

Punitive Damages for Corporations in China: Establishment and improvement

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Abstract. Punitive damages are remedies for non-specific subjects like communities without specific rights suffering from illegal behaviors. Having the functions of compensation, punishment, and prevention, punitive damages are the necessary solution to the inherent deficiencies in current remedy system in China that both civil and public remedies can hardly cover the losses of communities. However, punitive damages are misunderstood theoretically and practically in China. Traditional critics like caseload of courts, lack of procedural protections, ineffectiveness in punishment and deterrence, and overlapping in functions cannot deny the necessity of establishing punitive damages. Meanwhile, punitive damages in Chinese legal system cannot fit in with their functions, comparing with legal practice in the US. This issue is mainly the result of the inadequate application conditions, narrow scope of factors, and single distribution of damages, which are also the issues to be resolved when reconstructing the punitive damages system. Based on legal analysis of positive law and judicial practice in both America and China, this article attempts to justify the necessity of punitive damages as well as putting forward some approaches to the reconstruction of punitive damages in China.

Keywords: Punitive damages; Corporate Liability; Community Interest; Dual Remedy System.

1. Introduction

With the establishment of free market in China, Chinese corporations have been developing faster than ever before. However, along with the free development of corporations, it has also caused some negative externalities to the society and community like monopoly, product defects and environmental pollution, as a result of market failure. Therefore, corporations should be regulated so as to tackle with market failure and maintain the market order. Regulations can be various based on different legal areas, and punitive damages, as a special economic liability, are definitely a necessary approach to be considered when regulating corporate behaviors, which is the topic of this article.

Since the legislation of the *Law of Protection of the Rights and Interests of Consumers (1994)*, punitive damages have gained their institutional foundation of legal basis and abundant judicial cases. At present, punitive damages are prescribed in both civil and economic legislations in China, presupposing the difference between civil law and economic law. For one thing, in article 179 of the *Civil Code of the People's Republic of China (2020)* (hereafter, the Civil Code), punitive damages are listed as one of the basic forms of civil liabilities. Moreover, in article 1185, 1207, and 1232, the Civil Code imposed punitive damages on torts of intellectual property, product defects, and environmental pollution. [1] For another thing, punitive damages are also prescribed in economic legislation like article 55 in the *Law of Protection of the Rights and Interests of Consumers (2014)* (hereafter, the Consumer Protection Law) and article 148 in the *Food Safety Law of the People's Republic of China (2009)* (hereafter, the Food Safety Law), which mainly regulate economic relationships between social members and corporations. [2-3]

So far, research on punitive damages in China can be concluded into two aspects: the necessity of punitive damages and the nature of punitive damages. For the previous part, some scholars hold the view that it is unnecessary to accept punitive damages as legal liability, considering the current remedy system can compensate the victims and punish the wrongdoers. [4] On the contrary, some scholars argue that punitive damages are a necessary approach to regulate market order, safeguarding the interests of the consumers and other social members. [5] For the latter part, debates are mainly

about whether punitive damages are civil liability or not. On one hand, some scholars regard punitive damages as civil damages, since they are prescribed in the Civil Code and applied in civil procedure. [6] On the other hand, some scholars hold that punitive damages are separate liability from civil damages, covering the gap of remedies between tort law and criminal law. [7]

From the perspective of this article, punitive damages are a necessity for remedy system, and they are independent form of liability from civil damages, which would be further discussed in the following parts. This article would start with the clarification of punitive damages, dealing with its definition, function, and its difference from civil liabilities like compensative damages. Based on this clarification, the article will then analyze some critics on punitive damages as well as defending the necessity of punitive damages. Furthermore, comparison will be made on legal practice between the US and China, concluding the deficiency in Chinese punitive damages system. Eventually, this article will offer some possible suggestions reconstructing Chinese punitive damages system.

Before discussing punitive damages, it is beneficial to narrow down the scope of discussion. Firstly, corporations would be the only liable subject in this article, excluding partnership, sole proprietorship and so on. This is because only corporations are self-responsible for corporate liabilities with their independent legal personality in Chinese legal system.

What is more, it is property liability that would be discussed in this short article. Corporate liabilities can be diverse in forms, ranging from property, qualification to action. However, discussing all these forms would be unnecessary for this short article, given the importance of property liability. For one thing, property liability exists in all legal areas of corporate regulations. For another thing, it has the most minimal external impact on market entities. Property liability only reveals the hidden social cost of illegal behaviors rather than imposing direct prohibitions affecting the autonomous management of market entities. That is, it works in the market's way and better ensures the market order. Therefore, only property liability in China would be discussed, including punitive damages, compensative damages in civil law, fines in administrative law, and forfeit in criminal law.

