, 8(4), 565-597.

Voortrekker cases will hereafter be referred to as the fourth series of cases).[50]

To establish the existence of a public nuisance in the cases Intercape, Voortrekker and Growthpoint Properties, the logical point of departure would be to analyse the facts[51]. Paramount to this investigation are two requirements inherently connected with the presence of a public nuisance. These characteristics normally associated with public nuisance are: a) the health or wellbeing of the general public would be affected; and, importantly, b) the nuisance must have originated on public as opposed to private land or space (see the definition of a public nuisance in Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) LAWSA 19 (2006) 115-145 par 163). The Voortrekker case is a direct consequence of the judgment in Intercape and the facts of these two cases are therefore similar. However, Growthpoint Properties is a peculiar nuisance dispute.

[50] Samuels, A. (2015). Note on the use of the public nuisance doctrine in 21st century South African law. De Jure, 48(1), 183-194.
[51] Ibid

Nuisance in the 20th century

Milton's dissertation found the use of the Common Law notion of public nuisance in English law to be declining in the 20th century[52]. The regulatory framework, known as statutory nuisance, substituted the Common Law notion of public nuisance. Milton is of the opinion that the implementation of more statutory nuisances[53], now regulating public health and safety in England, is the primary reason for the decline in the use of the Common Law notion of public nuisance.

[52] McLaren, J. P. (1983). Nuisance law and the industrial revolution—some lessons from social history. Oxford Journal of legal studies, 3(2), 155-221.

[53] Bowman, K. M., & Rose, M. (1952). A CRITICISM OF CURRENT USAGE OF THE TERM" SEXUAL PSYCHOPATH". American Journal of Psychiatry, 109(3), 177-182.

CHAPTER THREE

The resentments that makes Public Nuisance a Tort

The idea that public nuisance is a form of tort liability is today regarded as self-evident. It is repeated by courts and commentators without qualification. It forms the basis for the claim that courts have inherent authority to adjudicate claims for injunctive relief and even damages arising out of phenomena like tobacco smoking, gun ownership, led paint residue, MTBE contamination, and global warming. Yet, the understanding that public nuisance is a form of tort liability is of relatively recent origin. It is a product of the Restatement (Second) of Torts,[54] the relevant provisions of which were approved by the American Law Institute in 1971 and published in 1977.

The first Restatement of Torts appeared between 1934 and 1939. Volume four, published in 1939, featured a chapter on private nuisance, but did not include any black letter provisions on public nuisance. The "Introduction" to the private nuisance chapter explained that public nuisance was not included because public nuisance is "an offense against the State," unlike private nuisance, which is a tort.[55]

[54] Antolini supra note 58, at 819-28; Gifford, supra note 29 at 806-09.

Thus, as recently as 1939 it was assumed that public nuisance was a type of liability that fell outside the scope of a comprehensive restatement of principles of tort law.

When the ALI decided to revise the Restatement of Torts in the 1950s, it appointed William L. Prosser, Professor of Law at Berkeley, as reporter. Prosser was at the time generally regarded as America's foremost expert on torts. He was also practically the only living expert on public nuisance, having written two articles that touch on aspects of the subject.[56]Prosser was determined to add public nuisance to the Restatement of Torts. His reasons for doing so aside from his personal interest in the topic were not convincingly explained. Prosser told the ALI members that the nuisance chapter in the first Restatement had been initially assigned to the Restatement of Property. When it was decided to move it to the Restatement of Torts, the drafting group was composed almost entirely of property scholars who, Prosser claimed, had "no interest in public nuisance."[57]

In other words, Prosser's published explanation was that public nuisance had been omitted from the first Restatement due to an accident of authorial assignments.

[56] William L. Prosser, Nuisance Without Fault, 20 TEX. L. REV. 399, 411–14 (1942).
[57] American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 15 at 6 (April 15, 1969).

Prosser's explanation does not jibe with what was said in the first Restatement: the authors of the first Restatement said public nuisance was omitted because it is not a tort. Moreover, his explanation is implausible on its face. Public nuisance liability nearly always attaches to owners of land. A group of property scholars sufficiently engaged to write an entire chapter on private nuisance would surely have an interest in and appreciation of public nuisance as a restriction on the discretion of land owners. Prosser's statement was equivalent to saying a drafting group of property scholars omitted zoning from the Restatement of Torts because they had "no interest in zoning." The mystery deepens given that Prosser insisted to his dying day that public nuisance is always a crime. In his published explanations to the members of the ALI Prosser never offered a reason why, if public nuisance is always a crime, it was imperative to include it in the Restatement of Torts.

