Punitive Damages in China: Evolution and Application
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The revised Law on the Protection of the Rights and Interests of Consumers (Consumer Protection Law), which sums up nearly twenty years of the evolution of Chinese punitive damages regulations, sets out a model system of punitive damages. These are in essence a special kind of penalty under a dual public-private legal system in which the punitive and deterrent functions of public law are realized through the mechanism of private law. Their application should be guided by the public law principle that the penalty should be proportionate to the offence. The question of whether the penalty is appropriate arises in the application of the two forms of punitive damages prescribed in the Consumer Protection Law—whether used separately or together, or in conjunction with or independently of fines or financial awards. The application of the new punitive damages regulations may overlap with the application of China’s Food Safety Law and Tort Liability Law.

Keywords: consumer rights protection, punitive damages, aggravated tort, fraud, principle of proportional justice

China’s system of punitive damages originated in 1994 when Article 49 of the Law on the Protection of the Rights and Interests of Consumers (Consumer Protection Law) took effect. In the following ten years, on the model of Article 49 of the Consumer Protection Law, regulations on various magnitudes of compensation were formulated in the Contract Law (1999), the “Interpretation of the Supreme People’s Court on Certain Issues Concerning the
Application of Law in Trial of Cases Involving Disputes over Contracts for the Purchase and Sale of Private Real Estate” (Judicial Interpretation [2003] No. 07), the Food Safety Law (2009) and the Tort Liability Law (2010). Possibly because they have different policy objectives and come under different legal categories, these regulations are clearly unbalanced in terms of their normative systems. This is especially true of Article 49 of the Consumer Protection Law; Article 96, Section 2, of the Food Safety Law; and Article 47 of the Tort Liability Law.

Although major amendments to Article 49 in the new Consumer Protection Law (hereafter, the new Law), which went into effect on March 15, 2014, have solved the problem of normative group imbalances in the various regulations on punitive damages, the application of this law entails some new questions: whether penalties are appropriate and whether the regulatory force of Section 2, Article 96, of the Food Safety Law and Article 47 of the Tort Liability Law could be seriously weakened. In this paper we first analyze the structural features and systemic defects of the current regulations on punitive damages and the institutional innovation in Article 55 of the new Law from the perspective of legislative change, then provide an abstract analysis of the structural basis and normative elements of punitive damages with a view to revealing their inherent regulatory nature. Finally, we discuss problems that may be encountered in the legal application of the newly introduced punitive damages regulations.


The starting point for understanding China’s punitive damages system should be Article 49 of the pre-revision Consumer Protection Law (hereafter, the old Law). The point of greatest interest in this Article is the interpretation of the concept of “fraudulent conduct,”¹ which determines not only the understanding of “damages,” but also directly determines the scope of application of Article 49. Since the Consumer Protection Law is designed to protect consumer rights and interests, “fraudulent conduct” should be understood from the perspective of private law rather than administrative law, criminal law or other branches of public law. In modern private law, fraud refers to intentionally inducing other parties to make a mistaken expression of will. Mere willful representation or deliberate concealment of the facts does not constitute

¹ There are two understandings of this concept in existing research. One is that if the conduct of a business operator is such as to mislead the average consumer, it constitutes fraud as stipulated by Article 49 of the Consumer Protection Law (see Wang Weiguo, “Fraudulent Conduct and Punitive Damages in China’s Consumer Protection Law”; Xie Xiaoyao, “Fraud: A Theoretical Interpretation of Competition Law—With a Discussion of the Application and Improvement of Article 49 of the Consumer Protection Law”; and Dong Wenjun, “On Punitive Damages in the Consumer Protection Law”). The other is that “The meaning and constituent elements of the concept of ‘fraud’ must be the same for Article 58 of the General Principles of Civil Law, for Contract Law, and for the Consumer Protection Law” (Liang Huixing, “The Understanding and Application of Article 49 of the Consumer Protection Law,” p. 3).
fraud in private law, because it is not always necessary to protect other parties as long as they know or can see through the malicious falsehoods of the counterpart and their freedom to form an intention is not infringed. In the provisions of Articles 58 and 61 of the General Principles of Civil Law and Articles 42, 52, 54 and 58 of Contract Law, fraud also serves as a legal fact that protects the interests of injured parties who have suffered losses due to fraud, as well as providing the legal basis of protection of freedom to form an intention. The same fraudulent conduct on the part of a business operator can result in two forms of right of relief: the right to claim damages and the right to revoke the expression of an intention, which can be simultaneously exercised by the injured party.