2. Punitive Damages: Clarification

Since this article would focus on punitive damages, a definition is necessary before deeper discussion. Punitive damages are an independent economic liability rather than civil compensations or public fines, and they impose higher number of damages than actual losses to punish the wrongdoers. [8] In this part, this article would make some clarification on the causes of punitive damages, the inherent deficiencies in liability system. Meanwhile, the functions of punitive damages will also be discussed, including compensation, punishment, and prevention. Then, this article would reveal the logic of punitive damages that constructing the remedy system based on obligations and community interests.

2.1 Causes of Punitive Damages: Deficiencies in Liability System

Punitive damages discussed in this article are a special liability different from traditional civil or public liability, as a result of inherent deficiencies in current liability system. Current liability system is not effective enough to regulate corporate illegal behaviors to community interests. Civil compensations can never compensate the uncertain majorities' interests, and public remedies forget about victims and their compensations. This is the inherent deficiencies in dual remedy system. To provide adequate remedies to the communities, as well as improving the current corporate liability system, punitive damages are the necessary middle way to go between public and private remedies.

Firstly, guided by the principle of equality, civil law only regulates legal relationships between equal entities and focuses on specific right holders' losses, regardless of social interests. Once illegal corporate behaviors do harm to community interests only without affecting specific individuals' interests, civil law can provide no remedies.

Moreover, in accordance with the restriction on subjects, plaintiff qualification in the *Civil Procedure Law of the People's Republic of China (2021)* (hereafter, the Civil Procedure Law) is also

a major obstacle to compensate losses in community interests. Whoever want to institute a civil litigation must have a direct interest in the case, according to article 122. [9] Direct interest generally means specific right holders in specific civil legal relationships. [10] This controversial article keeps the community away from civil remedies, since community have no civil rights. For instance, fake propaganda could ruin the competition order within a specific industry, none of the competitors may start a tort litigation against the briber. Since they have no legally prescribed civil relationships with the propagandists, nor specific civil rights to fair competition. What is worse, the number of them is uncertain, everyone may have interests in the case, but not a direct one. In practice, the judge rules that, acknowledging their plaintiff qualification would overthrow the order of civil procedural law, destroy the enthusiasm of competitors, and lead to caseloads in courts. [11]

Secondly, while fines could be a remedy for community interests, they lack the legitimacy since they are imposed and evaluated by regulatory agencies through administrative procedures, rather than courts with due process. Rough administrative process results in the irrational numbers of fines in practice, given that current legislations of fines are not well-developed and the governments tend to abuse their power. [12] Moreover, the punished ones are still entitled to institute an administrative litigation against the government, according to article 25 of the *Administrative Litigation Law of the People's Republic of China (2017)* (hereafter, the Administrative Procedure Law). When the numbers are irrational, they can be directly revised by courts. This is paradoxical that, while administrative procedural sacrifice due process for efficiency, the rough procedure leads to irrational fines and increasingly litigations, which would be a waste of efficiency and judicial resources.

Thirdly, even though forfeits could be a more legitimate remedies to public and community interest, as penalties, they are restricted by the principle of legality. Under this doctrine, forfeits can only be applied when the illegal behavior meet the conditions prescribed in the criminal law. What is more, there should be a relatively certain range for forfeit in order to secure the foreseeability of the criminals. [14] In a word, forfeits are restricted to a narrow scope that they can only be applied to certain cases, in limited numbers.

In addition, while forfeits are made by judges, the scope of discretion is also narrow for judges since criminal circumstance is the only factor to be considered in article 52, the *Criminal Law of the People's Republic of China (2020)* (hereafter, the Criminal Law). [15] This may lead to insufficient forfeits. Although criminal circumstance can be interpreted into a loose concept including the subjective bad faith of the criminal and the objective damage, it excludes other important factors related to prevention like the financial condition of the criminal. For instance, when the damages are uncertain and difficult to prove, forfeits may be too few to modern giant enterprises, and be counted as simply a cost rather than taken into serious consideration.

Lastly, fines and forfeits only focus on punishment and deterrence, and they offer indirect remedies to the victims by maintaining the market order, rather than providing compensations. In both legislation and practice, they are imposed by the government and all distributed to national treasury, rather than returning to the victims. [15-18] Victims are forgotten in public remedies.

2.2 Dual functions of Punitive damages

In fact, punitive damages have dual functions of both private and public remedies. For the private remedy aspect, they have compensative function. Part of the damages are distributed to the affected parties. For the public remedy aspect, they have punitive and prevention functions, for they not only recover the losses, but go further to impose a punishment as well as a deterrence. [19-20] The dual functions distinguish punitive damages from traditional civil and public liabilities. That is, while punitive damages also compensate the victims, they break the principle of recovering the loss by imposing way higher damages than actual losses. Traditional civil law only regulates equal entities, and there are no punishments between them. Under civil law theories, punitive damages could be an unjustified enrichment without ethical basis. [21]

What is more, the compensative aspect differs punitive damages from fines and forfeits in public legal area. Victims can get their compensations from punitive damages without specific legal

relationships or rights, so long as they are members of the affected community. It should be noted that, the damages given to victims in this case is different from compensative damages. For one thing, they are not as accurate as compensative damages since the actual losses can hardly be evaluated. Policy concerns and other objective factors can affect the damages numbers. For another thing, the victims in punitive damages are communities, not specific right holders. Therefore, the damages should not be totally distributed to specific persons, but special funds relating to the welfare of specific communities, which would be further discussed later.