My guess, which is necessarily speculative, is that Prosser believed it was appropriate to include public nuisance in a volume on torts because of the "special injury" exception that appeared to allow private persons to seek damages based the defendant's commission of a public nuisance. Prosser likely regarded public nuisance in its typical incarnation as a form of criminal liability. But when private parties who suffered special injury were allowed to sue for damages,

public nuisance was transformed into a tort.[58]As such, it belonged in the Restatement of Torts.

If one takes the special injury cases at face value, as Prosser clearly did (but, for reasons previously given, I do not), this was an understandable position to take. Once Prosser decided to include public nuisance in the Restatement, he faced a serious expositional problem. Most public nuisance cases, as we have seen, proceed on the basis of a very un-tortlike analysis. They are essentially a form of strict liability based on the maintenance of a condition deemed to be inimical to the public interest, such as blocking a highway or storing a large amount of gunpowder in a city. There was little differentiation in the cases been intentional and unintentional actions, little discussion of whether liability was always strict or sometimes based on reckless or negligent conduct, no suggestion that injury or causation had to be proven, no discussion of possible defenses. Given the dearth of authority addressing these issues, how was Prosser going to recast public nuisance into something that looked like a tort?

The strategy Prosser devised for overcoming this problem was clever.[59] He did not draft a series of sections, stipulating for public nuisance what is required in terms of act, duty, standard of care,

[58] Presentation of Restatement of Law, Second, Torts, Tentative Draft No. 16, A.L.I. Proc. 297 (remarks of William Prosser).
[59] The strategy is foreshadowed in Prosser's 1966 article on public nuisance. See Prosser, supra note 30 at 1002-04.

injury, causation, and defenses. This would have required citing authority for a variety of legal elements when such authority did not exist. Instead, he inserted a new comment, "comment a.," in front of each section of the Restatement setting forth the elements of the action for private nuisance, as these elements had been set forth by the 1939 Restatement. These comments indicated whether or to what extent each element for private nuisance should also be deemed to apply to public nuisance. For some elements, "comment a." made the equation complete. Thus, liability for public nuisance, like private nuisance, was said to require proof of "significant" harm[60]. And liability for public nuisance, again like private nuisance, required that the defendant perform an act or fail to perform an act the defendant had a duty to perform.[61]

More often, however, the equation of public and private nuisance was hedged somewhat, employing the formulation that a particular requirement of private nuisance law "may, and commonly does, apply to conduct that results in a public nuisance." Through constant repetition of this phrase in a long string of "comment as," Prosser engrafted onto public nuisance the notion that the defendant must perform an "intentional and unreasonable" act or an act that is

[60] Restatement (Second) of Torts § 821F comment a. Prosser's original draft used the word "substantial" rather than "significant." See American Law Institute, Restatement (Second) of Torts, Tentative Draft. No. 15 at 58 (April 15, 1969).

[61]

"unintentional and otherwise actionable under the principle controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities;"84 the idea that whether an interference is unreasonable should be determined primarily by a "weighing of the gravity of the harm against the utility of the conduct;"85 and so forth. In the end, public nuisance was transformed into an action that looked more or less exactly like another tort private nuisance.

Prosser's explanation to the ALI for why the elements of public nuisance liability were virtually indistinguishable from those for private nuisance liability was quite remarkable. Prosser had written in his draft "Introduction" to the revised nuisance chapter that public and private nuisance have "little or nothing" in common; that they "describe two quite different things;[62]" and that they are linked by nothing more than the "historical accident" that the same word applies to each[63]. Yet, he immediately added that "the use of the word 'nuisance' to apply to both has...resulted in the development of rules that, with minor differences, are the same for the two."

In other words, Prosser claimed courts had been fooled by the common use of the word "nuisance" into treating two forms of liability, which have "little or nothing" in common, as if they were

[62] Gifford, D. G. (2002). Public Nuisance as a Mas Products Liability Tort. U. Cin. L. Rev., 71, 741.
[63] Kopytoff, I. (1986). The cultural biography of things: commoditization as process. The social life of things: Commodities in cultural perspective, 68, 70-73.

the same. The unstated implication was that since courts had been fooled, the Restatement, being ever faithful to settled authority, would dutifully follow suit.