In fact, where one party has been misled into concluding an agreement and suffered losses thereby, he can seek to hold the other party liable for damages pursuant to Article 61 of the General Principles of Civil Law and Article 58 of Contract Law. The provisions in Article 49 of the old Law were designed to break through the conventions of the General Principles of the Civil Law and of Contract Law to punish business operators who behave fraudulently and give consumers higher compensation. Therefore, the "losses" mentioned in Article 49 are a loss of reliance interests in concluding an agreement and not a loss of inherent interests resulting from tort upon of personal or property rights, still less a loss of expected interests resulting from breach of contract. Although damages are conditional on consumer contracts in the "increased damages for consumer losses" of Article 49, increased liability for damages is in fact a special form of liability involving misconduct in concluding an agreement; it certainly cannot be regarded as a liability arising from breach of contract.2

Articles 8 and 9 of Judicial Interpretation (2003) No. 07 stipulate two totally different types of punitive damages. The main elements of Article 9, which targets fraudulent conduct, are similar to Article 49 of the old Law. The application of Article 8, which is conditional on a complete breach of contract on the part of the vendor, is in fact a kind of "court-made law," because China has no punitive damages applying to breach of contract.3 Overall, Articles 8 and 9 of Judicial Interpretation (2003) No. 07 improve the old system in two ways; first, they make it clear that punitive damages can be claimed alongside compensatory damages; and second, compensation is no longer strictly limited to twice the price of the item but may be, at the judge's discretion, up to twice the price of the real estate purchased.

The regulations on punitive damages in Section 2, Article 96 of the Food Safety Law have clearly absorbed the normative elements of Article 49 of the old Law and Articles 8 and of 9

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2 The mainstream opinion is that the award of punitive damages stipulated in the Consumer Protection Law is the liability for punitive damages arising from breach of contract (See Wang Liming, "On Punitive Damages"; Yang Lixin, "Successes and Shortfalls in the Determination of Punitive Damages under the Consumer Protection Law and Measures for Its Improvement").

3 Some studies have suggested that the provisions on punitive damages in Judicial Interpretation (2003) No. 07 cannot be justified and their legal validity is questionable (See Li Shengli, "Protection of the Interests of Real Estate Purchasers and Liability for Punitive Damages: An Analysis of the Relevant Provisions of the Judicial Interpretation of the Supreme People's Court").
of the *Judicial Interpretation* (2003) No. 07. However, since food prices are generally quite low, in many cases even compensation of ten times the price paid may be far less than the loss suffered by the consumer. Thus Section 2 of Article 96 of the Food Safety Law is seriously defective in that the punishment is much less than the crime. A major reason for this is that the framers of the method of calculating damages borrowed from Article 49 of the old Law, but overlooked the marked difference in the premises for the application of the two sets of regulations on punitive damages—one of which applies to misconduct where little injury or loss is involved in concluding an agreement, while the other is premised on torts that cause personal and property damage.

The system of punitive damages underwent marked development in the Tort Liability Law, Article 47 of which stipulates that, "Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or serious damage to the health of another person, the injured party is entitled to seek the corresponding punitive damages." In fact, this regulation strictly limits liability for punitive damages to serious damage, unlike the broad provisions of Section 2, Article 96, of the Food Safety Law; legislators clearly recognize that punitive damages should apply mainly to aggravated torts. Furthermore, the regulation goes beyond the old way of determining damages in the light of the price of the item concerned and, in extremely vague wording, "mandates the People's Court to determine the amount of damages awarded (as a multiple of the price of the item) in light of the specific facts of the case."

Overall, the Chinese system of punitive damages developed gradually on the basis of Article 49 of the old Law. Although, in inheriting the previous system, each new regulation introduced some innovations, each step involved little progress. Since each institutional change took place in a different legal field, the historical continuity of regulations on punitive damages did not result in a coordinated normative group of regulations but in a serious structural imbalance between Article 49 of the old Law on the one hand and Section 2, Article 96, of the Food Safety Law and Article 47 of Tort Liability Law on the other.