2.3 Institutional Logic and Subjects of Punitive Damages

Dual functions are only superficial difference between punitive damages and other remedies, to better understand the independence of punitive damages, it is necessary to dig into its institutional logic. Generally, the logic of civil liabilities is simply granting rights to specific right holders, and provide remedies to specific victims whoever exercise their rights. [22] Compensative damages are typical cases, and there must be a specific right holder whose absolute rights are offended when imposing these liabilities.

However, this logic is insufficient since they limit the remedy to specific right holders. Basically, civil law only regulates relationships between equal individuals, groups and communities are not acknowledged as right holders in civil law. The only way to secure the interest of communities is protecting the interests of individuals, which is an indirect approach. However, this approach does not work sometimes in economic relationships like the ones among different competitors. In this case, corporate illegal behaviors can do harm to social interest within the industry, while adequate remedies are absent. Correspondingly, punitive damages are designed to provide direct remedy to communities. Their justification starts with imposing obligations relating to market order within a specific community. Once there is an illegal behavior breaching these obligations, we can suppose that they are essentially breaking the market order and harming the community interests. At this time, punitive damages can be imposed. It is under this logic that community is recognized as an independent legal subject having its own interests. Starting with imposing obligations, rather than granting rights, punitive damages are based on different logic from civil legislations and thus include community interests into the remedy system. In short, the difference in subject of interests lead to the different institutional logic between punitive damages and civil remedies like compensative damages.

3. Punitive Damages: Relationships with Other liabilities

As mentioned above, this article attempts to justified the necessity of punitive damages. With their functions and logic introduced, there are still two questions remain for this task. One is the independence of punitive damages from civil liabilities, and the other is the irreplaceability of punitive damages from administrative and criminal liabilities. These questions will be further discussed as follows.

Clarification should be made that, this article premises that punitive damages are essentially quasi-public remedies, as community interests are their main concern. Therefore, it is impossible and unnecessary to completely distinguished them from other public remedies, and to justify their necessity is to justify their irreplaceability.

3.1 Independent from Civil Liability: Community interests

To demonstrate the independence of punitive damages from civil liability, further clarification is necessary that community interests are different from individual and national interests. Principally, community interests are just the integration of individual interests and assertions of rights, thus their subjects are not very specific to be recognized. In other words, community interests are not rights per se, as a result of the right holders' absence. [23] For example, while the interests to free competition is clear, the subject of this right, the competitor community is uncertain when there is no monopoly

in an industry. It is not until some corporations made their way to dominant the market that the affected parties comprising a community can be determined.

Moreover, community interests are more detailed and diverse than national interests. National interests are the abstract of all interests over all individuals and communities in within a nation. For one thing, their scope is limited to national consensus, which means some interests of communities are missed out in national interests. For another thing, as a tool of domination, national interests are generally politic concepts reflecting the interests of the ruling class and its policies. [24] Community interests are not rights per se, but an integration of rights related to specific obligations. This feature of pursuing community interests owned by non-specific majority distinguishes economic liability from civil liability, which are designed to secure various rights held by specific people. In a word, the difference in institutional logic and interests justify the independence of economic liability from civil liability.

3.2 Irreplaceable by Public Remedies: Judicial Procedure and Flexibility

Now that punitive damages basically focus on community interest, they are mainly one of the public remedies. The differences between punitive damages and other public remedies are only institutional, but this does not necessary mean that they can be replaced by fines and forfeits. As mentioned above, punitive damages are imposed by courts with judicial review, discussion, and due process. These features provide more legitimacy and procedural safeguard for the wrongdoers, which administrative process can hardly provide.

Could punitive damages be replaced by fines? Not really, since they emphasize different values. Fines concentrate on efficiency, and judicial process could be a delay for implementations. While hearing process has been established in practice when imposing fines, [16] it is not comparable with judicial procedural to offer equivalent procedural remedies for the wrongdoers. Therefore, affected by the value of efficiency, punitive damages are irreplaceable by fines. As for the forfeits, even though there are both property liability through judicial process, forfeits are restricted by the principle of legality and they are not as flexible as punitive damages in application. This is not the issue that can be simply resolved by revising the criminal code, since it is the nature of penalties to be restricted. Given the fast-developing economic relationship in modern era, constantly revisions could affect the stability of criminal code as well. Therefore, flexible punitive damages could serve as a supplementary for forfeits to tackle with emerging economic illegal behaviors, while forfeits focusing on severe illegal behaviors.

