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MISSED CHANCES AND REFLECTIONS: A RESEARCH ON PUNITIVE DAMAGES

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"Mi piacerebbe (e non mi pare impossibile né assurdo) che in tutte le facoltà scientifiche si insistesse a oltranza su un punto: ciò che farai quando eserciterai la professione può essere utile per il genere umano, o neutro, o nocivo. Non innamorarti di problemi sospetti. Nei limiti che ti saranno concessi, cerca di conoscere il fine a cui il tuo lavoro è diretto. Lo sappiamo, il mondo non è fatto solo di bianco e di nero e la tua decisione può essere probabilistica e difficile: ma accetterai di studiare un nuovo medicamento, rifiuterai di formulare un gas nervino. Che tu sia o non sia un credente, che tu sia o no un "patriota", se ti è concessa una scelta non lasciarti sedurre dall'interesse materiale e intellettuale, ma scegli entro il campo che può rendere meno doloroso e meno pericoloso l'itinerario dei tuoi compagni e dei tuoi posteri. Non nasconderti dietro l'ipocrisia della scienza neutrale: sei abbastanza dotto da saper valutare se dall'uovo che stai covando sguscerà una colomba o un cobra o una chimera o magari nulla".

P. LEVI, *Covare il cobra*, in *La Stampa*, 11 settembre 1986, ora in *Opere II*, Torino, 1997, 990 ss.

Missed chances and reflections: a research on punitive damages

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General introduction to the subject

It may seem bizarre that in the Italian legal system the issue of punitive damages has progressively evolved to the point of formal recognition by the Joint Sections of the Supreme Court at a time when, in the native jurisdictions, the concept was being critically discussed and then subjected to new limitations in terms of quantification.

This debate has, in fact, on one hand, led common law countries to regulate this civil remedy, by limiting their use and introducing restrictions to their amount, and, on the other hand, has pushed civil law countries to change approach in light of the developments occurred, particularly by abandoning the traditional monofunctional nature of tort law.

The aspect of the determination of recoverable damages plays indeed a crucial role in the 21st century tort law. Liability is increasingly being insured, both in compulsory and optional form. In this context, the lesson of Guido Calabresi comes up again - as relevant today - who emphasized the nature of the social cost of the institution of tort law: from a structural point of view, the relationships between the wrongdoer and the victim, on the one hand, and the relationship between the injurer and insurance companies, on the other, cannot be considered separately. On the contrary, the insurance instrument makes it possible to redistribute and socialize costs that would otherwise remain in a private sphere.

These reasons, therefore, justify the diriment importance of the assessment of the compensable damages and, as regards, in particular, the Italian legal system, they should be read and coordinated with the principles recently affirmed by a further ruling of the Joint Sections, on the subject of *compensatio lucri cum damno*.

This is in order to understand the current rationales and trends of tort law. Any attempt to seek and define (intra)-systematic balances should consider, at least, which the two sides of the discussion are: on the one hand, experiments aimed at recognizing ultra-compensatory damages; on the other hand, the "risk" of affirming an indemnity model, which is certainly far from the principle of ("just") and full compensation.

It thus seems useful to reflect again on the reasons that led to consolidating a rather widespread favor, on the interests that favor was intended to serve, on the

implications that a further expansion of the boundaries and functions of law of torts entails in the system. In particular, however, the research would like to verify which other categories of the system require an evolution. If so, it may be useful for constitutionally orienting recourse to the new tool and making the underlying system of interests clear, thereby also defining the operational limits and the necessary instruments for controlling hypotheses of use that might appear unjustified or excessive.

In so doing, the analysis will be moving from the origin of punitive damages, situated along the uncertain borderline which divides criminal law remedies from those proper of civil law domain. If traditionally, in the civil law contest, these classifications appear clearly entrenched, the same is not true for the common lawyer. In fact, while the gradual expansion of the field of criminal law has led, in the areas of continental Europe, to the affirmation of the reparatory function of tort law, so that it has to 'only' compensate and restore patrimonial losses, the development of damages in the areas of common law has followed a different evolution. Situated in a “foggy” borderland between civil and criminal law, punitive damages served to fill the gaps in the system of rights enforcement; in their development, however, they revealed the difficulty of finding a 'third way' (between criminal and civil law) adequate to meet needs that required widespread protection. Thus, starting from the first decades of the 20th century, a 'public vocation' of an instrument traditionally at the service of the individual began to be experimented with; tort law was therefore used to protect the first organized communities, having common, homogeneous and legally relevant interests, against the abuse of economic power of large corporations.

Reflecting on the collective dimension of the interests that justified punitive damages award explains the reasons for the inner paradox of the institution, characterized by an individual enrichment based on collective interests. At the same time, it also shows the reasons for its acceptance, which can be traced back to the persistent difficulty of identifying entities to which the entitlement of collective interests might be referred. Despite civil liability has struggled to free itself from some of its dogmas and has progressively been used to deal with conflicts that have no longer just individual significance, but assume a clear social value (e.g.

protection of the environment or ecological balance), some structural obstacles are still in place, difficult to overcome when rules and procedures based on the scheme of subjective rights are faced with collective interests of different nature. Nevertheless, it is difficult to say whether these limits are inherent to civil liability or rather belong to those of legal subjectivity, which is still unable to entify interests deserving consideration and protection.

From this particular standpoint, the Seventies represented, for private law in general and for civil liability in particular, a fertile laboratory for analysis and discussion. The decade offered - among other things - the opportunity to approach Economic analysis of Law and the consequent overturn of some long-standing perspectives: the question that had been posed until that time - whether and when a subject should compensate the damaged party - was replaced by another: what society should do about the risk of possible harm; how conducts likely to generate it should be discouraged; how the costs of the entire system should be reallocated. At the same time, the debate no longer and not only looks at individual injuries, but a whole series of interests of a clearly collective kind were taken into consideration, with respect to which it was nevertheless problematic to identify the qualified players to stand as holders of the relative claims (and, hypothetically, to sue for both injunctive and compensatory remedies).

The emerging of interests of such nature and the distrust of Government had initially left it to the Courts to provide the first answers. However, once the 'collective' relevance of certain conflicts had been acknowledged, the difficulty of finding solutions of purely judicial nature to crucial issues for the development of future models of society, which would have required more appropriate strategies and would have been more likely to receive a broad political consensus, re-emerged in all its gravity.

The aim is therefore to verify whether and to what extent some of the interests - of a clearly collective sort - behind the phenomenon of punitive damages can find responses in a rethinking of the concept of the legal entity, going back over the experiments of the 1970s and verifying whether the notion can still be useful. In this way it would be possible to avoid the inconvenience of remedies that favour individual enrichment which, in continental tradition, appear clearly unjustified and

that collective injuries may instead continue to remain without appropriate attention and protection.

CHAPTER ONE

Part I – Origins and topic's legal framework

1. The ancient roots of the remedy

The ancestor of modern punitive damages can be considered the statutory remedy of multiple awards, a practice that, like punitive damages, provided for awards in excess of actual harm[1].

It's possible to find one of the earliest signs of punitive damages in the Code of Hammurabi in 2000 B.C[2]. Punitory forms of damages also appeared in the Hittite law in 1400 B.C. and in the Hindu Code of Manu in 200 B.C[3].

Even Roman law, from its very beginnings, recognized that a wrongdoer might have been liable to make payments to the victim for an amount beyond the actual harm suffered[4]. The Twelve Tables, dating from 450 B.C., provided several examples of multiple damages, in the form of fixed money payments, such as where a party failed to carry out a promise, or where a party was a victim of usury[5].

Roman law recognized three categories of torts: (1) *furtum*, civil theft, relating to the wrongful distribution of wealth; (2) *damnum iniuria*, "wrongful waste," directed against the wrongful waste of wealth; and (3) *iniuria*, a wrongdoing, which

[1] L.L. SCHLUETER-K.R. REDDEN, *Punitive Damages*, New York, 2000, p. 1 f.

[2] In the Code of Hammurabi, punitive damages, in the sense of multiple damages, were payable for offences, such as stealing cattle (from a temple, thirty-fold; from a freeman, ten-fold), a merchant cheating his agent (six times the amount), or a common carrier failing to deliver goods (five-fold their value). See G. DRIVER-J. MILES, *The Babylonian Laws*, Oxford, 2007**,** pp. 500-501; see also L.L. SCHLUETER-K.R. REDDEN, *op.cit*.

[3] Even the Bible contains several examples of multiple damages remedies. E.g. Exodus 22:1: «if a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep»; Exodus 22.9 «for all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challenge to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour».

[4] See M. RUSTAD-T. KOENIG, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, in *The American University Law Review*, 1993, pp. 1285-1286, according to which «the early Romans apparently employed multiple damages to mediate social relations between patricians and plebeians and to punish those who injured or killed slaves».

[5] H. F. JOLOWICZ, *The Assessment of Penalties in Primitive Law*, in *Cambridge Legal Essays Written in Honor of and Presented to Doctor Bond, Professor Buckland and Professor Kenny*, 1926, pp. 203-216, according to which «the penalty is made to fit, not the amount of damage inflicted by the tort, but the nature of the tort itself. In other words, the principle of appropriateness, not […] reparation, is the guiding one». This multiple restitution, Jolowicz observes, is «a strong argument for the preponderance of the idea of fittingness over that of reparation in fixing the penalties».

protected personality or personhood. Each allowed for multiple damages in the delictual action[6].

Moreover, the Code of Justinian provided for multiple damages against the defaulting debtor, too[7].

However, although already in the thirteenth century many statutes[8] provided for awards of punitive damages and there were cases in which damages exceeded those effectively caused, the origin of punitive damages is traced back to the English cases of *Wilkes v. Wood*[9] and *Huckle v. Money*, both occurred in 1763, which led to the first explicit recognition of the legal concept of exemplary damages.

Wilkes v. Wood concerned a search under a general warrant of arrest of a publishing house which had distributed a pamphlet, the "North Briton[10]", defamatory towards the King. George III had proceeded, through the Government, to provide for a general warrant of arrest, since the authors were unknown, and 48 people were arrested, many of them unfairly. Thus, Mr. Wilkes brought an action in trespass against the official who did the search and his counsel asked for «large and

[6] This delictual action was penal and commonly resulted in the payment of more than compensation. In terms of civil theft, *furtum nec manifestum* (a thief by night or "nonmanifest theft") involved double payment, while a manifest theft or *furtum manifestum*,by day, involved a higher fourfold money payment. The victim of a theft could demand to make a search with witnesses of any premises on which he thought the goods were hidden. If the search was refused, he could exact a fourfold penalty from the occupier. If the search was allowed, and the goods were found, the occupier of the premises was liable to a threefold penalty even if he knew man who left the goods on the premises, but only if he did so to avoid detection. In terms of *damnum iniuria*, this was dealt with in the *Digest* 9.2 on the *Lex Aquilia*, a plebiscite promulgated by a Tribune of the Plebeian, Aquilius, between 286 and 195 B.C. A text from Gaius on the *Lex Aquilia* provides that «an action for double damages may be brought against a person who makes a denial». *Digest* 9.2.23 states: «where a slave is killed through malice (*dolo*), it is established that his owner can also bring suit under criminal process by the *Lex Cornelia* (*de iniuriis*), which punished three kinds of injury committed by violence, namely *pulsare* (beating), *verberare* (striking), and *domum introire* (forcible invasion of one's home)], and if he proceeds under the *Lex Aquilia*, his suit under the *Lex Cornelia* will not be barred. Further on, *Digest* 9.2.27 states: «if anyone castrates a boy slave, and thereby renders him more valuable, Vivianus says that the *Lex Aquilia* does not apply, but that an action can be brought for injury (*iniuriarum erit agendum*), either under the Edict of the aediles, or for fourfold damages (*in quadruplum*).