Although Prosser's "comment a." strategy laid the groundwork for turning public nuisance into a tort, the transformation was of limited significance given that Prosser's draft also imposed an important restriction on the potential scope of public nuisance liability: conduct charged as a public nuisance had to be a crime. Prosser's draft presented for consideration by the American Law Institute offered the following succinct definition of public nuisance:

A public nuisance is a criminal interference with a right common to all members of the public.[64]Prosser's explanatory note acknowledged that"[s]everal members of the Council have challenged the proposition that a public nuisance is always a crime. After rather intensive search, the Reporter sticks to his guns."89 There followed an impressive collection of authorities, including eight English and American commentaries and nine American judicial decisions (which Prosser said were representative of many more), all of which equated public nuisance with criminal liability. Prosser added that he had failed to "uncover a single case in which it was held that there was a public nuisance although there was not a

[64] Zasloff, J. (2007). The judicial carbon tax: Reconstructing public nuisance and climate change. UCLA L. Rev., 55, 1827.

crime," although he added there was one case in which the criminal character of the conduct was not mentioned and another case where the defendant, a municipal corporation, was immune from criminal prosecution.

In sharp contrast to his "comment a." strategy of assimilation, for which he cited no authority, the limitation of public nuisance liability to conduct that was criminal was backed by a massive show of doctrinal support.

Prosser's draft of the new provisions pertaining to public nuisance was scheduled to be taken up by the Institute at its plenary session in May of 1969. Other matters consumed too much time, however, and the discussion was postponed for a year. This proved to be fateful[65].

The plenary session of 1970 occurred immediately after the first "Earth Day" on April 22, 1970, at a time when the news media was full of fervent entreaties to save the planet. Although Prosser assumed that his effort to add public nuisance to the Restatement of Torts would secure routine approval, he was blindsided by a revolt from the floor.

[65] Rustad, M. L., & Koenig, T. H. (2011). Reforming Public Interest Tort Law to Redress Public Health Epidemics. J. Health Care L. & Pol'y, 14, 331.

The objections came from two sides. One group, led by Charles A. Bane of Illinois, argued that recent statutory developments designed to protect the environment counseled in favor of[66] "removing entirely from the concept of nuisance those activities that are subject to regulation." Another group, led by John P. Frank of Arizona, argued that the proposed language, especially the description of public nuisance as a "criminal interference" with public rights, failed to offer sufficient support to the nascent environmental movement[67].

As Frank stated: What is happening at the moment all over America is that the people are asking to deal with pollution of air and of water and land, that in this connection a developing body of law is beginning to formulate which is breaking the grounds of traditional public nuisance. What is happening is that we are clamping a ceiling down, and by this restatement of public nuisance we are making it impossible to use the courts for the most important single social function which at this moment law in its civil reach ought to have....

Pollution may be crime against God and nature, but it is not usually a crime against the laws of the state, so that by putting in that definition we make it impossible to reach the problem of the black cloud of filth which hangs over my community and, I suspect, yours.

[66] Katzmann, R. A. (2010). Courts and congress. Brookings Institution Press.
[67] Gifford, D. G. (2002). Public Nuisance as a Mas Products Liability Tort. U. Cin. L. Rev., 71, 741.

Frank also objected to the proposed draft's language limiting private actions for public nuisance to individuals who have suffered an injury "different in kind" from other members of the public. Frank said this was out of step with "modern" developments regarding standing to sue.

The Frank's passion won the day; at least, his group proved to have more votes than Bane's group. After a heated debate, in which Prosser's defense of the draft as a faithful restatement of the weight of authority was parried by earnest calls for the Institute to go on record in support of the emergent environmental movement, a motion was passed recommitting the provisions on public nuisance to the reporter for further consideration.

The reference to conduct considered a crime at common law was quietly dropped, and was replaced by the sweeping proclamation that liability would lie when "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience." This was surely broad enough to give courts inherent authority to condemn any form of environmental degradation as a public nuisance or any other social ill for that matter. Authority to condemn activity as a public nuisance was severed from any link to history or legislative

proscription, and given over to courts based on their independent analysis of the needs of the public.