4. Punitive Damages: Theoretical Controversies and Responses

Since the creation of punitive damages, there are various critics and doubts on them. The following paragraphs would discuss some typical critics like caseload of courts, lack of procedural protection, ineffectiveness in punishment and prevention, and overlapping in functions. Responses will be made correspondingly in order to defend the necessity of punitive damages.

4.1 Caseload of courts

The first critic is that, punitive damages would encourage people instituting too much litigation, putting too much pressure on judicial system, and resulting in the waste of judicial resource. Generally, when imposing fines, government would examine the necessity of intervene, as a result of surveillance system. However, without beforehand surveillance, people are more willing to start a litigation if their anticipated profits are higher than their cost, regardless of potential negative externalities. [25]

Given that it is human nature to seek profit, and punitive damages with huge number of damages can be a great profit. It seems like this critic makes sense that punitive damages do lead to caseload of courts. However, this critic is based on the misunderstanding about punitive damages.

To start with, principally, people are entitled with the right to institute litigations by the constitution. It is legitimate for the offended citizens to seek for judicial remedies, and this is also true for communities. It would be invalid to restrict communities' constitutional rights and keep them away from judicial remedies simply because this would lead to the caseload of courts.

What is more, this critic regards caseload as totally adverse circumstances. However, caseload is an objective fact, which could include pros and cons. It should be further examined before making any value judgements. In fact, punitive damages litigations are the reflection of disorders in economic relationships, as well as the insufficient of governmental regulation. [26] For instance, according to the legislators, the reason why punitive damages are included in consumer protection law is the serious issues in food security, which had caused grievous injuries to consumers. [2, 27] Punitive damages could bring up the incentive in consumers to struggle for their interests and serve as an external pressure and surveillance to the producers.

Moreover, the concern of caseload is only theoretical and may be exaggerated to some extent. In practice, judges can generally recognize plaintiffs seeking just damages in case of intentional purchasing of defective products, and the limited interpretation of articles prescribing punitive damages. [28] Caseload seems like only an exaggerated concern to judges.

In short, while punitive damages do increase the number of litigations, which could be regarded as caseload, this issue is only the reflection of disorders in economic relationships. Cancelling punitive damages can do nothing to restore orders, but abandoning communities from remedies.

4.2 Lack of Procedural Protection for Defendants

This critic focuses on due process in punitive damages litigation. With high number of damages, punitive damages are almost as severe as forfeits, and they could be a burden for the defendant. However, punitive damages are applied in civil process, which could not offer sufficient procedural rights for defendant facing punishments. In detail, this sufficiency includes the relatively low standard of proof, judgement in absentia, and the lack of reasoning by judges. [29] However, this critic just points out the current deficiencies in procedural legal area that adequate litigation system has not been built yet, rather than defying the necessity of punitive damages.

Firstly, the relatively low standard of proof can be fixed by adopting a higher standard of beyond reasonable doubt in punitive damages litigations. [30] Such standard is as much strict as that in criminal process, with the target of providing equivalent procedural protection to the defendant. While strict standard could make it hard for plaintiff to win the litigation, it would not harm the effectiveness of punitive damages, since the fear of being accused for punitive damages could be a enough deterrence for wrongdoers. Furthermore, while judgement in absentia is also accepted by criminal procedural law, it is restricted to certain severe and necessary cases or under the agreement of the defense party. As for the Civil Procedure Law, although judgement in absentia is not severely restricted, there are still regular process like summon and afterward remedies like appealing for second instance and retrial. [9, 31]

In addition, while comparing with forfeits in criminal procedure, we should not forget that they are not the only comparing objects to punitive damages, and there are fines. In fact, fines are more constantly applied compared with forfeits, given the fact that administrative procedure is simpler. The point is, punitive damages could provide better procedural protection for the defendant than fines. In other words, talking about procedural protection, those illegal behaviors to be regulated by punitive damages generally are not regulated by forfeits, but fines. Comparison should be made between punitive damages and fines, rather than forfeits. Punitive damages through judicial process can provide better procedural protection compared with fines. [25]

4.3 Ineffectiveness in punishment and deterrence

This critic argues that, it is nearly impossible to evaluate the actual loss and the deterrence is ineffective so long as the damages are lower than actual loss times reciprocal of the rate of being accused. In practice, it is impossible for judges to get all the information to make a comprehensive

judgement, and the damages of punitive damages is relatively low, compared with those in the United States, and there are wrongdoers still breaching the law after being punished. [32] Just like the previous critic, this one also focuses on the problems in current legal system, rather than defying the rationality of punitive damages. The reason why punitive damages are insufficient in prevention is that the factors being taken into consideration is relatively narrow, the same as the case of forfeits mentioned above. Therefore, the issue behind this critic is how to design a comprehensive system of factors to be considered when imposing punitive damages, rather than whether we should adopt punitive damages. As for the factors, they will be further discussed by the following parts.

