

Analysis of China's Punitive Damages System

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Abstract—There have been continuous disputes over the nature of the punitive damages system since China's first reference in the "Consumer Rights Protection Act". The theory of public law responsibility, the private law responsibility and public and private law responsibility, each of these three doctrines has its own words. The author believes that since the punitive compensation provisions are in civil legislation, it should be considered a private law responsibility. The function of punitive damages also has a view from dualism to pluralism. The author believes that the system only has the function of punishment and compensation, and other functions can be considered as the derivative functions of the two basic functions. Secondly, regarding the determination of the amount of punitive damages, the author compares the four methods of determination in China and gives some factors that he thinks should be considered. Finally, regarding the existence and punishment of punitive damages, the author believes that the punitive damages system is beneficial to China's legal system. The punitive damages system should continue to play its due role in the construction of China's legal system and China should constantly improve the mechanism to make it more compatible with the reality of China.

Keywords—*punitive damages; nature; function; reserving or abolishing*

I. INTRODUCTION

Strictly speaking, the punitive compensation system is an imported product. Until 1993, China's "Consumer Protection Law" introduced this provision, and the system was officially entered into the public's vision. Since the adoption of this system in the Consumer Protection Law, the academic discussion on punitive damages has always been a hot issue. This article will mainly introduce the academic controversy about the nature of the punitive system, the determination of the amount of punitive damages, the function and the abolition. As for its use in the field of mass infringement or intellectual property rights, the author will only conduct a brief discussion. The author hopes to put forward some opinions based on the previous scholars' research, and then attract more scholars to study in this field to provide better theoretical support for the development and practical application of the punitive damages system in China.

II. OVERVIEW OF THE PUNITIVE DAMAGES SYSTEM

Punitive damages are a system of damages in the Anglo-American law, but the meaning of the word is different in Anglo-American law. In the theory and practice of Anglo-American law, the most common terms used in punitive

damages include Punitive Damages, Exemplary Damages, followed by Vindictive Damages, Aggravated Damages, Multiple Damages, Smart Money, etc., but with different emphasis. Literally speaking, Punitive Damages emphasize the punitive function of illegal action, Exemplary Damages emphasizes the exemplary role of compensation, and Vindictive Damages emphasizes retaliation against unscrupulous actors. The most commonly used is Punitive Damages. [1] For China, the "Consumer Protection Law", which was formally implemented in 1994, was first adopted into the punitive damages system in the Anglo-American law, and since the law, the "Contract Law" and the "Tort Liability Law" had also absorbed the punitive damages system. But the system has been controversial since the implementation of the "Consumer Protection Law". Therefore, this article will first determine the nature, function, amount and current status of punitive damages. In the four aspects of the application field, some of the main controversies about punitive damages will be introduced and some of the author's own views will be presented. Finally, the author will discuss the issue of the punitive damages system in China.

III. THE NATURE OF PUNITIVE DAMAGES

The first that need to be talking about is the nature of punitive damages. As a statute country, China has always had the division of public law and private law. Under such a state of division, so-called public law responsibility and private law responsibility have arisen. Among them, the former is characterized by criminal liability and administrative liability, and the latter is mainly characterized by civil liability to fill damage. It is precisely because of the existence of the public-private dichotomy system in China that the nature of punitive damages has always been the angle of criticism. Punitive compensation, literally, there are "punishment" and "compensation" at the same time, in order to punish the illegal actions of illegal acts, but also to compensate for the loss of relatives. Therefore, in terms of its nature, it has both the punishment nature of public law and the function of filling damages in private law. Specifically, regarding punitive damages, the academic community has the following points.