The structural imbalance between Article 49 of the old Law and Section 2, Article 96, of the Food Safety Law lies mainly in the fact that consumers of food and consumers of non-food products get dramatically different levels of protection. While both consumers of food and consumers of non-food products were protected under Article 49 of the old Law, consumers of food can receive broad protection under Section 2, Article 96, of the Food Safety Law for any damage to person or property caused by food consumption, regardless of the business

4 For a representative example of the literature, see Li Xiang, "A Critique of the Regulations on 'Tenfold Damages' in China's Food Safety Law and Ways of Improving It."


6 See Liang Huixing, "Explanations and Comments on the Tort Liability Law of the PRC."
operators' subjective intentions and the seriousness of the damage, whereas consumers of non-
food goods cannot claim punitive damages unless they meet the rigid conditions of Article 47 of the Tort Liability Law. The structural imbalance between Article 49 of the old Law and 
Article 47 of the Tort Liability Law lies in the fact that while the latter gives both consumers 
and non-consumers exactly the same right to seek punitive damages, the Consumer Protection 
Law, which is specifically for the protection of consumers, cannot offer the same protection to 
consumers whose safety and health are endangered.

To maintain a balance between normative groups in punitive damages, it is imperative to 
ampend Article 49 of the old Law.

II. Institutional Innovation and Norm Construction in the New Regulations on Punitive 
Damages

Besides some significant modifications to the regulations concerning punitive damages in 
the old Law, the new Law introduces new kind of punitive damages regulations. Although 
both systems are stipulated in the same Article, there is a considerably substantive difference 
between them.

1. Legislative evolution and norm construction in the revised regulations on punitive 
damages

Section 1, Article 55, of the new Law amends Article 49 of the old Law as follows: 
“Business operators engaged in fraudulent activities in supplying goods or services shall, on 
the demand of consumers, increase the compensation for their losses; the increased amount 
of the compensation shall be three times the price that the consumer paid for the goods 
purchased or services received. Where the increased damages amount to less than 500 RMB 
they should be deemed to be 500 RMB. Where other laws provide otherwise, the provisions 
in such laws should prevail.” This provision follows the basic scheme of Article 49 of the old 
law but improves the legal effect of the old law’s provisions on punitive damages in three 
respects. Firstly, it greatly increases penalties by increasing punitive damages from double to 
three times the price of the goods or services; secondly, it sets a minimum value for punitive 
damages and makes clear the minimum incentive or reward the injured party can claim in 
punitive damages; and thirdly, it paves the way for further evolution of regulations concerning 
punitive damages by introducing the applicability of other provisions.

Section 1, Article 55 of the new Law regulates fraudulent conduct. The “losses” referred 
to are a kind of reliance loss under a contractual agreement. When the consumer revokes 
a consumer contract because of fraud, these losses are expressed as the expenditure under 
the contract or as the foregone opportunity to carry out a transaction. When the consumer 
accepts a consumer contract involving fraud, the damages are expressed as the difference 
between what the person has actually paid for the good or service and what the price should 
be for that good or service. Since the law provides for punitive damages to be calculated on
the basis of the price of goods or services, legal studies and court rulings do not generally contain any detailed analysis of the losses incurred in the two different situations. Judging from the provision on “increasing compensation for loss,” punitive damages are simply additional damages based on compensating the consumer for losses arising from fraud. This kind of extra compensation is premised on the fraud having caused real losses to the consumer. When a consumer seeks only punitive damages, the court must still ascertain whether and to what extent his losses arise from the fraudulent conduct of the business operator.

With regard to legal effect, Section 1, Article 55, of the new law follows the old law’s method of determining the amount of punitive damages on the basis of the price of the goods or services concerned. While increasing the amount of damages from double to three times the price of the goods or services concerned may solve the problem of the penalty being too low, it may aggravate the problem of overly heavy penalties. The fact that the same fraudulent conduct makes a business operator liable both for the punitive damages set out in Section 2, Article 55, of the new law and for fines and financial payments under public law highlights the problem of too-heavy penalties under the provisions of Section 1.