The question of identifying the proper enforcement agent followed a similar pattern. After setting forth provisions allowing public officials or persons who have suffered special injury to seek injunctions, Wade added a new provision stating that a private citizen could also seek injunctive relief provided she had "standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."

CHAPTER FOUR
PRESENTATION OF FINDINGS

This Chapter presents the finding about arguments for public nuisance law in Uganda.

A public nuisance is an unreasonable interference with the public's right to property. It includes conduct that interferes with public health, safety, peace or convenience. The unreasonableness may be evidenced by statute or by the nature of the act, including how long and how bad the effects of the activity may be. In Gillingham Borough council vs Medway (Chatham) Dock Co Ltd & Others (1991) Buckley J stated that public nuisance is primarily concerned with the effect of the act complained of (as opposed to its inherent lawfulness or unlawfulness) to the sufficient number of the public. No civil action can be brought by a private individual for public nuisance. The reason normally given is that it prevents multiplicity of actions. The Attorney General may bring an action for an injunction ('relator action'). However, where any person is injured in some way peculiar to himself i.e if he can show that he has suffered some special or particular loss over and above the ordinary

inconvenience or annoyance suffered by the public at large, then he may sue in tort For the distinction between public and private nuisance see, · Arima Nantongo & Others vs Hiral Mohammed [1974] E.A 557; [1975] HCB 21 · Arima Nantongo & Anor vs Hiral Mohammed [1974] HCB 181 · Tindarwesire vs Kabale Town Council [1980] HCB 33 · Kitamirike vs Mutagubya [1965] EA 401 · Gillingham Borough Council vs Medway Dock Co Ltd [1992]3 ALLER 923 And those already cited on your reading list

In the case of late Former Mp Arua municipality VS Uganda.

The City Hall Magistrates court fined Arua Municipality Member of Parliament Ibrahim Abiriga Shs 40.000 for urinating in public, On September 28 the Kampala City Council Authority (KCCA) prosecution team charged Abiriga with being a public nuisance, after he publicly admitted to easing himself on the fence of the Ministry of Finance headquarters along Nile Avenue in Kampala, A day later, photos had circulated on social media platforms showing the legislator yellow Volkswagen Settle parked by the roadside next

to the perimeter waLLwh le he stood in a posture akin to someone urinating, The NRM legislator who is prominent for dressing in yellow, the NRM party color appeared before Grade One magistrate Beatrice Kainza at City Hall Court in Kampala, and pleaded guilty to the offence. the KCCA Prosecutor, Iradukunda Elijah asked court to grant Abiriga four months'jail term as the penalty for his offense stipulates However, his lawyer. Usama Ssebuwufu argued that MP Abiriga was forced to ease hoim self in open due to health related conditions.

Uganda v Nabakoza & Ors[68] This revision relates to the order of the Chief Magistrates court dated 7/7/2004. That order was made following the arrest on 6/7/2004 and prosecution of ten persons six of whom were women. All of them were in their twenties or so. They were arrested at Abayita Babiri on the Entebbe Kampala Highway on the very day when the COMESA summit delegates were also making their entry into the Capital City. The ten were then taken to

[68] CRIMINAL REVISION NO. 8 2004) [2004] UGHCCRD 4 (7 September 2004);

court the following day and at once charged with being idle and disorderly C/S 167 (d) of the Penal Code Act. They all pleaded guilty to the charge and were accordingly convicted and sentenced to three months imprisonment each with no option of a fine.

According to constitution of Uganda [69]Publicly conducts himself or herself in a manner likely to cause a breach of the peace; shall be deemed an idle and disorderly person and is liable on conviction to imprisonment for three months or to a fine not exceeding three thousand shillings.

The common law of public nuisance has evolved for dealing with public bads. When an agent imposes a cost, similar in amount and kind, on a group of individuals, then the harmed group can call upon a public defender to bring a public nuisance action against the agent. If a copper smelter discharges corrosive fumes that fall systematically on homeowners in the mining village, then any one of the homeowners can call on the attorney general or prosecutor to

[69] Article 26 of the constitution of Uganda

bring suit against the smelter. Alternately, if the emissions affect particular homeowners in demonstrably different ways, then those homeowners may have a cause of action for either private or public nuisance, or perhaps both, against the offending business. Just as economic theory ushers in collective decision-making and government action when dealing with public bads, common law taps the shoulder of the public attorney, who is paid with tax money.