[7] See P. GALLO, *Pene private e responsabilità civile*, Milan, 1996, p. 37 f.; W.W. BUCKLAND-A.B. MCNAIR, *Roman Law and Common Law*, Cambridge, 1936, pp. 344- 48, according to which the function of multiple damages in Roman Law is completely different from that of punitive damages in common law.

[8] See F. BENATTI, *Correggere e punire. Dalla law of torts all'inadempimento del contratto*, Milan, 2008, p. 1 f., according to which the first example is the statute of Gloucester, 1278, 6, Edw. c. *5*, which provided for treble damages for waste. Moreover, in cases of trespass against religious persons, a law of the thirteenth century provided for double damages: «Trespassers against religious persons shall yield double damages», in *Synopsis of Westmister*, I, 3 Edw. 1, c. 1, Vol. 1, in *24 Statutes at Large*, 138 (Pickering Index 1761).

[9] *Wilkes v. Wood*, in *98 Eng. Rep.*, 1763, p. 489 f., in which the publisher asked for «large and exemplary damages» in his suit, because actual damages would not punish or deter this type of misconduct.

[10] John Wilkes criticized the speech of George III at the Parliament, arguing that the King had given «the sanction of his sacred name to the most odious measures and to the most unjustifiable declarations from a throne even renowned for truth, honor and unsullied virtue».

exemplary damages», since purely compensatory damages would not put a stop to such proceedings.

Lord Chief Justice Pratt instructed the jury that «damages are designed not only as a satisfaction to the injured person, but likewise as a punishment on the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself[11]».

With this decision the term punitive damages were introduced for the first time.

In *Huckle v. Money*[12], government messengers arrested and confined the printer of the "North Briton" pamphlet for six hours on the orders of the Secretary of State. Although treated well, Huckle brought a suit alleging trespass, assault, and false imprisonment against the official executing the warrant. The jury awarded a verdict in favor of Huckle for £ 20 as compensatory damages and £ 300 as exemplary damages.

Lord Chief Justice Pratt refused to reject the jury verdict as excessive. Despite the fact that actual damages amounted to £20 at most, the Chief Justice stated: «the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 pounds damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light […] I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no English- man would wish to live an hour; it was a most daring public attack made upon the liberty of the subject[13]».

An analogous reasoning is found in another following case, *Tullidge v. Wade*[14], in which exemplary damages were awarded to the father of a pregnant girl.

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[11] In fact, the behavior of the Government was described by the Chief Justice as lacking any justification and «contrary to the fundamental principles of the constitution», *Wilkes*, cit., p. 499.

[12] *Huckle v. Money*, in *95 Eng. Rep.*, 1763, p. 768.

[13] Further, Pratt stated: «perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great points of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate all over the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom [...]». See J. TALIADOROS, *The Roots of Punitive Damages at Common Law: A Longer History*, in *64 Clev. St. L. Rev.*, 2016, pp 251-302.

[14] *Tullidge v. Wade*, in *95 Eng. Rep.*, 1769, p. 909.

Chief Justice Wilmot, in his opinion, declared that «actions of this sort are brought for example's sake, and although the plaintiff's loss in this case may not really amount to the value of twenty shillings ye the jury has done right in giving liberal damages […] if much greater damages had been given, we should have not been dissatisfied therewith».

It has been underlined[15] that at that time there was not yet a general theory concerning punitive damages and that only starting from the nineteenth century English courts began to expressly admit the deterrent function of punitive damages as their *ratio*.

In order to explain the origins of punitive damages, two essential theories have been advanced[16].

The first theory relates their roots to the role of the jury in the King's Court[17]. The determination of the amount of damages was a prerogative of the jury, which carried out both detective and judiciary functions[18].

For those reasons, the Courts of Appeal refused to review jury verdicts, even when the damages far outweighed the compensatory ones. Hence, the power of the jury was both discretionary and almost limitless[19].

The second theory assumes that the cause of punitive damages is the necessity to compensate the plaintiff for injuries to his honor, thus for immaterial losses that initially were not considered compensable under common law[20].

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[15] See T.J. SULLIVAN, *Punitive Damages in the Law of Contract: the Reality and the Illusion of Legal Change*, in *61 Minn. L. Rev.*, 1977, p. 207.

[16] See F. BENATTI, *op cit.*; J.B. SALES-K.B. COLE JR, *Punitive Damages: a Relic that Has Outlived its Origins*, in *37 Vand L. Rev.*, 1984, pp. 117-1120; L.L. SCHLUETER-K. R. REDDEN, *Punitive Damages*, *op.cit.*

[17] « […] Common law courts […] yet remained reluctant to disturb an excessive jury award when the defendant's conduct had been particularly outrageous. To justify this reluctance, courts developed a theory that the jury was permitted to award an amount in excess of actual damages, when the defendant's conduct had been motivated by malice or will», J. MALLOR-B. ROBERTS, *Punitive Damages toward a Principled Approach*, in *31 Hastings L. J.*, 1980, p. 641.

[18] Moreover, the members of the jury were selected for their knowledge of the parties and the case at stake. See J.B. SALES-K.B. COLE JR, cit, p. 1120, according to which «Early English common law juries consisted of local lawnspeap who knew more about facts than did the judges and under the reign of Henry II the Knights who acted as jurors also provided the only testimony of the trial».

[19] See F. BENATTI, *op. cit.*, p. 5, according to which the only remedy for the abuse of the powers of the jury was the writ of attaint, which provided a jury, composed of 24 members, to control the verdict of another jury and, if necessary, modify it by punishing the relative jury. The consequences of the writ of attain were particularly heavy: «become forever infamous; should forfeit their goods and the profits of their land; should themselves be imprisoned and their wives and children thrown out of doors, should have their house razed, their trees extirpated and their meadows ploughed».

[20] See T.B. COLBY, *Beyond the Multiple Punishment Problem: Punitive Damages and Punishment for Individual Private Wrong*, in *87 Minn. L. Rev.*, 2003, p. 615, according to which «the plaintiff is a man of family, a baronet, an officer in the army, and a member of Parliament, all of them respectable situations, and

Presumably, these two views together illustrate the origins of punitive damages, in combination with the assumption that punitive damages were the only remedy capable to ensure a deterrent function, because they effectively punished serious offences and reflected the society's disregard towards outrageous behavior[21]. In fact, such a function explains not only their origins, but also the reason why punitive damages were frequently awarded. Indeed, within a decade of *Wilkes*, courts commonly awarded punitive damages in tort actions such as assault, false imprisonment, defamation, seduction, malicious prosecution, and trespass[22].

As the eighteenth century came to its end, exemplary damages were firmly enshrined in the Anglo-American tradition, and soon after its emergence in England, the doctrine was experienced in America.

2. Origins in the American legal system

Almost thirty years later, punitive damages were recognised in the United States. The earliest reported punitive damages case is *Genay v. Norris*, judged by the South Carolina Supreme Court in 1784[23]. The plaintiff was awarded punitive damages after becoming ill from drinking wine that contained toxic Spanish fly, added to it by the defendant. After that, in 1791, the New Jersey Supreme Court decided *Coryell v. Colbaugh*[24]. In this case punitive damages were awarded to the plaintiff, who had sued the defendant for breach of promise to marry, to serve as an example to others[25]. During the eighteenth and nineteenth century punitive damages were

which may render the value of the injury done to him greater». On the contrary, see A.J. SEBOK, *What did punitive damages do? Why misunderstanding the history of punitive damages matters today*, in *78 Chicago-Kent L. Rev.*, 2003, p. 138, according to which «in footnote eleven of the decision, the court relied on a claim about the history of punitive damages that is at best misleading and at worst dangerous». So, the Author denies that the origin of punitive damages corresponds to the need to compensate for moral damages.

[21] However, beyond the theories relating to the origin of punitive damages, the essential element of their admissibility was and is the existence of malice, oppression, or gross fraud.

[22] See *Loudon v. Ryder*, in *2 Q.B.*, 1953, p. 202 (assault); *Dumbell v. Roberts*, in *1 All. E.R.*, 1944, p. 326 (false imprisonment); *Bull v. Vazquez*, in *1 All E.R.*, 1947, p. 334 (defamation); *Tullidge v. Wade*, in *95 Eng. Rep.*, 1769, p. 909 (seduction); *Leith v. Pope*, in *96 Eng. Rep.*, 1779, p. 777 (malicious prosecution); *Owen & Smith v. Reo Motors*, in *151 L.T.R.*, 1934, p. 274 (trespass to goods).

[23] *Genay v. Norris*, 1 Bay 6, 1 S.C.L. 6, 1784 WL 26 (S.C. Com. Pl. Gen. Sess. 1784).

[24] *Coryell v. Colbaugh*, 1 N.J.L. 77, 1791 WL 380 (N.J. 1791). See L.L. SCHLUETER-K. R. REDDEN, *Punitive Damages*, *op.cit*., p. 15; S. DANIELS-J. MARTIN, *Myth and Reality in Punitive Damages*, in *Minnesota Law Review*, 1990, p. 7.

[25] *Coryell v. Colbaugh*, at § 77. The jury was instructed by the court 'not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future'.

awarded in a range of legal categories, all involved in insult to the victim's dignity, including slander, seduction, assault, malicious prosecution and false imprisonment, illegal intrusion into private dwellings and confiscation of private papers, trespass into private land in an offensive manner, etc[26]. The U.S. Supreme Court, in 1851, explicitly recognized punitive damages in *Day v. Woodworth*, affirming that the institution had already been endorsed for more than a century[27].

3. Nature and theory

The Restatement of Torts defines punitive damages as "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future[28]". Thus, the theory behind punitive damages is one of punishment and deterrence and involves a blending of the interests of society in general with those of the harmed party in particular[29]. Punitive damages ought to "make the guilty defendant feel the pain of his misdeeds and to deter him and others from similar misconduct[30]".

Even though their procedural setting is civil, in most states the primary aim of punitive damages is non-compensatory[31]. Only three states have assigned a compensatory function to punitive damages[32]. Given the *public interest* in awarding punitive damages, the civil remedy has been depicted by American courts as a "civil fine, fine or penalty for the protection of the public interest, private fine, civil

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[26] D. D. ELLIS, *'Fairness and Efficiency in the Law of Punitive Damages', S Cal L Rev*, 1982, p. 15
[27] *Day v. Woodworth*, 54 U.S. 363, 1851 WL 6684 (U.S. Mass. 1851), at § 371.
[28] Restatement of Torts, § 908.
[29] 25 C.J.S. Damages § 195.
[30] A. T. VON MEHREN & P. L. MURRAY, *Law in the United States*, Cambridge University Press, 2007, p. 180.
[31] K. MANN, *Punitive civil sanctions: the middle ground between criminal and civil law*, *Yale L. J.*, 1992, p. 1798; L. L. SCHLUETER, *Punitive Damages*, I, LexisNexis, 2005, p. 1, p. 16; D. G. OWEN, *Products liability law*, Thomson/West, 2005, p. 1122.
[32] L. L. SCHLUETER, *Punitive Damages*, cit., 2005, p. 17; J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, Thomson/West, 2000, paragraph 4-3 to 4-8. In Connecticut, punitive damages aim at compensating the plaintiff for his injuries instead of punishing the defendant for his wrongful behavior, and in Michigan wounded feelings and injured dignity add to the amount of compensation available through punitive damages. A Michigan court (*Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (Mi. 1922), at § 747) once held that: *"Exemplary damages are of necessity intangible in nature and, therefore, cannot well be considered apart from those matters which are capable of exact pecuniary valuation. They may enlarge the compensatory allowance, but they are not to be considered as authorizing a separate sum by way of example or punishment".* Although the purposes of punitive damages in Texas are to punish and deter, they also serve to compensate for the plaintiff's inconvenience and attorney fees and to reimburse for losses too remote to be considered as elements of strict compensation.

penalty and quasi-criminal penalty[33]". It is often said that punitive damages pursue criminal rather than civil law goals. In this regard, they are even considered an 'anomaly' in the law of torts[34]. The main objective of modern tort law is *compensation* for actual loss suffered[35]. If a person is held liable under tort law for harming another one, the damages are by far the most important remedy. Damages play a key role in serving the functions of tort law and are therefore usually compensatory[36]. That is not the case with punitive damages, which present an exception to the general rule that damages only serve to compensate the plaintiff[37]. They are basically not compensatory, but rather they seem to have objectives that are close to those of criminal law.