2. Institutional innovation and norm construction of the new regulations on punitive damages

Section 2, Article 55, of the new law introduces a new regulation on punitive damages: “Where a business operator knowingly provides to consumers defective products or services that cause death or severe harm to the health of a consumer or other injured parties, the injured party has the right to require the operator to compensate him for his losses in accordance with Articles 49 and 51 of this law and other provisions and has the right to claim punitive damages of less than two times the loss incurred.” This provision is in fact a necessary option for solving the problem of the structural imbalance between Article 49 of the old law on the one hand and Section 2, Article 96, of the Food Safety Law and Article 47 of the Tort Liability Law on the other. That is, only the addition of this kind of provision can maintain a balance between the manifestly unbalanced regulations on punitive damages. Its great significance lies in the fact that, building on years of legislative and judicial experience, it completely abandons the fixed way of determining damages on the basis of the price of goods or services and for the first time makes losses the basis of calculating the award of punitive damages. After a series of changes, the punitive damages system has emerged from its chrysalis and is becoming more standardized.

With regard to cases “where a business operator knowingly provides to consumers defective products or services,” Section 2, Article 55, of the Revised Law mainly applies to aggravated tort in which the perpetrator intentionally infringes on consumers’ rights and interests. Given that the consumer’s counterparty is generally a highly organized group of legal or non-legal persons, it is generally quite difficult for consumers to prove the subjective intentions of business operators. To avoid the disadvantage they suffer, consumers may be
allowed to provide circumstantial evidence alone to prove that a business operator is fully aware that the goods or the services have defects.  

Since business operators' tort upon consumers' rights and interests involves varying degrees of subjective factors and damage consequences, Section 2, Article 55, of the new law makes a fairly flexible provision for the legal effect of punitive damages: injured parties "have the right to require punitive damages amounting to less than twice their losses." This provision can be understood in two ways: (1) it sets a cap on punitive damages of twice the losses incurred; (2) it gives judges flexibility to determine penalties on the basis of the degree of blame of the tort.

Section 2, Article 55, of the new law clearly determines the method of calculating punitive damages, i.e., multiplying the losses by a number less than two (but larger than zero). It changes the previous unreasonable method of calculation on the basis of the price of goods or services to making punitive damages directly associated with the losses of the party affected. "Losses" means statutory losses related to death or serious damage to health of the consumer or other injured party caused by defective goods or services, i.e., the five types of loss or damages stipulated in Articles 49 and 51 of the new law.

3. Normative elements of the new regulations on punitive damages

The components of Section 2, Article 55, of the new law basically follow the normative construction of Article 47 of the Tort Liability Law, with the slight difference that this section also applies to aggravated torts caused by defective services. The Tort Liability Law is a basic law dealing with the conflict between freedom of conduct and protection of rights and interests. Its regulations on damages, including punitive damages, set the norm for general regulations. The punitive damages provisions of Article 47 of the Tort Liability Law are therefore fundamental to China's current regulations on punitive damages; its normative ideas and method of construction offer the researcher a multum in parvo view of punitive damages in China. The Consumer Protection Law is a personal status law specifically designed to protect consumers; its rules on damages, including punitive damages, are specific compared to the Tort Liability Law. Although more flexible provision than that of Article 47 of the Tort Liability Law could certainly have been made in that part of the new law concerned with punitive damages to demonstrate its specific interest in consumer protection, the new law ended up using the main components of the Tort Liability Law. Given that both the first

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7 Professor Wang Liming is of the view that "in some circumstances, 'res ipsa loquitur' or presumption can be used to determine the awareness of producers or vendors" (Wang Liming, Research on Tort Liability Law, vol. 2, p. 278).

8 In his interpretation of Article 47 of the Tort Liability Law, Professor Liang Huixing states, "It should be noted that under Article 47, application of punitive damages is limited to 'product liability,' and is not applicable to torts other than product liability" (See Liang Huixing, Interpretation of Major Articles of the Tort Liability Law; and Commentary on Chinese Civil Legislation: Civil Code, Property Law and Tort Liability Law, p. 369).
and second drafts of the revised Consumer Protection Law placed much stricter limits on
the punitive damages component of the new regulations, we can certainly conclude that the
legislators were of the firm opinion that punitive damages should be strictly limited to serious
torts resulting in death or serious damage to health, with no exception even for consumers
deserving of special protection. Such legislative thinking is of great significance for the
further development of punitive damages; the added regulations can be seen as a significant
intellectual outcome for the legislative aspect of punitive damages. Indeed, they clearly reject
all legislative proposals for enlarging the scope of punitive damages’ application.