Arguments for public nuisance law in Uganda.

Emergency

One possible argument for retaining inherent judicial authority to protect the general public is that this might be useful in the event of an unanticipated emergency, for which no legislative or administrative response has been provided. In re Debs168 presents a possible illustration. The case arose out of the Pullman strike of 1894, when workers sought to block the movement of trains with Pullman cars in and out of Chicago.169 Rolling stock was destroyed, tracks torn up, and a general atmosphere of mob violence prevailed.

Federal troops were called in to restore order. In addition, the U.S. Attorney General sought and obtained an injunction against the leaders of the strike, including Eugene V. Debs, a future Socialist Party candidate for President. When Debs and others were held in contempt for violating the injunction, they challenged the authority of the federal court to issue the injunction.

The Supreme Court, speaking through Justice Brewer, sustained the contempt conviction. He analogized the matter to the obstruction of a highway, which he noted could be enjoined as a public nuisance.Just as the United States has plenary authority over navigable waterways, and could seek to enjoin an obstruction of such a waterway, so it has plenary authority over interstate highways by rail, and could seek to enjoin the obstruction of interstate commerce by rail. The defendants argued that an injunction was unnecessary, because the executive had sufficient authority to respond to the emergency with force. But Justice Brewer observed that it was possible the strikers would respond

more willingly to a court order, thereby avoiding bloodshed and further destruction of property.

In effect, the injunction was upheld as an effort to abate a public nuisance that was subject to exclusive federal jurisdiction, and the superior efficacy of a court order relative to force was cited as one reason in support of recognizing such authority.

Necessity

Another argument for retaining inherent judicial authority to define public nuisances is that there may be circumstances in which there is no other source of authority to resolve the dispute in a satisfactory way. Transboundary disputes between political jurisdictions provide a possible illustration. Suppose State A is blocking a navigable river that State B uses to gain access to the wider world, or State A is polluting the air to the injury to citizens of State B. It would be undesirable to have the courts of State A resolve the dispute using the law of State A, or to have the courts of State B resolve the disputes using the law of State B, because neither State

could be trusted to do so in a way that would be fair and impartial toward the other.

Indeed, either State A or State B might jigger the rules in order to determine the outcome. In these circumstances, it is generally thought to be desirable to have the dispute resolved by some higher level tribunal, such as the U.S. Supreme Court in a dispute between American States, or perhaps an international tribunal in a dispute between nation states. Nevertheless, if we turn to a higher level tribunal to decide the case, there may be no enacted law that can be called upon for a rule of decision, either because the tribunal is part of a government of limited powers, or the tribunal is part of no governmental authority at all. In these circumstances, the argument runs, higher level tribunal must draw upon its own authority to develop an appropriate rule.

The only alternative may be recourse to armed conflict, which is far more costly.

This argument, like the argument from emergency, has a dated quality. At one time the U.S. Supreme Court was required to develop federal common law rules of transboundary nuisance, water apportionment, and the like, in order to resolve disputes between States under its original jurisdiction. But these matters are increasingly covered by general statutory frameworks, interstate compacts, and specific congressional legislation addressing the source of the conflict, with the result that enacted law is much more likely to provide an appropriate rule of decision. The same is true at the international level, where today a plethora of bi-national and multi-national treaties are available to provide benchmarks for international adjudication.

Even if there is no enacted law on point, the critical requirement is an impartial tribunal, not national or international law. An impartial tribunal, through judicious resolution of choice of law issues, can usually find a way to resolve the dispute in a way that is perceived as being fair to all parties.

Finally, even if we acknowledge that there may be cases in which judicial articulation of a rule of decision is compelled by necessity, this does not justify the use of judge-made rules in cases where no such necessity exists. Recent public nuisance cases involving tobacco use, hand gun sales, lead paint, and MTBE cannot plausibly be said to be cases of necessity, in the sense that no political jurisdiction could fairly exercise authority over the issue. Global warming presents a different conundrum, but here the problem is that only a truly global tribunal could be said to be in a position to adjudicate the matter in a truly impartial fashion. No such tribunal exists that is likely to obtain jurisdiction over the necessary parties in the foreseeable future. What is needed is a diplomatic solution or, failing that, national action to mitigate expected harms from climate change.