Criminal law aims at punishment and reintegration of the offender, dissuasion of the offender and others from similar conducts, and, at last, the protection of society[38]. The long-standing division between public law and private law – also known and hereafter referred to as *public-private divide* – and the idea that punishment is a goal best reserved for criminal law is the main reason why punitive elements in tort law are minimal in most civil law systems[39].

Opponents of punitive damages contend that punishment is typically a criminal law matter that should be left to the state and that the defendant who faces punitive damages should be granted criminal procedural guarantees. Such procedural safeguards generally do not apply in American punitive damages law[40]. Redish and Mathews put it as follows: *"The framework of punitive damages gives us the worst of both worlds: pure public power is vested in the hands of purely private actors,*

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[33] 22 Am. Jur. 2d Damages § 541.

[34] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, *op.cit.*, p. 2-5; C. MORRIS, *Punitive damages in tort cases*, *Harv. L. Rev.*, 1931, p. 1176; L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, p. 79.

[35] U. MAGNUS, *Comparative report on the Law of Damages*, in Unification of Tort Law: Damages, U. Magnus (ed.), Kluwer Law International, 2001, p. 185; S. DEAKIN, A. JOHNSTON & B. MARKESINIS, *Markesinis and Deakin's Tort Law*, Claredon Press, 2008, p. 52; L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, p. 79.

[36] A. BURROWS, *Remedies for Torts and Breach of Contracts*, Oxford University Press, 2004, p. 29; S. D. LINDENBERGH, *Damages in Tort*, in Elgar Encyclopedia of Comparative Law, Edward Elgar Publishing, 2006, p. 234-241.

[37] S. C. YEAZELL, *Civil Procedure*, Aspen Law & Business, 2008, p. 273.

[38] L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, p. 79-80

[39] S. DEAKIN, A. JOHNSTON & B. MARKESINIS, *Markesinis and Deakin's Tort Law*, cit., 2008, p. 50; A. T. VON MEHREN & P. L. MURRAY, *Law in the United States*, cit., 2007, p. 179.

[40] D. G. OWEN, *Products liability law*, *op. cit.*, p. 1122; F. P. HUBBARD, *Substantive due process limits on punitive damages awards: "morals without technique"*, *Fla L. Rev.*, 2008, p. 386, stating that there are of course exceptions to the general rule. For example, some states have adopted the reasonable doubt standard for proving the egregious conduct necessary for imposing punitive damages. See for example Colo Rev Stat § 13-25-127 (2007).

but those private actors do not simultaneously assume the constitutional and political restrictions traditionally imposed on those who exercise pure public power[41]*".*

However, opinions on this controversial issue differ throughout the country: *"Under some authority, because exemplary damages rest on justifications similar to those for criminal punishment, they require the appropriate substantive and procedural safeguards to minimize the risk of unjust enrichment. Under other authority, an award of punitive damages based on a civil claim may not be considered a substitute for criminal punishment, or a criminal sanction to which criminal-law protections apply. Although an award of exemplary damages is punitive, it is a private remedy rather than a public criminal sanction*[42]*".*

However, it is widely acknowledged in the United States that punitive damages are a form of criminal remedy in civil law[43]. As Behr outlined, legal systems in which punitive damages are explicitly available have a dualistic approach towards tort law, *i.e.* a focus on a compensatory and a punitive function of tort law, in contrast to the monistic approach in civil law systems[44].

To summarize: the theory of punitive damages is neither entirely civil or criminal, and this hybrid character is an important reason for the dispute that has always accompanied the topic.

4. Objectives

From the early beginning, American courts have regarded punitive damages as primarily non-compensatory in character[45]. The remedy serves more than a few functions: punishment, deterrence or prevention, preserving the peace, inducing private law enforcement, compensating victims for otherwise non-compensable losses, and paying the plaintiff's attorney fees[46].

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[41] M. H. REDISH & A. L. MATHEWS, *Why punitive damages are unconstitutional*, *Emory L. J.*, 2004, p. 4, 30.
[42] 25 Am. Jur. 2d Damages § 541.
[43] D. G. OWEN, *Products liability law*, cit., p. 1122.
[44] V. BEHR, *Punitive damages in American and German Law, tendencies towards approximation of apparently irreconcilable concepts*, *Chi-Kent L. Rev.*, 2003, p. 105-106.
[45] B. KUKLIN, *Punishment: the civil perspective of punitive damages*, *Clev. St. L. Rev.*, 1989, p. 5.
[46] The functions of punitive damages are extensively analyzed in a leading article of D. D. ELLIS, *Fairness and Efficiency in the Law of Punitive Damages*, *cit. above*, 1982, p. 4. See also D. G. OWEN, *Products liability*

According to Owen: *"In this nation, punitive damages are still considered an important remedy that checks, rectifies, and helps prevent extreme misconduct*[47]*".* The significance of 'extreme misconduct' is interpreted differently and varies according to the specific circumstances of the case, but it always implies an important aggravating element.

Most United States jurisdictions acknowledge that compensation follows from the harm, but punitive damages are not a feature of it[48]. Punitive damages are more concerned with the defendant's conduct than with the plaintiff's prejudice. The remedy is founded on ideas of public policy rather than individual compensation[49]. In this regard, Zipursky draws the distinction between objective punitiveness ('punitive damages are focused on the defendant's conduct and character') and subjective punitiveness ('the idea that the victim of a wrong is allowed to be punitive'). In the opinion of the Author, this latter theory of subjective punitiveness, which he also terms 'private revenge', is an essential argument why punitive damages are not an accepted part of tort law in many jurisdictions outside the United States and in several American states[50].

With regard to objective punitiveness, which is the *dominant theory* in American punitive damages law, the primary aims of awarding punitive damages are to punish the defendant, *thereby* deterring him and others from similar conducts in the future[51]. The opinion that deterrence should be considered as a goal of punishment has been advanced by Posner and other law and economics scholars[52]. On the basis

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law, *op. cit.*, 2005, p. 1132-1144; L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, § 2.2; D. SCHOENBROD et al., *Remedies: Public and Private*, West Publishing, 1996, p. 452-453.

[47] D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1200.

[48] 25 C.J.S. Damages § 195; 22 Am. Jur. 2d Damages § 544.

[49] 22 Am. Jur. 2d Damages § 544.

[50] B. C. ZIPURSKY, *A theory of punitive damages*, *Tex. L. Rev.*, 2005, p. 154-155.

[51] Restatement of Torts, § 908; L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, p. 25; S. C. YEAZELL, *Civil Procedure*, cit., 2008, p. 273; 22 Am. Jur. 2d Damages.

[52] R. Posner can be regarded as the pioneer of Economic analysis of law, not only in common law circles. With regard to its contribution to this method of the interpretation of law, see R. POSNER, *Economic analysis of law*, Little, Brown & Co., 1972. The juseconomics literature is vast. It can be seen, with regard the law and economics theory of punitive damages, among others, R. D. COOTER, *Economic analysis of punitive damages*, *S. Cal. L. Rev.*, 1982, 79-101; D. D. ELLIS, *Fairness and efficiency in the law of punitive damages*, *op. cit.*, 1982; D. G. OWEN, *Civil punishment and the public good*, *S. Cal. L. Rev.*, 1982, p. 103-121; G. T. SCHWARTZ, *Deterrence and punishment in the common law of punitive damages: a comment*, *S. Cal. L. Rev.*, 1982, 133-153; D. FRIEDMAN, *An economic explanation of punitive damages*, *Ala. L. Rev.*, 1989, 1125-1142; M. F. GRADY, *Punitive damages and subjective states of mind: a positive economic theory*, *Ala. L. Rev.*, 1989, 1197-1225; B. CHAPMAN & M. TREBILOCK, *Punitive damages: divergence in search of a rationale*, *Ala. L. Rev.*, 1989, 741-829; R. D. COOTER, *Punitive damages, social norms, and economic analysis*, *Law and Contemp. Probs.*, 1997, 73-91; C. R. SUNSTEIN- D. KAHNEMAN & D. SCHKADE, *Assessing punitive damages (with notes on cognition and valuation I law)*, *Yale L. J.*, 1998, 2071-2153; A. M. POLINSKY & S.

on the theory of objective punitiveness, it does not matter whether the award goes to the plaintiff or to the state on the basis of a split-recovery statute; the only relevant point is whether the defendant will pay[53]. Thus, it could be stated that the main purposes of punitive damages are threefold, namely punishment, specific deterrence, and general deterrence. Since these functions are almost affine to each other[54], they are usually brought together.

Some American authors dissent from the idea that punitive damages do not have a compensatory function nor lead to subjective punitiveness. Owen is one of them: *"While American courts typically refer only to 'punishment' (meaning retribution) and 'deterrence' as the purpose of punitive damages, such damages have a third important function – providing victims with added compensation, sometimes called 'aggravated damages', for the purpose of victim vindication and redress – despite the almost universal proclamation in American law that punitive damages are 'non-compensatory'. Recently, scholars have begun to rediscover the value of punitive damages in forcing flagrant wrongdoers to fully restore the aggravated losses suffered by their victims[55]".*

In particular, losses involving immaterial harm, such as lost opportunities, injured feelings and dignity are often left unrecovered by compensatory damages and should be accepted by the victim as a risk of life. Although this might, under normal circumstances, be fair to the wrongdoers, Owen notes that there is a problem when the injurer *intentionally* injured the victim and, according to him, this issue – which he calls unjust impoverishment of the victim and unjust enrichment of the wrongdoer – could be addressed by awarding an additional amount of punitive damages[56]. Other insightful views that differ from the 'trend' also highlight mainly

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SHAVELL, *Punitive damages: an economic analysis*, *Harv. L. Rev.*, 1998, 869-962; A. M. POLINSKY & S. SHAVELL, *Punitive* damages, in P. Newman (ed.), *The new Palgrave Dictionary of Economics and the* Law, MacMillan Reference, 1998; T. EISENBERG, *Measuring the deterrent effect of punitive damages*, *Geo L. J.*, 1998, 347-357; J. BOYD & D. E. INGBERMAN, *Do punitive damages promote deterrence?*, *Int'l Rev. L. & Econ.*, 1999, 47-68; M. G. FAURE, *Tort law and Economics*, Edward Elgar Publishing, 2009; C. M. SHARKEY, *Economic analysis of punitive damages: theory, empirics and doctrine*, New York University Law and Economics Working Paper n. 12-02, 2012; R. J. RHEE, *A financial economic theory of punitive damages*, *Mich. L. Rev.*, 2012, 33-88; L. T. VISHER, *The Law and Economics of punitive damages*, in L. Meurkens-E. Nordin (eds.), *The power of punitive damages – Is Europe missing out?*, Intersentia, 2012, 471-491.

[53] L. M. ROMERO, *Punitive damages, criminal punishment, and proportionality: the importance of legislative limits*, *Conn. L. Rev.*, 2008, p. 125; B. C. ZIPURSKY, *A theory of punitive damages*, cit., 2005, p. 154.