First is the theory of public law responsibility [2]. The doctrine is mainly represented by civil law countries. According to the study of this point of view, punitive damages are a product of no distinction between civil and criminal punishment. The system has always had advocates and opponents in its history. In China, only a few scholars hold public law responsibility. For example, Yin Zhiqiang

believes that punitive damages reflect the nature of "punishment" and can be implemented between the subjects with unequal status. In modern society, such measures exist only in the field of public law, and private individuals cannot perform the functions of state machines. Further, punitive damages are essentially state interventions for damages, with the aim of penalizing the perpetrators. [3]

Second is the theory of private law responsibility. This theory is the mainstream view in the Anglo-American law and is also the mainstream view of China. The study of this viewpoint does not deny that the punitive damages system has certain similarities with the purpose and function of criminal law, but formally, punitive damages are still prescribed in civil law. For example, Article 1632 of the "Proposed Draft of the Chinese Civil Code" presided over by Prof. Liang Huixing and the drafting of the draft of the "Law of the Chinese Civil Code Tort Law" drafted by Professor Wang Liming have provisions for the punitive damages system [5]. Article 47 of the "Tort Liability Law" clearly stipulates the product liability for the application of punitive damages, so its proceedings are civil procedures, and they also recognize that punitive damages are different from general compensatory compensation. At least in the view of Professor Wang Liming, punitive damages are premised on the existence of compensatory compensation, and only punitive damages can be requested if they meet the constituent elements of compensatory compensation. [6]

Finally is the theory of public-private law mixed responsibility. Scholars who hold this view believe that whether it is the responsibility of public law or the responsibility of private law, it actually recognizes the punitive damages system. But in terms of its purpose and function, it is more biased towards public law. And from the point of view of procedures and other elements, it is biased towards private law, so it is a product of public-private mix. What's more, since China introduced the punitive damages system in the "Consumer Protection Law" in 1993, and the law of the Ministry is usually recognized by the legal profession. Therefore, many scholars regard the punitive damages system as a system of "economic law nature", [7] and then adopt the punitive damages system along with the "Contract Law" and the "Tort Liability Law", which reflects the punitive nature. The compensation system not only pays attention to the individuality embodied in compensatory compensation, but also focuses on third parties and society. The civil liability embodied in it has gone beyond the scope of private law and reflects the characteristics of social law. [8]

In response to the above doctrine, the author agrees with the responsibility of private law for the following reasons. First of all, the provisions on the punitive damages system exist only in civil legislation, which means that, in fact, when the system is first cited in China, the legislator may think that the system belongs to the civil category. Secondly, as far as procedural is concerned, it is also a civil procedure. Although there may be a public law nature in its purpose and function, it cannot be denied that its final realization value still exists in the civil field, such as the amount of final compensation, or used to make up for the victim, or to build

industry standards to repair the environment, etc. These are actually in the civil category.

IV. FUNCTION OF PUNITIVE DAMAGES

The function of the punitive damages system is also one of the fundamental issues of the system. In general, the function of the law refers to the performance or function inherent in the law as a particular social norm. The function of the law usually depends on the nature of the law itself, and the capabilities of the internal elements. Since the punitive damages system is a system other than the compensatory compensation system, it exhibits a unique function different from the general civil compensation and has its own characteristics. [1] For the punitive damage function, there are mainly dualism, ternary theory and quaternary theory in China.

The first is dualism. The dualism holds that the functions of punitive damages include the functions of punishing infringers (compensating victims) and deterrence (preventing damage). Generally speaking, both functions are equally important, but some scholars believe that prevention is better than compensation. For example, Wang Zejian believes that the functions of the "Tort Law" have changed in history, varying from time to time, and from different places. In terms of Taiwan, it includes two aspects: filling damage and preventing damage. Among them, "prevention of damage is better than compensation for damage." [9]

Secondly, the ternary theory holds that the functions of the punitive damages system include compensation, sanctions and containment. [6] Or it is believed that the punitive damages system function includes filling damage, preventing and containing illegality. [10]

Finally, the quaternary theory argues that punitive damages have four functions: punishment, containment, and encouragement of private assistance in law enforcement and compensation. [11] Or it is considered to be deterrent, compensation, punishment, and encouraging market transactions. [12]