III. Structural Foundation and Normative Elements of Punitive Damages

The new regulations on punitive damages in the Consumer Protection Law constitute a
significant link between past and future institutional change. On the one hand, they correct
the imbalance in China’s normative system of punitive damages; on the other, they provide
a prologue to the improvement of punitive damages regulations in the Food Safety Law
and Tort Liability Law and to consideration of the punitive damages regulations in Judicial
Interpretation (2003) No. 07. In order to use these regulations appropriately and give
reasonable guidance to their continuing evolution, we need to provide a general analysis of
the structural foundation and normative elements of punitive damages.

1. Uniqueness of punitive damages

Punitive damages are not aimed at compensating injured parties for their losses but at
punishing offenders and deterring others from behaving in a similar way. They endow the
legal relationship between the parties in private law with quite a unique structure: one of two
equally positioned parties can impose a penalty on the other. In other words, an injured party
who has already obtained remedy for losses pursuant to the system of compensatory damages
can demand that further and generally higher damages be awarded against the wrongdoer.
This state of rights and obligations almost completely overturns the structure and principles
of unjust enrichment and compensation for loss in the field of private law. It is well known
that in private law, relations do not simply involve the rights and obligations of two or more
equal parties: the rights, gains or opportunities one party enjoys in relation to the other or the
obligations, burdens or risks he assumes in relation to the other need to be based on mutually
legitimate grounds. In the case of compensatory damages, the reason the law compels one
party to assume the obligation of compensating the other is because the misconduct of the first
party has caused losses to the other party.10

Over the course of the development of modern law, the state has almost completely

9 The restriction is that business operators “knowing any defect of a product continue to manufacture
or sell the product and the defect causes death or serious damage to the health of another person.”
10 Helmut Koziol, “Punitive Damages: A European Perspective,” pp. 741, 752; Franz Bydlniski,
System und Prinzipien des Privatrechts, p. 92.
monopolized the right to impose criminal penalties on wrongdoers; the public's desire for retribution can only be realized through criminal law, and the injured party can only claim damages in accordance with the private law principle of full compensation. The punitive damages system, which can be implemented by private individuals, infringes on the state monopoly of the right to punish and breaks away from the convention that punishment is governed by public law.

2. Structural foundation of punitive damages

Even so, punitive damages have developed in some countries or regions. In technical legal terms, there are two major reasons for their acceptance. First, the punitive damages system uses private law to make up for the legislative and judicial defects of criminal law and criminal procedure law with regard to satisfying the public's desire for retribution. Both criminal law and criminal procedure law are generally considered to have inevitable shortcomings even in ideal circumstances. For instance, the state organs that initiate and control criminal proceedings do not have sufficient resources to arrest all criminals, and even if they could bring all suspects within reach of the long arm of the law, they may for various reasons not wish to enforce the law or prosecute the case. Second, punitive damages use the punitive system of public law to overcome the limitations in private law's protection of rights and prevention of misconduct. Injured parties' abilities and preferences differ enormously and not all of them are able or willing to bring a civil action against the party inflicting the injury; the latter will thus not be liable for compensation for all the losses incurred as a result of his misconduct. This will necessarily provide an incentive to engage in misconduct rendered profitable by the fact that the wrongdoer assumes liability for only a part of the injured parties.

The former reason is the more convincing, because the same offence may cause different injuries to its victims. If serious enough, it may constitute antisocial conduct that endangers public security or public order and thus is subject to regulation by criminal law. In this sense, given the dichotomy between public and private law, punitive damages are essentially a special punitive system used to realize the punitive and deterrent functions proper to public law through the mechanism of private law; they constitute a system of private law that is designed to punish quasi-criminal conduct and offers conditional recognition of retribution between individuals. Therefore, the institutional construction of punitive damages must take the inherent regulation of penalties in public law as an underpinning for the basic requirements for damages in private law.