[54] L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, p. 29.

[55] D. G. OWEN, *Punitive damages as restitution*, in *The Power of punitive damages – Is Europe missing out?* (L. Meurkens & E. Nordin Eds.), Intersentia, 2012, p. 120-121

[56] D. G. OWEN, *Aggravating punitive damages*, *U. Pa. L. Rev.*, 2010, p. 186.

the function that punitive damages have in relation to the victim's right to seek revenge or recourse against their injuries, private retribution, and vindication[57]. This is also known as the civil recourse theory, *i.e.* victims who seek redress from their wrongdoers via tort law[58].

Notwithstanding these alternative theories, in 2008 the U.S. Supreme Court once again declared the mostly punitive and deterring function of punitive damages[59]. What do these purposes consist of? The term 'punishment' entails a retributive aim. Ellis refers to this aim as a 'notion of desert', a method of serving justice[60]. A person who is hurt by the outrageous conduct of another should be avenged, whereas the tortfeasor deserves to be punished. This theory is justified on the basis of general notions of public morality, that it is considered immoral to commit an unlawful act and thereby violate the rights of another person without any justification for it[61]. Indeed, retributive justice is one of the most important aspects of punitive damages law[62]. It is a general assumption in almost every American state that, if the requirements for awarding punitive damages are met, the defendant should be punished for the sole reason of justice. The retributive function does not only defend the interests of the injured party, but it also serves society as a whole[63]. In this sense, punitive damages are meant to benefit society, although the protection of the individual can also be understood as a matter of both individual and societal concern[64]. Markel, for example, is firmly in support of the idea that punitive damages should primarily be regarded as a retributive sanction that serves the

[57] See e.g., T. B. COLBY, *Clearing the smoke from Philip Morris v. Williams: the Past, Present and Future of punitive damages*, *Yale L. J.*, 2008, p. 392-479; A. J. SEBOK, *Punitive damages: from myth to theory*, *Iowa L. Rev.*, 2007, p. 957-1036; M. GALANTER & D. LUBAN, *Poetic Justice: punitive damages and legal pluralism*, *Am. U. L. Rev.*, 1993, p. 1393-1463; B. C. ZIPURSKY, *A theory*, cit., 2005, p. 105-171; A. NEZAR, *Reconciling punitive damages with Tort Law's normative framework*, *Yale L. J.*, 2011, p. 678-723. Cf. C. M. SHARKEY, *Punitive damages as societal damages*, *Yale L. J.*, 2003, p. 389, suggesting that punitive damages should be seen as 'compensatory societal damages assessed to redress widespread harms caused by the defendant, harms that reach far beyond the individual plaintiff before the court'.

[58] B. C. ZIPURSKY, Palsgraf, *Punitive damages, and Preemption*, *Harv. L. Rev.*, 2012, p. 1778.

[59] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605 (U.S. 2008), at § 2621.

[60] D. D. ELLIS, *Fairness and Efficiency*, *op. cit.*, 1982, p. 4. See also D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1133; L. M. ROMERO, *Punitive damages, criminal punishment, and proportionality: the importance of legislative limits*, cit., 2008, p. 120. In his article, Romero compares punitive damages to other forms of punishment.

[61] Again, D. D. ELLIS, *Fairness and Efficiency*, cit., 1982, p. 5.

[62] D. G. OWEN, *Products liability law*, cit., 2005, p. 1193.

[63] 25 C.J.S. Damages § 195; 22 Am. Jur. 2d Damages § 544.

[64] A. P. HARRIS, *Rereading punitive damages: beyond the public/private distinction*, *Ala. L. Rev.*, 1989, p. 1102.

public interest[65]. In some jurisdictions, all awards of punitive damages must be based on a finding that the public interest will be served by punishing the wrongdoer[66].

As affirmed by Ellis, deterrence, preserving the peace, and inducing law enforcement are *instrumental* functions of punitive damages that look at the notion of effectiveness as opposed to the 'notion of desert'; the scope of these instrumental functions is not to inflict a disadvantage on the defendant, but rather to improve social life as a whole[67]. It is argued, for example by Dobbs, that deterrence is the *leading purpose* of punitive damages[68]. Dobbs suggests that 'extra compensatory damages should be triggered when deterrence is demonstrated to be necessary': the court should estimate the punitive damages award at 'the amount necessary to deter' rather than 'the amount necessary to inflict a fairly deserved punishment'. How can the amount that is needed to deter be measured? The Author, in this regard, refers to torts committed by so-called *calculative wrongdoers*: *"For torts committed in the course of a profit-motivated activity, the deterrence measure would usually either (a) the profit or gain derived by the defendant from the activity (or in some cases the hoped for gain), or (b) the plaintiff's reasonable litigation costs, including a reasonable attorney fee based on hours reasonably invested at a reasonable hourly rate[69]".*

According to Dobbs, deterrence damages have several advantages over punitive damages and thus cope with all the serious critiques of the civil remedy[70]. As mentioned above, also Posner considers deterrence as the purpose of punishment. In other words, punishment is not a function of punitive damages *per se* but rather a means to an end, namely deterrence.

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[65] D. MARKEL, *Retributive damages: a theory of punitive damages as intermediate sanction*, *Cornell L. Rev.*, 2009, p. 293-340; D. MAEKEL, *How should punitive damages work?*, *U. Pa. L. Rev.*, 2009, p. 1383-1484; of the same Author, D. MARKEL, *Punitive damages and private ordering fetishism*, *U. Pa. L. Rev.*, 2010, p. 283-304.

[66] 22 Am. Jur. 2d Damages § 542.

[67] D. D. ELLIS, *Fairness and Efficiency*, *op. cit*., 1982, p. 8. See, on the 'preserving the peace' purpose of punitive damages, C. J. ROBINETTE, *Peace: a public purpose for punitive damages?*, *Charleston L. Rev.*, 2008, p. 327-344.

[68] D. B. DOBBS, *Ending punishment in "punitive" damages: deterrence-measured remedies*, *Ala. L. Rev.*, 1989, p. 858. See also D. G. OWEN, *Products liability law*, cit., 2005, p. 1136, and, critical of the deterrence theory, A. J. SEBOK, *Normative theories of punitive damages: the case of deterrence*, in *Philosophical Foundations of the Law of Torts* (J. Oberdiek eds.), Oxford University Press, 2014, p. 312-331.

[69] D. B. DOBBS, *Ending punishment in "punitive" damages*, *op. cit.*, 1989, p. 915.

[70] D. B. DOBBS, *Ending punishment in "punitive" damages*, *cit.*, 1989, p. 916.

Whilst the effectiveness of deterrence through the imposition of punitive damages is still a source of discussion, it is a deemed side effect of both tort law and criminal law that the imposed liability or punishment has a certain deterrent effect. The deterrent function of punitive damages is of particular interest with regard to potential infringers who know that misbehavior often remains undetected and unpunished, the above-mentioned calculative wrongdoers[71]. The punitive damages award gives an explicit message: the cost of being caught is higher than the value of perpetrating the wrongful act. In other words, the tort does not pay.

The law enforcement function is instrumental in the sense that the punitive damages remedy is a procedural device which is intended to serve as an incentive for potential plaintiffs to initiate civil litigation[72]. As mentioned by Schlueter, this might include the exposure and punishment of minimal loss: "*Proponents of punitive damages suggest that they are an incentive for a person who has suffered only minimal damages to bring a cause of action when it may not otherwise be economically feasible or it would be unlikely that the defendant would be punished under criminal law*[73].

Part II – Liability rules for punitive damages awards

Section I: When ...

5. Sorts of claims in which punitive damages may be restored

The precondition for awarding punitive damages is the violation of a legally protected right[74]. The ground for bringing the action and the evidence offered in support of the claim shall allow the recovery of punitive damages. Although the rules of appellate procedure have become more permissive in the last few years, some tribunals may in some cases still deny punitive damages because the cause of action alleged and adduced does not bear such an award[75]. Generally, punitive

[71] D. G. OWEN, *Products liability law*, cit., 2005, p. 1137.
[72]M. H. REDISH & A. L. MATHEWS, *Why punitive damages are unconstitutional*, *op. cit.*, 2004, p. 2; E. L. RUBIN, *Punitive damages: reconceptualizing the runcible remedies of common law*, *Wis. L. Rev.*, 1998, p. 132.
[73] L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, 2005, p. 37.
[74] 22 Am. Jur. 2d Damages § 551.
[75] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit.*, 2000, p. 5-66.

damages are available only for *tort actions*[76]. The infringement of a duty required by tort law justifies a punitive damages award but – as will be further explained below – only in certain *aggravating* conditions. All jurisdictions where punitive damages are awarded have embraced this general rule[77]. In practice, American courts impose punitive damages in all sorts of situations: "Punitive damages are available in civil lawsuits for willful or intentional violations of common law or statutory duties[78]".

For instance, even though punitive damages are in theory not possible under contract law, they may in fact be awarded if a breach of contract and a tort consist of the same act[79]. This derives from the principle that, although tortious acts are separate from the contract, a tort may arise from a contractual relationship[80]. The general rule in the Restatement of Contracts, which is observed in nearly all states where the issue has been posed and decided by court or legislator, reads as follows: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable[81]". Over the past two decades, American courts have increasingly admitted exceptions to the principle that, in the lack of statutory permission, punitive damages are not allowed in contract cases[82]. Punitive damages are also available in property cases, provided that the defendant consciously and willfully violated the plaintiff's rights[83]. In addition, punitive damages have been granted in cases of medical malpractice, false arrest or imprisonment, employment law, discrimination, human rights infringements, family law, aviation litigation, aids and sexually transmitted

[76] 22 Am. Jur. 2d Damages § 568, § 569, § 570; 25 C.J.S. Damages § 198; § 199; § 200.
[77] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-81.
[78] 25 C.J.S. Damages § 195.
[79] W. BURNHAM, *Introduction to the law and legal system of the United States*, Thomson/West, 2006, p. 241.
[80] 74 Am. Jur. 2d Torts § 1.
[81] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-66, citing the Restatement (Second) of Contracts (1979) § 355. The classic example of a tortious breach of contract is that of bad faith claims against insurers. Disputes over insurance contracts are common practice in the American legal system. Insurers are frequently held liable for punitive damages due to shortcomings in the claim handling procedure of their insureds. Bad faith of the insurer does not always entitle a plaintiff to punitive damages: "The generally accepted rule is that punitive damages are not recoverable by an insured simply because he or she has established the necessary elements of the tort that allow the recovery of compensatory damages resulting from insurer bad faith". Also, in this situation certain aggravating circumstances are required, such as oppression, fraud or malice on the side of the insurer or a conscious disregard of the plaintiff's rights.
[82] L. L. SCHLUETER, *Punitive Damages, op. cit.*, 2005, p. 399; 25 C.J.S. Damages § 199.
[83] L. L. SCHLUETER, *Punitive Damages, op. cit.*, 2005, p. 399; 25 C.J.S. Damages § 199.

infections[84]. Hence, punitive damages are in fact available in a broad range of actions based on a tort, if the required component of major aggravation is satisfied.

6. Looking at the traditional punitive damages' classes

Fortunately, there is more documentation available on the kinds of cases in which punitive damages are most often awarded. Firstly, contrary to conventional wisdom, punitive damages awards are actually scarce in medical malpractice and products liability cases[85]. According to Baker, the relative growth in punitive damages awards that has been reported in these legal fields reflects the near nonexistence of such awards in the past[86]. Another factor already referred to, that most probably contributes to this misinterpretation, is the media[87].