In view of the above points, in terms of the classification of functions, the author favors dualism. What needs to be mentioned here is that as the punitive damages system is increasingly explored by various scholars. More scholars have proposed the distinction between the original and derivative functions of punitive damages. Based on this position, it can be seen that the function of punitive damages can be divided into punishments and compensation. As for other scholars' prevention, containment, encouragement of four people to assist in law enforcement and encourage market transactions, it can be understood as it is derived from its derivative function. As a whole, the punitive damage function can be divided into the original function and the derivative function. This is the author's approval, but it does not mean that the author agrees with some of the above functions. Especially in the quaternary theory, the author does not agree with the two functions of "inspiring private assistance in law enforcement" and "encouraging market transactions". The first is to encourage private assistance in law enforcement. As discussed earlier, the nature of punitive

damages has been debated, but for most scholars, that is, the mainstream view, punitive damages are of a private law (civil) responsibility. For the private sector, the punitive damages system may make it obtain more compensation. From this point of view, the system may be more to encourage the victims to bravely raise the law as his weapon. But for the aggressor, it is to encourage them to abide by the law and avoid punitive damages. The term law enforcement has an independent subject in China. As far as private individuals are concerned, there is no law enforcement issue. Therefore, the author still has doubts about this function. Secondly, the author also has doubts about "encouraging the function of market transactions". As we all know, the punitive damages system actually protects the injured party. For the aggressor, punitive damages are a limitation on the market position of the victim. Therefore, for the aggressor, sometimes the consequences of the punitive damages system may cause excessive burdens. Under such circumstances, encouraging market transactions has nowhere to start. The transaction includes the quality and quantity of the transaction, and the punitive damages system has more effects. In author's opinion, it may improve the quality of the transaction. But in terms of promoting the volume of market transactions (ie, promoting market transactions), the author believes that there is still a need to consider.

V. DETERMINATION OF THE AMOUNT OF PUNITIVE DAMAGES

How to determine the amount of punitive damages has always been a hot topic of discussion in the application of the punitive damages system. If the amount of punitive damages is too low, it will not serve as a deterrent; if it is too high, it will violate the original intention of the punitive damages system, and it is also a blame for the offenders. If the punitive damages amount is fixed, it is conducive to a wide range of applications, avoiding the excessive discretion of the judges. However, its shortcoming lies in the different levels of economic development in different regions. The amount involved in different cases is different. The fixed penalty amount may not be conducive to the realization of the value of punitive damages. Conversely, if it does not impose a restriction on the amount of punitive damages, it may result in different judgments arising from the discretion of the judges. In real life, the amount of punitive damages is too large, which is not conducive to judicial authority. However, this problem cannot be avoided. Looking at the legislation and the determination of the amount of punitive damages, China has the following four practices. The first is to specify a certain multiple; the second is not to specify a specific amount, neither an upper limit nor a lower limit; the third is to provide a minimum amount of compensation. The fourth is to specify a certain amount of space. [1] For the first approach, since the offender can directly calculate his own illegal costs, and generally is a multiple of the price or service, there is a situation where the compensation is too low. The second case is not prone to different cases in the same case, and may also lead to the issue of judge corruption. The third type of minimum compensation amount has positive significance for motivating victims to protect their rights in the case of less damage. The fourth is the way that

scholar Chen Nianbing agrees. That is to say, under the current social conditions in China, it is most appropriate to stipulate a certain choice space in determining the amount of punitive damages.