4.4 Overlapping in functions with other property liabilities

While punitive damages have dual function of compensation, punishment, and prevention, these functions may be owned by other liabilities, leading to the conflicts in application when the illegal behaviors meet the requirement of various liabilities. This critic includes two aspects, for one thing, the punitive damages' functions are overlapping with other liabilities, for another thing, this overlap leads to conflicts in application.

The first argument is true, since punitive damages are the middle way between public and private remedies, they would unavoidably include attributions from both public and private remedies. Nevertheless, overlap in functions does not necessarily lead to conflicts in applying these liabilities, so long as the application relationship between them is clear. Firstly, with different subjects, the problems that compensative damages and punitive damages trying to solve are different. Compensative damages are designed for specific victims, while punitive damages focus on communities. When the victims can be specified, they can bring up joint civil lawsuits prescribed in the Civil Procedure Law. [9] In this case, punitive damages would be inadequate and unnecessary. In case of victims are relatively abstract communities and specific right holders can hardly be identified, punitive damages are the proper choice for victims to get their compensation.

Secondly, though sharing the same function of punishment and prevention, punitive damages and forfeits can be coordinated given that forfeits are not frequently applied. When the illegal behaviors do not meet the strict requirements of crime, punitive damages could be a possible remedy, covering the loopholes of forfeits. It is worth discussing that whether there would be conflicts when illegal behaviors constitute crimes. It should be clarified that, the case discussed here is that community interests are affected, rather than simply individual or national interests. In this case, punitive damages litigations are still necessary since forfeit can hardly compensate the loss. Therefore, there would be two litigation and two claims of punitive damages and forfeits. While the courts can make judgements on these two claims, there should be offset rules between punitive damages and forfeits, since they share the same function of punishment and prevention. It would be unfair for the defendants to impose punitive damages, fines and forfeits simultaneously. In practice, there are already judgements applying compensative rules between punitive damages and forfeits, avoiding conflicts in their applications. [33-34]

Thirdly, although fines and share the same function with punitive damages, they are totally different liabilities. Fines are imposed by government, which is not definitive and can be overthrown by courts through administrative litigation procedure. On the contrary, imposed by judgements of the courts, punitive damages are definitive and mark the final settlement of disputes. Furthermore, in accordance with their difference in definitiveness, punitive damages and fines are property liability in different stages. It is possible to establish punitive damages in current legal system without denying fines, if a proper offset system is built. This could open the door for flexible judicial judgements to compensate the restricted administrative decisions.

5. Punitive Damages: Comparison between American and Chinese Legal System

Before discussing about the reconstruction of punitive damages in Chinese legal system, it is beneficial to draw lessons of legislation and judicial practice from the United States, where punitive damages are most developed and frequently applied. [6] However, punitive damages are not well developed in current Chinese legal system, having some practical deficiencies. This part will discuss the conditions of punitive damages, the factors affecting damages numbers, and the distribution of damages in the US. Comparisons will also be made with current Chinese punitive damages system.

5.1 Conditions of punitive damages

In the US, punitive damages generally require two conditions: infringement and aggravated circumstance. For the latter condition, it is generally in connection with the subjective will of the wrongdoers, having stable interpretations of intent, recklessness, and gross negligence. [35-36] In other words, punitive damages would not be imposed to those who have no negligence or only have slight negligence, no matter how much losses they caused to community interests.

However, there are two different interpretations of infringements, leading to two kinds of punitive damages. The first kind discusses infringements under traditional tort law, which means only behaviors affecting specific civil rights can be evaluated as infringements. Under this interpretation, punitive damages are the aggravated version of tort liability, they are civil liabilities rather than independent ones. In this case, punitive damages are applied based on tort cases with specific rights holders.

Moreover, under this interpretation, compensative damages are the precondition of punitive damages. However, as discussed above, it is nearly impossible to find a specific victim in economic relationships like competitive relationships to start a tort litigation, and compensative is not generally applicable to communities. Therefore, this kind of punitive damages, the aggravated version of tort liability, is substantially not the punitive damages advocated by this article. They are just compensative damages with unreasonable higher numbers than actual losses, breaching the principle of recovery in civil law. The second interpretation regard infringement as a breach of obligations, rather than directly offense to specific rights. This interpretation starts at obligors, and it is more effective and practical to find the specific wrongdoers with legal obligations, especially in economic relationships. Once the obligors breach their obligations and cause losses to community interests, punitive damages can be imposed to compensate social losses. [37] This kind of punitive damages, which is based on obligations and aim at remedying community interests, is what this article advocates and defends.