Punitive damages are – in fact – rarely available in cases of personal injury resulting from negligence and accidents; the fundamental argument for this is that they should not be assessed when the harm is caused by accident[88]. Dorfman also notes that punitive damages are rarely awarded for the tort of negligence[89]. This does not imply that personal injury cases have any role in American punitive damages law. It is therefore necessary to discern between personal injury caused by negligence

[84] For a list of specific tort-based causes of actions, see L. L. SCHLUETER, *Punitive Damages*, *op. cit.*, 2005, chapters eleven, twelve, thirteen, and fourteen; 22 Am. Jur. 2d Damages § 570.

[85] T. H. COHEN & K. HARBACEK, *Punitive damages awards in State Courts*, Report of the Bureau of Justice Statistics, U. S. Department of Justice, Washington DC, 2011, p. 2; T. J. COHEN, *Tort Bench and Jury Trials in State Courts*, Report of the Bureau of Justice Statistics, U. S. Department of Justice, Washington DC, 2009, p. 6; A. J. SEBOK, *Punitive damages: from myth to theory*, *op. cit.*, 2007, p. 966.

[86] T. BAKER, *Transforming punishment into compensation: in the shadow of punitive damages*, *Wis. L. Rev.*, 1998, p. 211-212.

[87] See, for example, D. S. BAILIS & R. J. MacCOUN, *Estimating liability risks with the Media as your guide: a content analysis of media coverage of tort litigation*, *Law and Hum. Behav.*, 1996, p. 424. On this topic, also S. GARBER & A. G. BOWER, *Newspaper coverage of automotive product liability verdicts*, *Law & Soc'y Rev.*, 1999, p. 93-122, have done research in American media coverage of three types of tort cases: automobile negligence, products liability, and medical malpractice. Their article shows that the majority of cases *filed* – in twenty-seven state trial courts between 1984 and 1993 – were automobile cases (60%) whereas the minority was formed by products liability cases (4%) and medical malpractice cases (7%). Interestingly, research into five national magazines between 1980 and 1990 shows that the products liability cases were most *reported* (49%), second were the medical malpractice cases (25%), and the least reported were the automobile accidents (2%). This shows how the media is able to give a wrong impression of the facts. Although the article of these two authors is nearly twenty years old, the idea that many critics have a wrong impression of the frequency of punitive damages awards has been confirmed by others, for example A. J. SEBOK, *Punitive damages: from myth to theory*, *op. cit.*, p. 966, in 2007: "In fact, there have been concentrations of frequently awarded punitive damages, but they have not occurred where the critics of punitive damages imagined. For example, in recent years, medical- malpractice and products liability cases have exhibited the lowest frequency of punitive damages among all types of civil actions for which punitive damages are available".

[88] S. D. SUGARMAN, *A Century of change in personal injury law*, *Cal. Law Rev.*, 2000, p. 2430.

[89] A. DORFMAN, *What is the point of the tort remedy?*, *Am. J. Juris*, 2010, p. 141.

and personal injury resulting from intentional conduct. In the latter category, punitive damages are relatively often awarded, whereas punitive damages awards are unusual in the first category.

Subsequently, the most dominant punitive damages categories among all civil actions are intentional torts (for example battery, assault) and defamation cases (also called slander or libel). Another area with comparatively high rates of punitive damages awards are some contract cases, such as fraud, bad faith insurance, employment discrimination, real property, and consumer sales[90]. These contract cases are also known as *financial torts*. An analysis of punitive damages application by state courts in the seventy-five most populous counties in 2005 provides a more accurate description of categories in which punitive damages are awarded[91].

Although it should be clarified that the survey is not comprehensive for the *entire* United States, as the investigation has only been conducted on the seventy-five most populous counties, the result reveals that in these counties punitive damages are mostly awarded for intentional torts (30%), fraud (23%) and employment cases, including employment discrimination (22%). A similar study, about punitive damages awards by state courts in the seventy-five most populous counties in 2001, finds that the types of tort cases in which punitive damages were mostly awarded are libel and slander (58%), intentional torts (36%), and false arrest or false imprisonment (26%). Of the contract cases, punitive damages were mainly granted in partnership disputes (22%), employment discrimination (18%), and fraud cases (17%)[92].

Therefore, American punitive damages verdicts are broadly dominated by intentional torts, defamation cases and financial torts, whereas personal injury deriving from negligence, automobile accidents, medical malpractice and products liability plays a rather minor role. A reasonable justification for this result is the higher aggravating factor that is needed for the assessment of punitive damages. This aggravating element is likely to be more often present when the cause of action

[90] T. J. COHEN, *Punitive damages awards in Large Counties*, Report of the Bureau of Justice Statistics, U. S. Department of Justice, Washington DC, 2005, p. 1; T. J. COHEN, *Tort Bench and Jury Trials in State Courts*, cit., 2009, p. 6; T. H. COHEN & K. HARBACEK, *Punitive damages awards in State Courts*, cit., 2011, p. 4; A. J. SEBOK, *Punitive damages: from myth*, cit., 2007, p. 967.

[91] T. H. COHEN & K. HARBACEK, *Punitive damages awards in State Courts*, cit., 2011, p. 4

[92] T. J. COHEN, *Punitive damages awards in Large Counties*, cit., 2005, p. 1.

is an intentional tort, defamation case or financial tort than in personal injury cases resulting from negligence, automobile accidents, medical malpractice and products liability. This is explained as follows in the above-mentioned report containing data from 2005: "The variation in punitive damage claims by case type might be influenced by the legal elements inherent in the CJSSC (*i.e. Civil Justice Survey of State Courts, LM*) case categories. Certain civil claims, such as intentional torts such as, assault, battery, slander, or libel tend to have elements of willful or intentional behavior that would be expected to support a punitive damages request. Other CJSSC case categories, such as automobile accident or premises liability, typically do not involve elements of intentional or reckless behavior that could be used to support a punitive damages award[93]".

To sum up, an important observation should be outlined at this point: the categories of tortious acts in which punitive damages might play a role particularly in continental Europe are known in American law as intentional torts, defamation, and financial torts. These three categories encompass both deliberate and serious misconduct, which applies in particular to the intentional torts, and calculative wrongdoing, for example defamation and fraud. This seems to be in accordance with the increasing European interest for powerful civil remedies to strengthen the enforcement of *tort law* standards and cope with intentional, calculative and grave misconduct of wrongdoers.

7. Character of behavior for which punitive damages may be awarded

Not just the alleged cause of action, but equally the character of the wrongdoer's behavior is relevant to the question whether or not punitive damages can be awarded. According to Kircher and Wiseman: "In determining whether a punitive award is justified, the focus is directed at the nature or character of the conduct of the defendant[94]".

[93] T. H. COHEN & K. HARBACEK, *Punitive damages awards in State Courts*, cit., 2011, p. 2. See also T. J. COHEN, *Tort Bench and Jury Trials in State Courts*, cit., 2009, p. 6.
[94] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-4

As we have observed, punitive damages are, for example, available for *intentional* conduct such as the tort of battery[95]. A further recognized form of conduct which may lead to punitive damages is reckless or conscious disregard of the likelihood that the claimant will be injured[96]. Keeton et al. give the subsequent description of the behavior necessary to sustain a punitive damages award: "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice", or a fraudulent or malice on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross." Gross negligence is a term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort[97]".

In every American state that enables punitive damages, courts or legislatures have enacted *aggravated* factors in order to describe the character of the defendant's conduct. In addition to the infringement of a right, there shall be an added element of antisocial behavior beyond the sort of one necessary to constitute a standard tort[98].

This indicates that punitive damages can in principle not be awarded in ordinary tort actions in the absence of aggravating conditions[99]. In theory, liability criteria which would support punitive damages can be set with reasonable accuracy and coherence. In reality, the standard for awarding punitive damages is rather imprecise, leading to legal uncertainty. This vagueness is essentially due to the following reasons: (1) the diversity and imprecision of language employed by legislators and courts to define when punitive damages are appropriate, and (2) the

[95] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-41; 25 C.J.S. Damages § 200.
[96] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-51.
[97] W. P. KEETON et al., *Prosser and Keeton on Torts*, West Group, 1984, p. 9-10.
[98] For an overview of definitions of the required conduct per state, see J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-4 to 5-41.
[99] 25 C.J.S. Damages § 200.

large discretion that is given to the trier of fact – normally the jury, but it may also be the court which sits without a jury – in awarding such damages[100].

The Restatement of Torts stresses, in accordance with the aforementioned nature of the conduct as defined by Keeton et al., that "punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others[101]".

This expression can be read very broadly, which in effect raises to objection concerning the vagueness of liability standards in American punitive damages law[102]. Whether or not punitive damages can be imposed depends on the context of each specific case, including the relationship between the claimant and defendant and the duties owed by them[103]. The conduct and state of mind of the defendant are crucial elements in the process of whether punitive damages should be awarded[104]. The fact-finder may, at its discretion, assign punitive damages in a variety of scenarios. As mentioned above, more than the simple occurrence of a tort is required: the wrongful conduct of the defendant is so excessive and egregious that it includes an element of major aggravation[105]. A high degree of misbehavior is expected to motivate the punishing and deterring purpose of the award. One might, in this respect, consider of the following aggravating conditions: willfulness, wantonness, malice or ill will, gross negligence or recklessness, oppression, outrageous conduct, violence, indignity or insult, fraud or gross fraud and criminal indifference[106]. In most jurisdictions, one aggravating requirement is sufficient to allow a punitive damages award[107]. If none of these circumstances is alleged and demonstrated, only compensatory damages can be awarded. Some jurisdictions only admit a limited number of aggravating conditions as the basis for punitive damages[108].

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[100] D. D. ELLIS, *Fairness and efficiency*, *op, cit.*, 1982, p. 34; 22 Am. Jur. 2d Damages § 605; 25 C.J.S. Damages § 196.
[101] Restatement of Torts, § 908.
[102] D. G. OWEN, *Products liability law*, *op cit.*, 2005, p. 1185.
[103] 25 C.J.S. Damages § 202.
[104] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit.*, 2005, p. 159; 22 Am. Jur. 2d Damages § 559; 25 C.J.S. Damages § 202.
[105] 22 Am. Jur. 2d Damages § 556; 25 C.J.S. Damages § 202.
[106] 22 Am. Jur. 2d Damages § 558.
[107] 22 Am. Jur. 2d Damages § 557; 25 C.J.S. Damages § 202.
[108] In Arkansas for example, the characterization of the behavior that may give rise to punitive damages is as follows: "In order to support an award of punitive damages, the evidence must indicate the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice might be

The most often found key notions will be briefly explained. Intentional misconduct, which is related to a higher degree of culpability than negligence, is defined as highly inappropriate conduct, or an extraordinary deviation from the standard of care, in a circumstance in which a high degree of risk is clear[109]. The concept has also been expressed as conscious indifference. Willful and wanton conduct is not the same as malicious one, also known as ill will or the intent to injure[110]. Malice concerns both to the case in which a person deliberately perpetrates a wrongful act without legitimate motive (legal malice), or to the situation in which the defendant has a bad reason with which the purpose and desire to harm is activated (actual malice or malice in fact)[111]. It is particularly hard to prove malice[112]. Some jurisdictions require actual malice while in other one's legal malice is a justified ground for punitive damages[113]. A court might even grant punitive damages if the defendant's conduct is aggravated by deceit and oppression[114]. Moreover, in the absence of aggravating conditions, pure negligence does not entitle one to a punitive damages award[115]. There are states that admit punitive damages in the event of serious negligence, but then the act needs to be so grave that there has been "a conscious indifference to the rights and safety of the plaintiff[116]".