A basic requirement of compensation for loss is the existence of loss or damage. "Loss"

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11 The legal system of private law (largely civil law) is completely different from that of public law (largely criminal law). The major difference is that in the field of private law, it is up to the private party whose interests have been violated to put in motion procedures leading to penalties, while in the field of criminal law a special organ of state has this function (See Hans Kelsen, General Theory of Law and State, p. 206).

connotes firstly, violation of a right (legal interest) and secondly, the result of such violation. The punitive damages system based on the former not only compensates the injured party, but also defends private rights, while the system based on the latter mainly functions to award compensation to the injured party. Punitive damages in the continental legal system are generally of the second kind, and this is also the case with Chinese legislation and theory. Since punitive damages are designed mainly to remedy functional defects in criminal law, they should take into account the basic requirements of criminal penalty. According to modern criminal law theory, criminal penalty has the following characteristics: (1) the criminal conduct subject to criminal penalties should be morally or ethically culpable; (2) the principle of the punishment being proportionate to the crime should be observed so as to maintain the legitimacy of criminal penalties and ensure that crime and sentence correspond; (3) to prevent misuse of the state’s monopoly of the right to impose criminal penalties, criminal law and criminal procedure law are guided by the idea of protection of the offender.

3. Normative elements of punitive damages

Based on the analysis above, at least four requirements must be met in the normative design of punitive damages.

First, their application should be conditional on aggravated tort that maliciously violates or intentionally neglects the rights and interests of others. This means that they should be conditional on manifestly quasi-criminal aggravated misconduct. As the official Comment in the US Restatement (Second) of Torts, Section 908, puts it: since the purpose of awarding punitive damages is not to compensate the claimant but to punish and deter the defendant, damages are awarded because of conduct to which such remedies are conformable, that is to say, because of quasi-criminal aggravated misconduct.

Second, in order to highlight their punitive function, it should be stressed that punitive damages constitute extra damages over and above compensatory damages. The injured party cannot claim for punitive damages until his right to claim for compensatory damages is confirmed; only in this way can the punitive function of punitive damages be highlighted. If punitive damages were allowed to be claimed directly, it would be unclear whether they were compensatory or punitive.

Third, the amount of damages should be determined on the basis of the losses of the injured party. This is done mainly to stress that the misconduct and the losses it has caused are linked directly to the award of punitive damages. Unlike criminal law, in Tort Law, the extent of the consequences of the injury (the losses) is an important indicator of the

13 See Dieter Schwab, Einführung in das Zivilrecht, pp. 252-253.
14 Civil laws such as the General Principles of the Civil Law, Contract Law and Tort Liability Law expressly use the concept of indemnification for loss. For a representative study of the concept of loss or injury, see Zhang Xinbao, A Study on the Main Components of Tort Liability, p. 120.
16 See Gustav Radbruch, Einführung in die Rechtswissenschaft, p. 96.
seriousness of the tort. Since the Chinese system of damages understands concept of loss or harm in the narrow sense, loss should be made on the basis for the determination of punitive damages.

Fourth, a due proportion should be maintained between punitive damages awards and compensatory damages awards or actual losses. This requirement is meant to put into effect the principle of correspondence between the sentence and the crime. While compensatory damages observe the principle of compensation in full, punitive damages are unrelated to completeness and indemnification of losses; the latter should therefore observe the principle of correspondence between the sentence and the crime found in criminal sanctions. In addition, the standards for determining punitive damages should be appropriately flexible, so that judges' rulings on punitive damages will be proportionate to actual torts.