The proponents of using public nuisance law to address social problems like tobacco use, handgun possession, lead paint, MTBE

contamination, and climate change do not claim that these are unforeseen emergencies. Nor do they argue that judicial resolution of these matters is compelled by necessity. The claim, rather, is that these problems represent chronic conditions that have failed to elicit a satisfactory response by political institutions.

Indeed, it is hard to find a partisan of the recent public nuisance campaigns who sincerely believes that courts are the best institution for addressing these problems. The argument in favor of public nuisance liability is instead expressed in terms of a perceived need to break a political stalemate that prevents action by conventional political institutions.

The idea is that high-profile litigation challenging tobacco, guns, lead paint, MTBE or CO2 emissions will serve as a catalyst inducing conventional political institutions to take the painful steps necessary to overcome these problems.

In some versions, the political stalemate argument relies upon a preference-shaping claim. Litigation will raise awareness of an

issue, change public perceptions, mobilize support among groups that have previously not been engaged with the issue, and all this will cause the political process to move in a new direction. The civil rights movement and the early environmental movement are cited as examples of this version of stalemate theory.

Recently, supporters of the use of public nuisance litigation to challenge global warming have made a different type of argument. This is the claim that the prospect of judicial regulation of greenhouse gases will be so frightening to political and industry leaders that it will induce them to embrace public regulation as a lesser evil.1 In other words, judicial control is such an obviously bad idea it will serve as the stimulus for a movement to adopt a better one.

In either version, the basic assumption of the political stalemate theory is a prediction about the future course of history. Today, position x enjoys only minority support, in the broad sense that it lacks sufficient political support to move conventional political

institutions grounded in periodic elections and interest group lobbying. Tomorrow, position x will command majority support, again in the broad sense of being a position that will be sustained by conventional political institutions. What is needed is some device or mechanism for hastening the day when tomorrow, in the form of majoritarian support for x, arrives.

There is of course nothing wrong with interest groups telling themselves some version of this story of historical inevitability. This is to be expected as part of their efforts to motivate their members. But as a premise for the design of institutions, and in particular for determining the allocation of authority to courts, it is deeply problematic.

For one thing, there is no basis at least none grounded in legal doctrine and reasoning by which judges can tell which claims of historical inevitability are sound and which are spurious. Consider a judge in 2004 confronted with earnest claims by municipal attorneys and their allies that greater regulation of the sale of

handguns would be a good idea. The judge is aware that the plaintiffs would not be in his courtroom if they could achieve the same result by going to the state legislature. But he thinks, "perhaps if I rule that handgun distribution is a public nuisance, and threaten to impose judicial limits on handgun sales, this will stimulate the legislature to get involved and pass a more effective regime of handgun regulation." So the judge declares handgun sales a public nuisance.

The next year, handgun manufacturers go to Congress and get a law passed that preempts any application of public nuisance law to handgun manufacturers. In other words, the ruling serves not to break a stalemate preventing a move to a future of gun regulation, but as a stimulus for backlash. And the backlash serves only to further entrench the status quo and the perception that the opponents of handgun regulation command overwhelming political support.

I am not claiming, of course, that backlash is the inevitable result of a campaign to use public nuisance law to achieve social reform. The point is that judges have no way of knowing the balance of political forces tomorrow or the next day, and hence have no basis for making rulings grounded in such predictions. If judges have no basis in law for assessing claims of political stalemate, then judges have no justification for rendering rulings grounded in arguments that public nuisance judgments will overcome such stalemates.

Another point is that litigation is not the only device for drawing attention to causes that enjoy minority support today but whose proponents earnestly believe will command majority support tomorrow. Indeed, litigation is a rather implausible candidate for this role. Litigation is slow, often dull, and frequently yields ambiguous results. Other devices for dramatizing issues include editorial writing, posting advertisements and flyers, circulating petitions, blogging, working for and against the election of candidates, holding demonstrations and rallies, and engaging in acts

of civil disobedience. Civil rights marches, mass demonstrations, and sit ins were probably more of a catalyst for the enactment of the civil rights laws of the 1960s than was the litigation activity of the NAACP Inc. Fund.