All the above constitutes a theoretical and to some extent opaque group of aggravating requirements. Blatt et al. have drawn the following helpful classification of conduct required for punitive damages to be awarded: 1) intent; 2) conduct which transcends gross negligence but not constituting malice; 3) gross

inferred. Negligence alone, however gross, is not a sufficient basis to justify the award of punitive damages (*Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (Ark. 1983), at § 452)".

[109] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 160.

[110] 22 Am. Jur. 2d Damages § 560.

[111] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 159; 25 C.J.S. Damages § 203.

[112] R. L. BLATT-R. W. HAMMESFHAR & L. S. NUGENT, *Punitive damages. A State-by-State guide to law and practice*, Thomson Reuters/West, 2008, p. 93.

[113] 25 C.J.S. Damages § 203.

[114] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 162; 25 C.J.S. Damages § 206.

[115] 25 C.J.S. Damages § 205; L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 162.

[116] The Supreme Court of Massachusetts (*Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 2013) recently confirmed that, in the absence of malice or willful misconduct, gross negligence can be a sufficient basis for a punitive damages award of $ 18 million. The claimant in this products liability case was the widower of a twenty-nine-year-old woman who died from injuries sustained due to a defective inflatable swimming pool slide. As shown in the previous section, the outcome of this case is extraordinary for two reasons: punitive damages awards are relatively rare in products liability cases and personal injury caused by negligent behavior is usually not enough for a punitive damages award. Note that there are a few cases in which punitive damages have been imposed in the absence of a guilty state of mind of the defendant. These cases usually involve defendants who seriously abuse their position or privilege of power, for example a policeman who violates the civil rights of a suspected person.

negligence; and 4) various statutory requirements. More than half of the states that provide punitive damages demand behavior in the second category, while the others require malice or gross negligence. It varies per state whether the conduct must be proved by clear and convincing evidence, by a preponderance of the evidence or beyond a reasonable doubt, although the latter criminal law standard is scarcely prescribed[117].

In conclusion, the mere occurrence of an illegal act is not, of itself, a satisfactory ground for a punitive damages award[118]. The act claimed must not only be illegal, but it must also include a certain aggravating element.

8. Is actual damage a condition?

There is no independent cause of action for punitive damages. Instead, an award of punitive damages is an "element of recovery, a type of relief, or an additional remedy[119]". Punitive damages alone do not constitute the premise of a cause of action, but are incidental to the underlying cause of action[120].

This implies that a claimant must have suffered a concrete injury in order to receive punitive damages and must adduce adequate evidence to that end[121]. The logic of this requisite is that conduct which has inflicted no quantifiable objective damage should not be sanctioned, which is in line with the principle that private persons should not be induced to bring a lawsuit if they have suffered no damage (damnum absque injuria). The common law rule that punitive damages can only be awarded if actual harm has been caused is commonly acknowledged, but American courts have divergent interpretations as to whether the plaintiff should be allowed nominal or compensatory damages as a ground for punitive damages[122].

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[117] R. L. BLATT-R. W. HAMMESFHAR & L. S. NUGENT, *Punitive damages. A State-by-State guide to law and practice*, *op. cit.*, 2008, p. 91.
[118] 25 C.J.S. Damages § 204.
[119] 22 Am. Jur. 2d Damages § 551.
[120] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 359.
[121] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 358; 25 C.J.S. Damages, § 197; 22 Am. Jur. 2d Damages § 551, 553.
[122] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-156; L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 359; 25 C.J.S. Damages, § 197.

Most jurisdictions believe that the claimant should be granted at least nominal damages[123]. These jurisdictions regard nominal damages as a sufficient base for punitive damages, because the aim of punitive damages is to punish and discourage offensive conduct. It is also argued that the defendant should not be exonerated from his responsibility because an injured party (unfortunately) was unable to demonstrate compensatory damages[124]. A recent illustration is an employment discrimination case, to be exact sexual harassment, where $1 in nominal damages and $125,000 in punitive damages were awarded to the plaintiff[125].

Conversely, in other jurisdictions the simple award of nominal damages could not be the basis for punitive damages[126]. In this respect, punitive damages are not admissible without the plaintiff proving that he is entitled to compensatory damages or that he has effectively been awarded compensatory damages[127]. The need for compensatory damages as a ground for punitive damages is motivated for a number of reasons: there is no separate cause of action for punitive damages; behavior that produces no measurable objective prejudice should not be punished; and compensatory and punitive damages should bear a balanced proportion to each other[128].

It is questionable whether American scholars discuss soundly when they underline the punitive and deterrent function of punitive damages, on the one hand, and require that the plaintiff must have suffered a concrete loss - as in the cases dealing with compensatory damages - on the other hand.

It could well be that, even in the lack of damage, the defendant's act is still so extreme as to deserve punitive damages. In other words, if the doctrine of punitive damages is in essence exclusively oriented to the punishment and deterrence of the defendant's conduct, the award of punitive damages in a situation where there is no actual harm should perhaps be possible. Nevertheless, given the common prerequisite of actual damage which refers to the plaintiff's position, it is conceivable that punitive damages also fulfil the function of compensating the

[123] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-161.
[124] 22 Am. Jur. 2d Damages § 553.
[125] *Arizona v. Asarco Llc*, 733 F.3d 882 (C.A.9 (Ariz.) 2013).
[126] *Hopewell Enterprises, Inc. v. Trustmark Nat. Bank*, 680 So.2d 812 (Miss. 1996).
[127] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 361-362; 22 Am. Jur. 2d Damages § 553.
[128] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 363.

plaintiff. As previously stated, the view that punitive damages also play an important compensatory function does indeed find favor in American legal doctrine.

Section II: ... and How (assessment and amount)

9. Discretion of the Jury

Punitive damages matters are typically heard by both the court and the jury. The court decides questions of law, while the jury determines issues of fact[129]. In its role of guardian, the court is required to judge whether the issue of punitive damages can be presented to the trier of fact. For instance, the subject of punitive damages is not put before the trier of fact when the punitive damages are not recoverable for the peculiar cause of action, such as a "normal" contractual action. In addition, the court has to decide if there is ample proof to uphold an award of punitive damages before the issue can be submitted to a jury[130]. The court must look at the evidence most in favor of the plaintiff[131]. If the briefs and evidence justify punitive damages, the case should be submitted to the trier of fact. In this respect, courts usually provide juries with instructions[132]. More than forty states have passed so-called Model Jury Instructions, which are used to frame the law so that jurors can comprehend it. If the evidence is weak, most courts either decline to provide jury instructions or instruct the jury not to award punitive damages[133].

Whether a certain behavior forms a foundation for punitive damages is not a question of law. The determination of whether punitive damages are recoverable ordinarily rests within the margin of appreciation of the trier of fact, who decides whether the defendant's act was sufficiently egregious to warrant punitive damages[134]. In addition to the nature of the defendant's conduct, the fact-finder may examine the type and scale of harm the defendant has inflicted or intended to cause

[129] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 331.
[130] 22 Am. Jur. 2d Damages § 550.
[131] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 332.
[132] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-202. For examples of appropriate jury instructions, see L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 333.
[133] L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 332, 336.
[134] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-172; L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 348; 22 Am. Jur. 2d Damages § 550.

on the plaintiff, and evaluate these elements in connection with the punitive and deterrent function of punitive damages. Other pertinent factors are the wealth of the defendant and the availability of criminal punishment[135].

Punitive damages are not recoverable as a right. In other words, the plaintiff "has no automatic right to such an award" unless it is awarded by statute[136]. The jury is not forced to assess punitive damages, even if the evidence and pleadings justify such awards, or the defendants' acts are adequately egregious[137]. As expressed in the encyclopedia American Jurisprudence: "No matter how compelling an award of punitive damages may seem under the facts of a given case, if the trier of fact for any reason chooses not to make such an award, the plaintiff has no remedy[138]".

Conversely, absent a clear abuse of discretion, a trial court's decision to award punitive damages cannot be overturned by the appellate court[139].

10. Judge and Jury in comparison

According to some commentators, the size of punitive damages will be lower if such cases are resolved by judges instead of jurors[140].

[135] Restatement of Torts, § 908; J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-175.

[136] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-171; L. L. SCHLUETER, *Punitive Damages*, I, *op. cit*., 2005, p. 27.

[137] J.J. KIRCHER & C. M. WISEMAN, *Punitive damages law and practice*, I, *op. cit*., 2000, p. 5-171.

[138] 22 Am. Jur. 2d Damages § 550.

[139] 22 Am. Jur. 2d Damages § 550.

[140] Critical remarks can be found, for example, in J. HERSCH & W. KIP VISCUSI, *Punitive damages: how Judges and Juries perform*, *J. Legal Stud*., 2004, p. 1-36. The abstract to their paper reads as follows: 'This paper presents the first empirical analysis that demonstrates that juries differ from judges in awarding punitive damages. Our review of punitive damages awards of $ 100 million or more identified 63 such awards, of which juries made 95 percent. These jury awards are highly unpredictable and are not significantly correlated with compensatory damages. Using data on jury and bench verdicts from the *Civil Justice Survey of State Courts, 1996*, we find that juries are significantly more likely to award punitive damages than are judges and award higher levels of punitive damages. Jury awards are also less strongly related to compensatory awards. The differential effect of juries is most pronounced among the largest awards. Juries also tend to award higher levels of compensatory damages, which in turn boost the punitive damages award. The findings are robust with respect to controlling for self-selection of jury or bench trial.' In a more recent article, the same authors again support the view that jury behaviour with regard to punitive damages is unpredictable: cfr. J. HERSCH & W. KIP VISCUSI, *Punitive damages by numbers: Exxon Shipping Co. v. Baker*, *Sup.Ct. Econ. Rev.*, 2010, p. 279. However, this has been debated by T. Eisenberg and M. Heise, who state that the claim made by Hersch and Kip Viscusi 'seems based on Exxon-funded experiments that never reconciled their findings with real-world punitive damages data': T. EISENBERG & M. HEISE, *Judge-Jury difference in punitive damages awards: who listens to the Supreme Court?*, *J. Empirical Legal Stud*., 2011, p. 326, footnote 2.

Punitive damages awarded by juries are objected to because juries are thought to be more biased, arbitrary and emotively pro-plaintiff than judges[141]. Various empirical studies that have been investigating judges and jurors decision-making process show that this assumption is not necessarily correct[142]. However, the findings of these studies regarding possible divergences between judges and jurors is rather controversial[143]. For example, one of the studies[144] that has compared a large number of civil cases over a ten-year period discloses that in some types of cases judges awarded more damages, while in other types of decisions juries have awarded more damages[145]. Another study[146] reveals that almost one-third of the 9,000 punitive damage cases were awarded by judges. To the researchers' surprise, the fraction of punitive damages awarded by judges is quite substantial when compared to "the overwhelming focus on jury punitive damages in the literature and policy debate[147]". The survey on punitive damages in large counties in 2001, which has already been mentioned above, reports that in 6,504 civil trials plaintiffs received punitive damages in 6% of jury trials and 4% of court trials[148]. In addition, the median amount of punitive damages awarded by juries was $50,000, while courts awarded $46,000. Of the 260 jury trials in which a plaintiff was awarded punitive damages, 14% were awarded $1 million or more. Punitive damages of $1 million or more were awarded in 2% of the 79 jury trials with punitive damages. These latter data illustrate that juries are marginally more inclined to award large punitive damages than judges.

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[141] B. H. BORNSTEIN et al., *Civil Juries and Civil Justice – Psychological & Legal perspectives*, Springer Verlag, 2008, p. 5.