IV. Principle of Punitive Damages Application and Methods of Applying the New System of Punitive Damages

1. Principle of punitive damages application

In modern law, penalties are generally established to defend the public interest, and fines or financial penalties as forms of punishment come under the state and have nothing to do with the injured party. As a kind of punishment, punitive damages should follow the general principles of punishment, and private persons should not enjoy punitive awards either individually or severally. However, in order to provide incentives for victims to actively bring proceedings under the law and thus make punitive damages function more effectively, the legislation stipulates, at the cost of compromising a basic principle of private law, that punitive damages be awarded to injured parties who pursue punitive damages. The function of punitive damages in encouraging individuals to engage in the execution of the law is therefore a kind of procedural or instrumental function falling under punishment and deterrence.\(^\text{17}\) The advantageous or disadvantageous consequences of punitive damages for both victims and wrongdoers should be analyzed on the basis of whether the damages' punitive and deterrent purpose is realized. Given that this is so, then according to the criminal law principle that the sentence must be commensurate with the crime and the administrative penalty law principle that the penalty must be commensurate with the offense, the application of punitive damages should give greater weight to whether the business operator's penalty is appropriate; the amount of damages received by the consumer and their possible negative consequences should take second place. Hence, punitive damages should follow the public law principle that fines and financial penalties should reflect proportional justice.

Since, prior to the new Law, the punishments meted out under punitive damages regulations were too low, resembling nominal damages or a financial incentive to encourage proceedings

by private individuals, the issue of the appropriateness of punitive damages has not drawn enough attention in various studies of punitive damages in China.

From the fact that the Tort Liability Law strictly limits punitive damages to intentional torts resulting in serious injury to the person, it can be seen that the legislators designing the new regulations on punitive damages had definite views on the issue of the appropriateness of punitive damages. However, since China has never considered whether procedural law should set necessary limits on punitive damages, a basic principle in applying the new regulations should be how to use substantive law to alleviate the negative effect of punitive damages on the person potentially incurring punishment in the light of the principle of proportional justice. In fact, whether in terms of the two sections themselves or of the systemic linkages between the regulations and the fines or financial penalties in public law, the new regulations on punitive damages entail a clear question of the appropriateness of penalties.

2. Method of applying the new regulations

Application of the new regulations on punitive damages involves two issues: the appropriateness of the penalties in Sections 1 and 2 when each section is applied in isolation and their appropriateness when both are simultaneously imposed on the same offender.

The issue of the appropriateness of the separate application of the penalties under the revised punitive damages regulations is most evident where the price of goods or services is clearly higher than the loss the consumer suffered under the contract due to fraud. The punitive damages award of three times the cost of the goods or services will be far higher than the consumer’s actual loss. For instance, if a consumer is defrauded in the purchase of a defective car for 200,000 RMB, then according to Section 1, Article 55, of the Revised Law, he may claim punitive damages of up to 600,000 RMB, although the amount he lost under the contract due to fraud may be no more than 1,000 RMB. It is obvious that in such cases the loss and the damages are totally out of proportion and the producer’s punishment is harsh. When they increased damages from one time to three times the cost of the goods or services concerned, the legislators’ obviously had high expectations of the protective and incentive role of punitive damages and gave insufficient attention to the principle that sentence must be commensurate with the crime observed in penal law. There are two ways to solve the issue of overly harsh penalties. The first is to link punitive damages directly to consumer losses, setting an appropriate ratio between actual losses and punitive damages or setting a cap on punitive damages; the second is to link punitive damages directly with fines or financial penalties under public law so as to reduce the business operator’s liability where punitive

18 See Sun Xiaomin, “A System of Incentives or of Punitive Damages: Comments on Article 47 of the Tort Liability Law”; Xie Xiaoyao, “Punitive Damages: An Incentive Perspective.”
19 The fourth edition of the Draft Tort Liability Law states that restricting punitive damages to serious injury is aimed at preventing the system from being misused and excessive damages being claimed by the injured party (See Supreme People’s Court Tort Liability Law Study Team, ed., The Understanding and Application of the Tort Liability Law of the People’s Republic of China, p. 342).
damages are too high.

Under the new punitive damage regulations, since serious injury to life or health equates to quite heavy losses, a business operator may be obliged to pay consumers millions of RMB in punitive damages even if these are restricted to “less than twice the amount of the losses.” If aggravated torts result in mass tort, the business operator may have to pay consumers tens of millions of RMB in punitive damages. To avoid excessive punishment, it is necessary to impose reasonable restrictions on the right of judges to determine punitive damages awards. This can be done, firstly, by expressly requiring the judges to observe the principle of proportional justice in applying punitive damages; secondly, by setting up some parameters for judges to refer to in exercising their right to determine punitive damages; and thirdly, requiring judges to explain the facts and reasons behind the determination of the damages in their written judgments.