Under Chinese legislation and the dominant viewpoint, punitive damages are in legislations like consumer protection, product liability, food safety, and even competition are the first kind of punitive damages discussed above, the tort liability. [20-21, 27] In practice, they are also regarded as civil damages based on civil rights and plaintiff qualifications. In a litigation of food safety, a court rules that, punitive damages prescribed in food safety law should be brought up by the consumers, rather than the consumer council. [38]

5.2 Factors considered in damages numbers

Except the conditions, it is also worth mentioning the factors considered when deciding damages numbers, which has a direct impact on the functions and effectiveness of punitive damages. Both statutes and courts in the US have listed some factors to consider when deciding the number of damages, which can be concluded as two aspects. [39-40]

One aspect is about punishment and prevention, the public functions of punitive damages, including the circumstance of behavior, the finance condition of the wrongdoers, other punishments or damages imposed on the wrongdoers. In detail, the circumstance of behavior is the most important factor, having direct relationships with the aggravated circumstance condition above. This factor

includes circumstance in both subjective and objective aspect, and the more serious it is, the more punitive damages there will be. Also, the finance condition is related to the punishment effect of the wrongdoers, with which punitive damages will be more flexible with specific cases. Lastly, other punishments or damages have something to do with the offset rules mentioned above, since the functions are overlapping between punitive damages and other property liability.

The other aspect is about compensation, the private function of punitive damages, including the influence on others, remedial measures from the wrongdoers. This means it is still necessary to examine the decline of interest in the communities, and whether the wrongdoers have done something to make up. In a word, while the exact number of damages depends on each specific case, it is basically related to the dual functions of punitive damages, and listing as much factors beforehand would be beneficial to jurisdiction practice.

As for the factors relating to damages numbers in China, they are severely narrow, even though punitive damages are accepted as legal liabilities. The losses of victims, price of the products, and the illegal profits are the main factors deciding punitive damages numbers in China. [2-3]

5.3 Distribution of damages

The last question is the distribution of damages, which is controversial for critics about plaintiff getting higher than they deserve from punitive damages. However, this is not the case in some states of the US, where punitive damages are distributed between the plaintiff and the governmental fund. For example, in Georgia, Indiana, and Iowa, 75 percent of the damages should be given to the state funds. In Alaska, Missouri, and Utah, it is 50 percent. The damages in the state funds would be used for the interest of the communities. For instance, state fund in Georgia collects 75 percent of punitive damages from product liability cases for the benefits of other citizens harmed by the defective products. [36] This remarkable dual distribution system solves the problem of plaintiff's unreasonable profits from punitive damages, and is in accordance with the dual functions of punitive damages. Plaintiffs, if they are specific victims but bringing up a lawsuit for communities, can only get their compensative part principally, and the extra damages will be enjoyed by the communities.

In China, punitive damages are mainly distributed to the plaintiff, as a result of plaintiff qualification and regarding punitive damages as civil liabilities. Typical critics on punitive damages that plaintiffs getting unjustified enrichment are the consequence of this misunderstanding and legal practice.

6. Punitive damages: Reconstruction through Interpretation and Revision

With all the legal practice in the US and current situation of China discussed above, it is clear that punitive damages in current Chinese remedy system have some deficiencies. They are still regarded as tort liabilities, the factors to be considered are not comprehensively legislated, and their distribution is unreasonable. Therefore, reconstructions are need to better apply punitive damages and to remedy community interests. The reconstruction approaches can be concluded as following aspects: separation from civil liability, interpretation of conditions and factors, and the establishment of split-recovery scheme.

6.1 Separation from Civil Liability

As above-mentioned, punitive damages are an independent liability based on different logic from civil liabilities. This is the premise of the following reconstruction approaches. Therefore, the reconstruction of punitive damages would start with the separation from civil liability. The following paragraph would dedicate to justify that, with proper interpretation, there are no substantive provisions for punitive damages in the Civil Code.

It is true that there are several articles prescribing punitive damages in the Civil Code, but this does not necessarily mean that they are legal basis for punitive damages. In fact, Chinese legislators took a relatively conservative stand on including punitive damages into the Civil Code, given the

incomplete content of punitive damages. Through interpretation, these so-called punitive damages provisions can be excluded.

In general, article 179 are regarded as the legal basis for punitive damages in civil liability system. [41] However, it is a misinterpretation to assert that article 179 accepts punitive damages as civil liabilities. Article 179.1 listed 11 forms of civil liabilities, while article 179.2 separately prescribes punitive damages as special liabilities in other legislations. [1] Since punitive damages are civil liabilities, why did the legislators exclude them from article 179.1 where all the traditional civil liabilities are listed? What is more, excluding punitive damages from civil liabilities would not conflict with 179.3, which prescribed that civil liability set forth in this article (article 179) may be applied alone or by a combination. [1] It may be interpreted that, both article 179.1 and article 179.2 are legal basis for civil liability. However, according to the text, only 179.1 defined its content as civil liability. Therefore, what article 179.3 actually refers to is article 179.1 solely. In a word, it is incorrect to assert that article 179 are the legal basis for punitive damages.