With regard to the determination of the amount of punitive damages, in terms of individual cases, some scholars believe that the factors that should be considered include: the social harmfulness of the wrongful act, the subjective malignancy, the size of the victim's damage, other penalties imposed on the offender, and the victim's litigation costs. [7] Some scholars also pointed out that aspects that should be considered include: the extent of the defendant's wrongdoing, the defendant's profitability, the defendant's financial situation, the extent and nature of the plaintiff's victimization, and the plaintiff's other punishments. [1] It can be seen that in terms of determining the amount of punitive damages, the two scholars believe that most of the factors that should be considered are consistent. One question that needs to be pointed out is, when determining the amount of punitive damages, should the illegal income and financial situation of the offender be taken into consideration? The former believes that it should not be considered. The reason is that the defendant's financial power and the deterrent effect of punitive damages have nothing to do with it. In terms of deterrence function, it should not be burdened with heavier punitive damages because the company has a large scale or rich financial resources. [13] While considering illegal income is conducive to the calculation of punitive damages, it is obviously difficult to calculate the benefits of personal behavior, such as hospital physicians engaged in individual medical behavior, daily beatings, and abusive behaviors, [13] [14] while the latter believes that it should be considered, because the unlawful income situation can determine its subjective viciousness to a certain extent, considering the defendant's ability to act on the one hand will not make the ruling impossible. On the other hand, different treatments need to be taken for different parties' different property conditions, and the punishment of different amounts of punitive damages is also the pursuit of substantive justice. [14] In author's opinion, whether or not to consider the content of illegal income, the author agrees with the latter and believes that it should be considered. Because the amount of illegal income can directly determine the subjective malignancy of the offender, it is helpful for the case to determine the ration and the amount of punitive damages. And whether or not the infringement of the property of the person should be considered, the author agrees with the former's point of view and believes that it should not be considered. Although by considering the financial resources of the aggressor, it can effectively promote the execution of the judgment, the victim is at least rich and cannot make its expectations fall through. But the problem is that if it is a particularly serious incident (when the amount involved is particularly large), once the infringement of the property of the person is considered, it may lead to unfair judgment (especially under the general conditions of the aggressor's wealth). Moreover, it seems that this kind of "more punishment for the rich, less punishment for the poor" seems reasonable, but if other

conditions of attribution are consistent, there is obviously a problem of unfairness.

VI. OVERVIEW OF THE APPLICABLE AREAS OF PUNITIVE DAMAGES

With the gradual development of the punitive damages system in China, along with the economic level and the expansion of various industries, some scholars believe that the application of the punitive damages system should be liberalized in various fields, but Wang Liming and other scholars believe that they are still cautious and believe that the punitive damages system should be restricted to the field of infringement. The author also agrees to expand the scope of application of punitive damages. In combination with the considerations of scholars such as Wang Liming, they mainly worry that if the scope of punitive damages is too broad, and it will lead to potential pressure on the infringers, which is not conducive to economic development. However, the author believes that it is now 2018, everyone would trade. If the transaction is subject to punitive damages, in this perspective, it can be considered that accepting punitive damages is a condition of market access (but it does not mean that there will be punitive damages, if the compensatory compensation is sufficiently fair or does not satisfy the constitutive elements of punitive damages, such as subjective requirements for intentional and gross negligence, it will cause serious consequences in terms of objectively requiring behavior). At least, the author believes that if it is a seller with sufficient goodwill, it will basically not encounter punitive damages. Even if it is encountered, in its constituent elements, it will reduce or even exempt its responsibility because an element does not meet, for example, no fault, enough duty of care, etc. On the contrary, if it is not good enough seller, there are problems such as fraud and disregard of their own responsibilities, then no matter what field applies punitive damages, the author believes that there is no problem. After all, the compensation function of the punitive damages system itself can also be understood as a revenge of a certain meaning. There doesn't exist the situation of having been developed enough in economic development, but needing to develop continuously. This is especially true for China's current economic development. China's economy situation is like it was a decade ago. What China wants is good and fast economic development. It is conducive to "good" to expand the scope of the punitive damages mechanism. But the author does not mean that it will not affect "fastly". However, for the research of the scholars mentioned above, perhaps the current scope of application is not necessarily narrow. But for now, many scholars who study punitive damages focus on the construction of punitive damages systems in the field of large-scale infringement and intellectual property. One point to be made here is that in the application of punitive damages in the field of large-scale infringement, some scholars believe that the state and the victims share the punitive damages proportionally. [15] The author disagrees with this view. Punitive damages are premised on compensatory compensation. The most fundamental and direct purpose is to fill the victims' losses. Since large-scale infringement damages a large number of personal and property losses, and these losses may not be