When the two clauses of Article 55 of the new Law are both applied to the one business operator, the issue of whether the penalty is appropriate will deserve even more consideration. Since the two clauses differ in the conditions for their application and the statutory losses to be compensated, business operators may be liable for extremely serious damages if they are guilty of fraudulent conduct involving false description when they are clearly aware that the goods or the services are defective and may cause injury to the life or health of the consumer or other injured parties. To keep the penalties reasonable, the courts should, in applying Article 55 of the new Law, focus on the overall effect of the punishments in the two clauses rather than mechanically applying them separately. To be specific, in determining the multiple of “losses” pursuant to Section 2, the courts should take into consideration whether the business operator is simultaneously subject to penalties under Section 1, and if so, to what extent. If the ruling states that the business operator must pay high damages, then provided that the aims of the penalty are achieved, a correspondingly lower award can be made when applying Clause 2.

Linkages between punitive damages and the public law system of fines or financial penalties should also be considered in applying Article 55 of the new Law. If the goods or services provided by a business operator fail to ensure the safety of persons and property, administrative punishment is expressly provided for under the old law and given greater force under the new law, which also gives much increased force to administrative punishment for the same offence (Article 56). In addition, according to the regulations of Article 140 of the Criminal Law on the crime of manufacturing and selling false and defective goods, the business operator concerned will face a harsher criminal liability—fines. Production and consumption are the two wheels of the balanced development of the national economy; admittedly, consumers in a vulnerable position should get special protection, but this should not in any way be at the cost of excessive punishment for producers. If the principle of

20 In the United States, where punitive damages are widely accepted, some rulings have clearly indicated that the purpose of punitive damages is not the economic destruction of the defendant (22 Am. Jur. 2d Damages § 559).
proportional justice is totally disregarded and business operators are excessively punished, they will shift the cost of damages to consumers through fixed pricing and other means.

Therefore, when a single offence by a business operator is simultaneously liable both for punitive damages and fines or financial penalties, punitive damages should not be applied partially and in isolation without considering the overall punishment and deterrent effect of all the penalties involved.

3. The new regulations on punitive damages and their legal application where they overlap with other regulations on punitive damages

When defective food causes injury to the life or health of the consumer, Section 2, Article 55 of the revised law applies concurrently with Section 2, Article 96, of the Food Safety Law and Article 47 of the Tort Liability Law. The obvious differences in the legal effect of the three sets of punitive damages regulations further aggravates the concordance and competition among the three sets of norms.

When this occurs, it is fairly clear that Section 2 of Article 55 of the new law holds the high ground. The reason is that compared with Article 47 of the Tort Liability Law, this section’s clearer provisions on the relationship between punitive and compensatory damages and the means of determining punitive damages offer consumers greater certainty and predictability; and compared to Section 2, Article 96, of the Food Safety Law, it can award higher punitive damages. This being so, the role of Article 47 of the Tort Liability Law may be confined to penalizing aggravated torts that result in harm to the person of non-consumers, while Section 2, Article 96, of the Food Safety Law may be confined to torts that have not caused serious damage. The normative logical consequence of this situation is inevitably that the position of Article 47 of the Tort Liability Law as the norm for general regulation will be seriously eroded and the Food Safety Law’s mission to provide consumers with greater protection will be come to nothing.

V. Concluding Remarks

Punitive damages are essentially designed to remedy defects in the criminal law’s defense of the public interest and satisfy injured parties’ desire for retribution against perpetrators by endowing private persons with the privilege of imposing a form of punishment. They break down the state’s monopoly of the right to punish and overturn the structural principle of civil law—that the rights and obligations between parties should have legitimate justification. Offenders may suffer major disadvantages from losing the protection of criminal procedure and injured parties may reap windfall gains because of the ease with which damages may be claimed. Even worse, punitive damages may make perpetrators suffer a double punishment, including fines or financial penalties. The punitive damages system is therefore one that requires systematic consideration from the angle of the constitution, civil law, civil procedure law, etc. because of its potential risks; it is a special system that needs to be handled carefully.
The new regulations on punitive damages in the Revised Consumer Protection Law indicate that Chinese legislators are already clearly aware that the scope of punitive damages application should be strictly limited.

Notes on Contributor

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