Moreover, other so-called punitive damages provisions in the Civil Code are not legal basis for punitive damages as well. These provisions are prescribed in tort liability part of the Civil Code. In detail, they are tort of intellectual property in article 1185, tort of product defects in article 1207, tort of environmental pollution or ecological damage in article 1232. [1]

For article 1185 and 1207, they are not legal basis for punitive damages. Even though punitive damages are included in these articles, they are actually prescribed and applied in intellectual property legislations like article 54 in the *Copyright Law of the People's Republic of China (2020)* (hereafter, the Copyright Law) [43]. This is the same for article 1207 in the Civil Code and article 55 in the Consumer Protection Law [2] How to explain this overlap in prescription? This article holds that, article 1185 and 1207 are only references to other legislations, they are nominal prescriptions rather than essential ones. The reason why the Civil Code keeps these articles is the integrity of tort legislation. That is, behaviors in these articles are tort, they can trigger both compensative damages and punitive damages. To recognize the position of these behaviors in tort legislation, the Civil Code includes article 1185 and 1207, while referring to other legislations like the Copyright Law and the Consumer Protection Law for remedies.

Article 1232 is different, since there are no provisions for punitive damages in environmental legislation. In practice, article 1232 are applied as the legal basis for punitive damages, according to the *Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Cases of Disputes over Ecological Environment Tort (2022)* (hereafter, the Judicial Interpretation [2022] No.01). [44] It seems like there are unavoidably punitive damages provisions existing in the Civil Code.

However, this situation does not overthrow the conclusion above that these provisions are only references. The explanation for this situation is the deficiency in environmental legislation, from the perspective of this article. In fact, there are basically no judicial remedies in the *Environmental Protection Law of the People's Republic of China (2014)* (hereafter, the Environmental Protection Law). [45] Administrative remedies like fines are the prime liabilities in this legislation. When it comes to judicial remedies, the Environmental Protection Law refer to civil legislations, according to article 64. In this regard, there are principally no judicial remedies in the Environmental Protection Law, which is definitely a deficiency given that the provisions in the Civil Code are not detailed enough and the relationship between the Civil Code and other specialized legislations like the Copyright Law and the Consumer Protection Law mentioned above.

In practice, the absence of punitive damages provisions is compensated by the Judicial Interpretation [2022] No.01. In this interpretation, article 4 to 11 prescribe detailly the application conditions, the factors related to the damage's numbers, and the offset rules of environmental tort. That is, Interpretation [2022] No.01 is essentially the amendment for the Environmental Protection Law, constructing the substantive provisions that article 1232 in the Civil Code can refer to. In a word, article 1232 is reference article too, the same as article 1185 and 1207. The only issue is the deficiency

in the Environmental Protection Law, which could be resolved by interpreting the Judicial Interpretation [2022] No.01.

6.2 Application Conditions and damages' factors under Community Interests

Now that there are no substantive provisions for punitive damages in the Civil Code, and there are no general provisions for economic liabilities, the conditions for punitive damages are only prescribed particularly in specialized economic legislations. However, according to the comparison with the US, there are deficiencies in conditions and factors of punitive damages provisions. This part would deal with the interpretation for these issues based on the clarification about punitive damages discussed above.

There two application conditions of punitive damages waiting for proper interpretation, the condition of losses and the condition of subjects. For the previous condition, it is misinterpreted as directly damage in specific rights and regarded as civil liabilities. To the contrary, another interpretation this article advocates is that, the condition of losses means damage to the community interests, rather than individuals. It is inadequate to focus how much damage the individuals suffer when applying punitive damages, and the examination of losses should be based on more abstract factors like the market order and the potential risks the illegal behavior brings. For instance, article 8 in the Judicial Interpretation [2022] No.1 focuses on the social effects of environmental pollution behaviors in examination of losses. The scope and degree of pollution and the adverse social impact are included, which means that the wrongdoers can be punished for simply causing severe environmental pollution, even though they have not directly cause damage specific individuals. In practice, there are already environmental litigations imposing punitive damages based on infringements on community interests like environmental interests. [46]

In accordance with the abstraction of the condition of losses, the condition of subjects should be more abstract as well. In article 55 of the Consumer Protection Law, it is the consumers that can start a punitive damages litigation. However, consumers in article 55 should be interpreted as the consumer community, including other subjects having indirect but relevant interests. In this regard, the just plaintiff should be the representative for the whole community, such as the procuratorates or the specific social organization. For example, article 12 in the Judicial Interpretation [2022] No.1 acknowledges the plaintiff qualification of legally recognized authority and social organization, which represent the community interests.

This interpretation on condition of subjects also has its institutional basis on procedure legislation. Practically, this interpretation replaces the plaintiff requirements for specific rights with the representative of community interests. This is the case in public interest litigation in China, prescribed in article 58 of the Civil Procedure Law. [9] In public interest litigation, procuratorate or social organizations act as plaintiffs to bring up lawsuits, which is the institutional basis for the interpretation of the conditions of subjects.