able to make up for the loss of a particular victim, and some losses are not enough to make up for it, in such cases, why is it necessary for the state and the victim to be compensated in proportion to the average? The article mentions that the damage caused by large-scale infringement will require more public resources to be compensated afterwards, but should this expenditure not be paid by the tort-feasor himself to the country? Why is it that the state has made up from the punitive damages paid to the infringed? In the author's view, even if the country needs a sum of money to maintain social stability, this money should be a bifurcated approach. That is, punitive damages are punitive compensation, giving the most direct victims; other expenses (country maintenance costs, etc.) will be settled separately. Based on this consideration, it is possible to make a certain reduction in the determination of the amount of punitive damages. But it is by no means a punitive damage, so that the victim and the country have average compensation.

VII. THE RESERVING OR ABOLISHING PROBLEM OF PUNITIVE DAMAGES

In fact, this issue is somewhat related to the nature of punitive damages. Some scholars believe that punitive damages should not be adopted as a product of public and private. [3] In fact, there is nothing wrong with the nature of punitive damages. However, in the case that everyone is difficult to convince each other, the author believes that the nature of the system can be discussed first. It can be seen the issue of the existence and punishment of the punitive damages system from another perspective.

China introduced the system of punitive damages for the first time in the "Consumer Protection Law", which was officially implemented in 1994. Since the reform and opening up in 1978, China's social economy has continued to develop and the process of global economic integration has been accelerating. Changes in the economic base are also inevitable as a reform of the legal system of the superstructure. With the gradual establishment of the market economic system, people's enthusiasm for creating wealth has never been higher. Social and economic activities have been more frequent and active than ever before, but the corresponding regulatory measures have not kept up in time. The direct consequence is the crisis that leads to social integrity. In turn, it hinders the forward development of society. In the civil field, there are many negative evaluation methods for torts and breaches, but punitive damages are more severe. [1] The use of this more rigorous method expresses the legislator's strong desire for certain types of civil violations, thereby transmitting a message to the offender that is negating certain illegal acts, that is, the denial and opposition to certain illegal acts are not only the case. This kind of negative evaluation is also a kind of respect for the rights of the victim, and a kind of relief other than the damage of the victim's damage. This kind of relief, compared with the remedy for filling the damage, pays more attention to the incentive of the victim to protect his or her rights, and encourages the victim to take up the legal weapons to defend his rights. [1] To sum up, there is nothing more than two points, that is, first, the reality needs to build a

credible society and promote better economic development. Second, it aims to build a more perfect punishment and relief mechanism. The punitive damages are based on the principle of compensatory compensation, and can better reflect the principle of comprehensive compensation of civil law.

Therefore, from the perspective of the benefits that the punitive damages system can bring us, there are reasons for its existence in China's legal system. It cannot be denied that the punitive damages system has a good effect on its normative content. Despite the controversy over its nature, in the current global economic integration, a country's legislation cannot remain in the concept of "a paradisiac and excellent country", and a country's legislation must also be nationalized, taking its essence and abandoning its dirty, China must be good at drawing on the excellent legislation of other countries. Whether the punitive damages system is for foreign countries or for China, it is still beneficial in the moment.

VIII. CONCLUSION

Even if punitive damages are an exotic product, there is no debate about its nature, amount determination, scope of application, and function. However, it cannot be denied that the current punitive damages system has a good effect on China or foreign countries. When the author's level is limited, in terms of the punitive damages, the complete development context and the elements of the system of the United Kingdom, the United States and even China are not involved in the content. Therefore, it is impossible to introduce and analyze the punitive damages system from source to flow. The main purpose of this paper is to make a brief introduction to the punitive damages system, and on this basis, the author puts forward some self-disciplined views, hoping that the existence and application of the system will be affirmed by many scholars and will do their best. The author also hopes that more scholars have expressed their opinions on the punitive damages system, providing better theoretical support for the development and application of the punitive damages system in China.

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