So it is difficult to make any claim that our legal system requires an open-ended "super tort" in order to provide a method by which interest groups can dramatize the need for or stimulate political action. Even if we posit that the mechanism by which public nuisance litigation will lead to climate change legislation is inducing fear about sub-optimal regulation, there are many other ways to engage in sub-optimal regulation such as enacting state and local climate change laws that will do little to address the problem and create high compliance costs for industry.

If litigation is not a necessary mechanism for facilitating social movements, there would seem to be little justification for assigning authority to judges in order to allow them to promote social movements. Far better to ask courts to do what they do best –

resolving disputes fairly and impartially in light of existing law and an honest assessment of historical facts.

CHAPTER FIVE

5.1 Conclusion

Public nuisance law is an atavism. Its traces its origins to the thirteen century, when English sheriffs held "court" overseeing a

variety of local problems, including road blockages, overgrazing the commons, and dumping animal wastes on the village square.

It evolved into a low level criminal charge, and then, after the passage of time, into an action allowing either criminal indictment or public injunctions. Still later, private citizens were allowed, in limited circumstances, to sue for damages for the same conditions that gave rise to public actions.

Public nuisance, which entails judicial enforcement, had been effectively displaced by the police power, which implies legislative and administrative action. Given accumulated ambiguities about what it means to call something a public nuisance, it was time to begin phasing this law out.

Instead, the American Law Institute, in adopting the Restatement (Second) of Torts, decided to remake public nuisance as a common law tort. The objective was to transform public nuisance, without any legislative authorization, into a weapon that could be wielded by judges to do battle on behalf of the environment.

These new public nuisance plaintiffs have cited the sweeping language of the Restatement as authority for obtaining far-reaching judicial mandates, including massive damage awards and settlements, designed to redress a variety of chronic social problems such as tobacco addiction, unauthorized hand gun sales, lead paint residue in older homes, MTBE contamination of ground water, and even global warming. With the notable exception of the Second Circuit, courts have generally been skeptical of these claims. The suits have been dismissed on a variety of grounds, including the nonpublic nature of the harms asserted, failure to establish causation, lack of standing, and the political question doctrine.

The more fundamental objection is that public nuisance never was, and ought not to be, regarded as a tort. It is a public action, and as such should be subject to the control and direction of the legislature. Given the confusion sown by the Restatement, existing statutory authority condemning activity as a "public nuisance" should be interpreted non-dynamically, as ratifying understandings of that

term when the law was enacted. For the future, legislatures should avoid speaking of public nuisances, and should instead spell out what is prohibited, the sanctions for violation, and which entities have authority to enforce the law.

5.2 Recommendations

Firstly, when faced with complaints of an alleged public nuisance, courts should: (a), distinguish between private and public nuisance in order to avoid using these two distinct species of nuisance interchangeably; (b) establish whether the alleged nuisances are in line with the definition of a public nuisance, namely to protect the

health and wellbeing of the community at large; and (c) establish whether the nuisance occurred only or mostly on private land, as opposed to public land or public space.

Secondly, the application of public nuisance should not be used as an indirect means to evict occupiers. The notion of public nuisance applied in this way is unconstitutional.52 However, according to van der Walt, „this does not mean that evictions based on a lack of compliance with planning laws or on public nuisance cannot or should not take place, but it does mean that such evictions have to be treated with great care and a healthy shot of scepticism and hesitance."

Furthermore, Van der Walt formulated a framework which courts should adopt before granting an eviction order.

Finally, as indicated in the fourth series, the notion of public nuisance can still serve a legitimate purpose in South African law.

In essence, the notion of public nuisance has a future in South African law if it is applied in the absence of statutory nuisance or any other legislation covering public nuisance offences and where it is not used as an alternative mechanism to evict occupiers. Furthermore, the courts should in future, when dealing with an alleged public nuisance, always distinguish between a private and public nuisance to avoid using the two distinct species of nuisance interchangeably.

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Courts have said self-help abatement is limited to situations of "urgent or extreme necessity"and only if the action will not breach the peace. Cook Industries v. Carlson, 334 F.Supp. 809, 815

(D.C.Miss., 1971). Further, the actor "assumes all liability for exceeding the right." Id.

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