As for the deficiencies in damages' factors, more factors should be included so as to guide the judges imposing punitive damages more effectively and adequately. The above-mentioned factors in the US could be a reference, that is, the factors relating to their punitive and compensative functions. The factors prescribed in article 9, 10, and 12 in the Judicial Interpretation [2022] No.1 can be a reference as well, which includes the maliciousness of the infringers, the consequence, the benefits the infringers obtained, the restoration measures taken by the infringers and their effects. Moreover, financial capability and the average local living standards are also possible factors worth considering when imposing damages, according to article 5 in the *Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts (2020)* (hereafter, the Judicial Interpretation [2020] No. 17). [47]

When it comes to the approaches to including these factors, judicial interpretation would be a more realistic way. Given that a specialized legislation of punitive damages is unlikely at present, and amending the current economic legislations would be inefficient considering the institutional obstacles like the amendment procedures. This is how it works in practice that the Supreme People's

Court includes relevant factors in judicial interpretations. The Judicial Interpretation [2022] No.01 and the judicial Interpretation [2020] No.17 are the practical evidences.

However, these factors are prescribed dispersedly in various judicial interpretations, waiting for systematization to better guide the judges. Therefore, a specialized judicial interpretation on the damages' factors for punitive damages should be made by the Supreme People's Court. This interpretation may be divided into the punitive and compensative parts. For the punitive part, factors should be focused on the infringers, including their maliciousness, their financial capability and so on. These factors are the insurance for the severeness and individuation of the damages. For the compensative part, factors should be concentrated on the effects of the illegal behaviors, including the affecting scope and extend of the illegal behaviors. The target of these factors is to make sure the damages are enough to cover the losses in the community.

6.3 Split-recovery Scheme for damages

The last issue mentioned in the comparison is the unreasonable distribution system, where all the damages are distributed to the plaintiff. Under this system, it is unavoidable that people tend to institute litigations sometimes just for seeking profits, even though their losses are trivial. This also possibly lead to the issue of caseload above. To tackle with this issue, and to be in accordance with the condition of subjects, a split-recovery scheme should be built that distributes damages obtained in punitive damages litigations to both specific victims and the abstract community.

This distribution system is practical, even though it has not been accepted by legislations. In practice, there are special accounts set up by the procuratorates to keep the damages from public interest litigation. [48] Moreover, there are social organization like the consumer councils in China, who can be the plaintiff in punitive litigation and the manager of public fund.

While setting funds is what this article advocates, it should be run by the specialized social organizations, which are more professional. While the authorities can argue that, these damages are compensated indirectly to the community interests by using them in the investigation, and victims can bring up applications to the authorities for their compensations. [48] However, these official fundings have not managed to compensate the communities in general, partly because procuratorates are non-professional dealing with consumers, and managing such a fortune would be a burden. [33] What is more, the community interests are specific, for example, consumers' interests are different from environmental interests. The fundings are not used separately for specific communities, which breaches the compensative functions of the punitive damages.

The only issue for social organization running funds of punitive damages is supervision. Afterall, corruptions may occur in social organizations without institutional supervisions like the administrative law for governments. Therefore, to fit in with the social funds run by the social organizations, relevant supervision system should be built. This system includes specialized legislation and supervisions from the authority. In detail, legislation regulating the operation of the funds is necessary so as to provide guidance unifying the compensation and legal basis for the authorities to supervise the operators of the funds. Moreover, authorities like the People's Procuratorates and Administration for Market Regulation can be the responsible supervisors of the social organization, rather than the operators of the funds.

With this system, direct interventions of the authorities are kept away from the market, and the damages can be professionally managed and specially applied. Moreover, the caseload issue would be relieved under this split-recovery scheme, since the victims cannot gain extra profits from starting punitive damages lawsuits, the only reason they keep doing this, is the justice in their minds.

7. Conclusions

Punitive damages are the necessary liability for corporation regulation. This article mainly clarifies punitive damages in China by discussing their causes, functions, and institutional logic, as well as establishing their independence from civil liability and their irreplaceability from other public

remedies. Furthermore, this article also analyzes some typical critics on punitive damages while making possible responses to them. Thereafter, this article makes legal comparison of punitive damages between the US and China, concluding the deficiencies in Chinese legal practice of punitive damages. Correspondingly, attempts are made by this article to construction the current punitive damages system in China, based on the deficiencies above.

This article holds the simple position that, punitive damages are the independent and necessary liability that remedies the community interests. Community interests are the main concern of punitive damages, which cannot be properly remedied in current liability system of civil and public remedies. Punitive damages and community interests bring the trend which could possibly overthrow the clear distinction between public and private legal sectors and the dual remedies system. Further researches on punitive damages are necessary, as the importance of the community interests and the large-scale torts from corporations nowadays.

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