[142] J.K. ROBBENNOLT, *Punitive damages decision-making: the decisions of citizens and Trial Courts judges*, *Law & Hum. Behav.*, 2002, p. 336-337. For an overview of empirical research on the decision-making of judges and jurors, see J. K. ROBBENNOLT, *Determining punitive damages: empirical insights and implications for reform*, *Buff. L. Rev.*, 2002, p. 146. See also L M. SHARKEY, *Judge or Jury: who should assess punitive damages?*, *U. Cin. L. Rev.*, 1996, p. 1089-1090, footnote 5 and 6, who gives an overview of authors advocating either judicial assessment or jury assessment of punitive damages. For a general overview of the relation between juries and, e.g., punitive damages, see *Developments in the Law – The civil Jury*, *Harv. L. Rev.*, 1997, p. 1408-1536.

[143] J. K. ROBBENNOLT, *Determining punitive damages: empirical insights and implications for reform*, *op. cit.*, 2002, p. 152.

[144] K. M. CLERMONT & T. EISEMBERG, *Trial by jury or judge: transcending empiricism*, 1992, p. 1134.

[145] The first types of cases were especially products liability, medical malpractice and motor vehicle cases, the second types of cases were especially marine and Federal Employer's Liability Act cases.

[146] T. EISEMBERG et al., *Juries, Judges and punitive damages: an empirical study*, *Cornell L. Rev.*, 2002, p. 747-748; J. K. ROBBENNOLT, *Determining punitive damages: empirical insights*, *op. cit.*, 2002, p. 149.

[147] T. EISEMBERG et al., *Juries, Judges and punitive damages: an empirical study*, *op. cit.*, 2002, p. 752.

[148] T. J. COHEN, *Punitive damages awards in large Counties*, Report, *op. cit.*, 2005, p. 2.

In the case *Philip Morris USA v. Williams*[149], the U.S. Supreme Court was advised on jury performance with regard to punitive damages by a panel of academics[150].

The advisor's viewpoints in favor of the rational and reasonable action of juries are as follows: 1) juries award punitive damages infrequently; 2) punitive damages awards have not increased in frequency; 3) when adjustments are made for inflation the magnitude of such awards has not increased over the past several decades; 4) most awards are modest in size; 5) the overwhelming majority of awards show a rational proportionality between actual and potential harm caused by defendants; 6) the same proportionality relationship between compensatory and punitive damages exists in cases involving large punitive awards; 7) juries pay particular attention to the reprehensibility of defendants' conduct; 8) jury decision-making processes in punitive damages cases are similar to the decision- making processes used by judges in bench trials of such cases; 9) the amounts of punitive awards rendered by juries and judges are similar when adjustments are made for case types; 10) little evidence indicates that juries are biased against large businesses; 11) judges effectively exercise supervision over punitive damages in post-verdict motions or on appeal; and 12) in other instances post-verdict settlements reduce or abandon punitive awards without judicial intervention[151].

These points were presented to the court by twenty-four academics who have all carried out empirical research on juries, punitive damage verdicts, or both[152]. In summary, the aggregate outcome of all the relevant analyses together is not averse to juries: juries do not seem to make decisions that plainly diverge from those that judges would make, surely not to the drastic extent that most jury censors recommend[153].

Thus, the criticism regarding jury awards of punitive damages has been put into perspective.

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[149] *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057 (U.S.Or. 2007).

[150] N. VIDMAR et al., *Brief of Neil Vidmar et al. as* Amici Curiae *in Support of Respondent, Philip Morris v. Williams*, 127 S. Ct. 1057 (2007), 2006.

[151] N. VIDMAR et al., *Brief, cit.*, 2006, p. 2.

[152] N. VIDMAR et al., Brief, *cit.*, 2006, p. 1. For more background information about punitive damages decision-making by juries and psychological or legal perspectives of civil juries, see C. R. SUNSTEIN et al., *Punitive damages – How Juries* decide, University of Chicago Press, 2002 and B. H. BORNSTEIN et al., *Civil Juries and Civil Justice – Psychological and legal perspective*, *op. cit.*, 2008.

[153] J. K. ROBBENNOLT, *Determining punitive damages: empirical insights*, *op. cit.*, 2002, p. 158.

11. *Quantum* of punitive damages

There is no rigid rule for determining the quantum of punitive damages[154]. Since punitive damages are intended mainly to punish and deter the defendant, the court must look at the defendant's behavior rather than the plaintiff's when it sets an appropriate amount. For this motive, courts normally dismiss the argument that the plaintiff's contributory negligence can be used to decrease the punitive damages award[155]. The level of punitive damages award is established by the trier of fact and depends on the circumstances of each case: "In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant[156]".

The jury ought to establish an appropriate amount without being biased, prejudiced or corrupt. Accordingly, in contrast to conventional assumptions, the jury's discretion may not be absolute or limitless. Draconian punitive damages are not tolerated and are often overturned on appeal, as the size of the award should not be out of proportion to, among other factors, the defendant's capacity to pay[157].

The award should be reasonable and should not exceed what is needed to reach its objectives. There are two relevant points in this respect. First, there has to be a reasonable balance between the amount of punitive damages and the (potential) prejudice caused to the plaintiff[158]. Secondly, there shall be a reasonable connection with the amount of compensatory damages[159]. This rule, which refers to the commonly acknowledged norm that punitive damages may only be awarded if effective harm has been inflicted, is also known as the reasonable ratio rule. The principle has led courts to conclude that the amount of punitive damages must bear

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[154] 22 Am. Jur. 2d Damages § 604; 25 C.J.S. Damages § 213.
[155] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, cit., 2000, p. 5-142.
[156] Restatement of Torts, § 908(2).
[157] This has been further explained by the Supreme Court of Ohio (*Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121 (2002), at § 144): "The focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant. We do not require, or invite, financial ruination of a defendant that is liable for punitive damages. While certainly a higher award will always yield a greater punishment and a greater deterrent, the punitive damages award should not go beyond what is necessary to achieve its goals. The law requires an effective punishment, not a draconian one".
[158] L. L. SCHLUETER, *Punitive damages*, I, *op. cit.*, 2005, p. 359; 22 Am. Jur. 2d Damages § 604.
[159] L. L. SCHLUETER, *Punitive damages*, I, *op. cit.*, 2005, p. 37, 353.

a reasonable relationship to the plaintiff's compensatory damages or injury. For example, if the defendant has behaved carelessly but without the real purpose of doing harm, the ratio of punitive damages to compensatory damages has been fixed at around five to one, whilst this proportion may be much larger if the defendant has acted with malicious intent[160]. It should be remarked that the reasonable ratio rule is not the easiest rule, in view of the primary non-compensatory scope of punitive damages. As said, most courts have thereby ruled that a relation between punitive and compensatory damages is not necessary: after all, punitive damages refer primarily to the defendant's conduct rather than to the plaintiff's loss[161]. These courts permit (rather vast) inequalities between punitive and compensatory damages.

A significant number of studies have been carried out on the relationship between punitive and compensatory damages[162]. Critics of punitive damages argue that there is no correlation. This has, however, been questioned, for example by Eisenberg et al.: "To our knowledge, no persuasive analysis of actual cases supports the absence of a relation between punitive and compensatory damages[163]". Eisenberg and co-authors observe that courts have allowed 'punishment to fit the crime', in the sense that greater injury and subsequent compensatory damages are associated with larger punitive damage awards.

As illustrated, the jury, or the (appellate) court which reviews the punitive damage award for excessiveness, can have regard to a number of variables in determining an adequate amount. These are similar to those that inform the jury's initial decision as to whether punitive damages should be awarded and they include the character, wrongfulness and length of the defendant's behavior, the defendant's intention or reasoning, the consciousness of any risk the conduct created, and other conditions

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[160] 22 Am. Jur. 2d Damages § 610; 25 C.J.S. Damages § 213.

[161] 22 Am. Jur. 2d Damages § 612.

[162] T. EISEMBERG & M. T. WELLS, *The predictability of punitive damages awards in published opinions, the impact of* BMW v. Gore *on punitive damages awards, and forecasting which punitive awards will be reduced*, *Sup. Ct. Econ. Rev.*, 1999, p. 59-86; T. EISEMBERG-V. P. HANS & M. T. WELLS, *The relation between punitive and compensatory awards: combining extreme data with the mass of awards*, p. 10-115, in B. H. Bornstein et al. (eds.), *Civil Juries and Civil Justice*, *op. cit.*, Springer Verlag, 2008; T. EISEMBERG-M. HEISE & M. T. WELLS, *Variability in punitive damages: empirically assessing* Exxon Shipping Co. v. Baker, *JITE*, 2010, p.5-26; C. M. SHARKEY, *Crossing the punitive-compensatory divide*, p. 79-104, in B. H. Bornstein et al. (eds.), *Civil Juries and Civil Justice, op. cit.*, 2008; N. VIDMAR et al., Brief, *cit.*, 2006, p. 10-14.

[163] T. EISEMBERG- M. HEISE & M. T. WELLS, *Variability in punitive damages*, *op. cit.*, 2010, p. 6.

pertaining to the defendant's actions[164]. The court may also take into account the defendant's wealth. Some, but not all, jurisdictions admit proof of the defendant's financial position. On the one hand, this reflects the general principle that punitive damages should not be draconian, that such damages are not aimed at destroying the financial standing of the defendant. On the other hand, a logic for allowing such tests is that larger awards may be necessary to punish and deter wealthier defendants. In other words, the punitive and deterrent impact of an award for punitive damages is determined by the financial position of the defendant[165]. It was also held that the financial position of both parties can be taken into consideration when establishing the amount of punitive damages[166]. In coming to its verdict, the jury, in weighing all the underlying circumstances, may appropriately consider the respective financial position of the parties.

In the view of this court, all facts and circumstances of the situation, including the loss suffered by the plaintiff and the consequences of this loss for his economic position, are relevant. The defendant's financial condition may be of significant importance: "*The financial worth of the defendant is an important factor. Punitive damages have often been referred to as 'smart' money and it takes only slight consideration to realize that an amount of damages which might 'smart' one defendant might be entirely inconsequential to another*[167]".

A further determinant of the quantum of punitive damages is the possibility that the defendant has profited from his tort. Courts may provide that the amount should be greater than the gain for the following reason: "This result is based on the theory that exemplary damages are intended to inject an additional factor into the cost-benefit calculations of companies that might otherwise find it fiscally prudent to disregard the threat of liability[168]".

With regard to litigation costs and lawyers' fees, the majority of courts take such costs into account when setting the amount of punitive damages. The logic is that the plaintiff who has been severely wronged should not sustain the expense of

[164] 22 Am. Jur. 2d Damages § 606.
[165] 22 Am. Jur. 2d Damages § 607; 25 C.J.S. Damages § 215.
[166] *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666 (Mo.App. 1971), at § 669.
[167] *Wisner v. S.S. Kresge Co.*, at § 669.
[168] 22 Am. Jur. 2d Damages § 607.

litigation[169]. This also encourages plaintiffs to bring wrongdoers to trial and is therefore in harmony with the law enforcement function of punitive damages[170]. However, opinions diverge on this, and, in some jurisdictions, it has been held that an award of punitive damages should not relieve the burden of litigation costs because this would only seek to compensate the plaintiff rather than to punish the defendant[171].

12. Connection with criminal sanctions

Unlawful acts that place a defendant under civil liability may at the same time put him under criminal liability. This is particularly the case for intentional torts or wrongful conduct with deliberate or wanton disregard for the health and security of others. In most states, a criminal conviction does not preclude the award of punitive damages to the defendant for the same act in a civil case, and an award of punitive damages is not considered double jeopardy[172].

Thus, the logic of this basic principle is that the penal sanction is principally enacted for the harm done to society, while a tort is mainly imposed for the wrong caused to the individuals[173]. Even though - as we have seen - there is certainly a public concern in awarding punitive damages, the view that the award for punitive damages should in theory be conceived as a punishment for the wrong done to the claimant rather than for public wrongs is supported by several American authors,

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[169] L. L. SCHLUETER, *Punitive damages*, I, *op. cit.*, 2005, p. 34-36; 22 Am. Jur. 2d Damages § 608.

[170] *Farmers Ins. Exchange v. Shirley*, 958 P.2d 1040 (Wyo. 1998).

[171] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 36; J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, cit., 2000, p. 5-169.

[172] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, *op. cit.*, 2000, p. 5-136. The authors give a useful overview of states in which this is the general rule. See also D. RENDLEMAN, *Common law punitive damages: something for everyone?*, *U. St Thomas L. J.*, 2009, p. 3; J. MALLOR & B. S. ROBERTS, *Punitive damages: on the path to a principled approach?*, *Hastings L. J.*, 1999, p. 1006. According to the Maine Supreme Court (*Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985), at § 1357-1358.): "In the constitutional sense, jeopardy is a technical term that encompasses only the risk inherent in proceedings that are "essentially criminal." Accordingly, a civil action for punitive damages cannot infringe on a defendant's constitutional right to be free from double jeopardy. A claim for punitive damages is based upon a *private* wrong, and is clearly distinguishable from a criminal prosecution, which is brought solely on the behalf of the public. The state and federal constitutional prohibitions against double jeopardy present no bar to actions for punitive damages. In the absence of constitutional compulsion, we can see no reason to bar actions for punitive damages based upon the fact that the underlying conduct is also subject to criminal prosecution. Such a step would "[fall] short of a principled approach." As we noted earlier, "the criminal system cannot always adequately fulfill its role as an enforcer of society's rules. We therefore prefer a more flexible rule, whereby the fact finder may consider any criminal punishment imposed for the conduct in question as a mitigating factor on the issue of punitive damages".

[173] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, *op. cit.*, 2000, p. 5-138.

for example Colby[174]. Furthermore, according to Freifield, who wrote an article on the rationale of punitive damages in 1935, punitive damages are originally meant to *supplement* the criminal law: "Now the objective in the civil forum is basically to make the aggrieved party whole. In the criminal court, the goals may be variously stated, though *en rapport:* first, to punish the offender against society; secondly, to deter him and other from perpetrating similar, or any, offenses against society; and thirdly, to inspirit in the offender an approach to penitence for his wrongful act. Yet an examination discloses that, to a not inconsiderable extent, the civil tribunal acts as a supplementing, bolstering factor, to secure the objectives of the criminal forum. The subject of punitive damages […] furnishes a choice example[175]".

To put it differently, the common rule that a punitive damages award cannot be regarded as a double jeopardy enables the punitive damages remedy to operate as a supplement to criminal law sanctions. The use of the word supplement indicates that the two types of sanctions should be aligned with each other in order to exclude over-punishment.

The infliction of a criminal penalty should thus not influence the civil punishment. It appears that the ne bis in idem rule, known as the double jeopardy rule in common law jurisdictions, which is a frequently felt objection to punitive damages in European civil law systems, has not much practical significance in relation to punitive damages in most American states. This is of course linked to the factor that the public-private divide equally has no great practical value, as it is not an obstacle to awarding punitive damages in the US. However, although these claims do not have much practical value, even in the American discourse on punitive damages the public-private partition and the conception that punishment is best reserved for criminal law is an essential critique[176].

In fixing the level of punitive damages, a court may have regard to any criminal punishment against the defendant; the presence of a criminal punishment may also be grounds for an award of punitive damages. In particular, the size of punitive

[174] T. B. COLBY, *Beyond the multiple punishment problem: punitive damages as punishment for individual, private wrongs*, *Minn. L. Rev.*, 2003, p. 678.
[175] S. FREIFIELD, *The rationale of punitive damages*, *L. J. Student B. Ass'n Ohio St U.*, 1935, p. 5.
[176] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 31, 184.

damages may be commensurate with the amount of criminal penalties awarded for similar behavior[177].

13. Individuals who are eligible to recover

Only the victim, i.e. the person who suffered the harm, is eligible to seek punitive damages from a responsible defendant[178]. Statutes may depart from this broadly accepted common law rule. For example, under some survival statutes punitive damages may be recovered from the personal representative of a decedent[179].

The law usually does not grant punitive damages to a party who has a derivative claim, e.g. for loss of consortium, because he is only indirectly injured[180]. However, it has been found that a spouse may be entitled to recover punitive damages for loss of consortium from the other spouse who was injured as a result of the defendant's intentional and reckless misconduct[181].

Some of those parties who are entitled to recover punitive damages need special reference. For example, a private firm may recover punitive damages in proper circumstances, such as when a willful and wanton trespass is committed on its property[182]. Also, an employer (or: principal) may recover punitive damages in a case against his employee (or: agent), provided that the employee has broken the confidence in a 'flagrant and calculated' way[183]. An award of punitive damages against an employee is for instance warranted if the employee hides a conflict of interest from the employer or takes the profits for himself. It has also been asserted that a state may recover punitive damages, simply because a state is competent to file a civil suit[184].

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[177] 22 Am. Jur. 2d Damages § 609. For example, in *Ellerin v. Fairfax Sav., F.S.B.* the Court of Appeals of Maryland decided as follows: "[…] in determining whether an award of punitive damages is proportionate to the defendant's misconduct, a court may consider, *inter alia*, the legislative policy reflected in statutes setting criminal fines" (*Ellerin v. Fairfax Sav*., F.S.B., 337 Md. 216, 652 A.2d 1117 (Md. 1995), at § 242).

[178] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 178; 22 Am. Jur. 2d Damages § 583; 25 C.J.S. Damages § 208.

[179] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 178, 630.

[180] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 178; 22 Am. Jur. 2d Damages § 583.

[181] 25 C.J.S. Damages § 208.

[182] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 179.

[183] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 178; 22 Am. Jur. 2d Damages § 584.

[184] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 179; 22 Am. Jur. 2d Damages § 585. However, the California Court of Appeal has ruled to the contrary (*City of Los Angeles v. Shpegel-Dimsey, Inc.*, 198 Cal.App.3d 1009 (Cal. App. 2 Dist. 1988). This court decided that it is against public policy for a public entity to recover punitive damages from a private tortfeasor for two reasons. Firstly, the public body already possesses

14. Multiple plaintiffs

The American legal system is well aware of the practice of multiple plaintiffs or, when claims are consolidated into a unified lawsuit, of plaintiffs claiming punitive damages in a class action[185]. Some incidents or products may harm many plaintiffs, e.g. a plane crash or a defectively manufactured medical drug. Above all, the class action is favorable to the median plaintiff, because it saves him a considerable amount in terms of costs and inconvenience of filing a lawsuit. Two scenarios can be identified. Firstly, a single event, such as a car or plane crash, may cause damage to a number of people. Secondly, a single act, such as a conscious manufacturing defect, may cause distinct events which lead to injuries[186].

As a basic principle, a court's decision to award punitive damages does not rely on whether the case was sued by multiple plaintiffs or as a class action[187]. The award of punitive damages to one plaintiff does not imply that all successive plaintiffs are denied the recovery of punitive damages, because each plaintiff in principle has an independent right to such damages[188]. However, in practice, multiple plaintiffs' claims are often deemed problematic, as "repeatedly imposing punitive damages on the same defendant for the same course of tortious conduct may imply substantial due process constraints[189]". Note that due process is not contravened if the defendant has perpetrated separate misconduct against different plaintiffs[190].

Multi-plaintiff litigation is actually perceived as a critical field in American punitive damages law. It is an often disputed and controversial topic that also raises jurisprudential challenges[191]. Schlueter distinguishes between legal problems and policy problems[192]. Problems in the first category deal with the collapse of

police power to punish by imposing fines and other penal remedies, whereas the only means a private party has to punish a tortfeasor is by an award of punitive damages. Secondly, California law prohibits private parties from recovering punitive damages from a public entity; to allow a public entity to recover punitive damages from a private party would therefore raise serious questions of equal protection under the law.

[185] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, *op. cit.*, 2000, p. 5-184, 5-195

[186] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, *op. cit*., 2000, p. 5-185.

[187] 22 Am. Jur. 2d Damages § 587.

[188] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 180.

[189] 22 Am. Jur. 2d Damages § 587.

[190] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 183.

[191] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, *op. cit*., 2000, p. 5-184; L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 180.

[192] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 180. For another extensive overview of problems relating to multiple plaintiffs, see J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, *op. cit*., 2000, §§ 5:27-5:34.

defendants due to the magnitude of punitive damages and the abnormal outcome that the plaintiff in one jurisdiction obtains a larger award than the second plaintiff in another jurisdiction. A perceived policy problem concerns the undesirable effect of "over-punishment" or "overkill", but the views on this point diverge. It is contended that awarding multiple punitive damages for the same wrong is unjust to the defendant and incoherent with the doctrine of punitive damages. This is refuted by the contention that each time a person is harmed represents a distinct wrong. In response to the issue of "wrongfulness", some courts have held that punitive damages are improper in this particular class of cases[193]. Another policy problem concerns multiple awards of punitive damages that are in excess of any criminal sanction inflicted for the same conduct[194].

In conclusion, there is no consensus in American law on the opportunity to award punitive damages in multi-claimant disputes. According to Kircher and Wiseman, there is no ideal resolution to all the questions of awarding multiple punitive damages against a defendant for a single egregious act[195]. They propose that to address the problem, there should be legislative uniformity across jurisdictions. This would be preferable to court intervention, since changes through common law would merely require excessive time. Gash suggested the practical option of introducing a national register of punitive damages: a defendant who causes damage to several plaintiffs through a single act would, under certain circumstances, be eligible to file a prior statement of punitive damages. According to Gash, his proposal would completely eliminate the problem of multiple

[193] E.g., *Globus v. Law Research Service, Inc*., 418 F.2d 1276 (C.A.N.Y. 1969); *deHaas v. Empire Petroleum Co*., 435 F.2d 1223 (C.A.Colo. 1970).

[194] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 184. This problem was already observed in the 1960s, when the case of *Roginsky v. Richardson-Merrell, Inc*. was decided. The defendant had brought a defective medical drug onto the market, was aware of the defect, but failed to warn those who took the drug. Roginsky, who filed a suit just like hundreds of others did, was awarded $ 17,500 in compensatory damages and $ 100,000 in punitive damages. On appeal, the punitive damages award was reversed because there was insufficient evidence to warrant punitive damages. One of the judges of the appellate court, Judge Friendly, nevertheless showed concern about the outcome of the initial case and the problem of manufacturers who are exposed to multiple punitive damages awards: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of 'imprisonment for not more than three years, or a fine of not more than $ 10,000, or both such imprisonment and fine,' 21 U.S.C. § 333(b), for each violation of the Food, Drug and Cosmetic Act with intent to defraud or mislead. We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill".

[195] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, I, *op. cit*., 2000, p. 5-212.

punishments and would promote the public policy on which the doctrine of punitive damages is based[196].

15. Sharing or split-recovery mechanisms of punitive damages awards

In some jurisdictions, the victim will not be awarded the whole amount of punitive damages. These jurisdictions have issued statutory provisions requiring the plaintiff to split a portion of the punitive damages award with the state treasury or a state or court-administered fund designed to compensate victims. The logic of such a scheme is to reduce or avoid a so-called windfall effect for the claimant and to face the problem of excessive punitive damages[197]. The states that have adopted split-recovery statutes include, for instance, Colorado, Florida, Georgia, Alaska, Illinois, Indiana, Iowa, Missouri, Oregon, New York, and Utah[198]. An instance of a split-recovery statute is § 668A.1(b) of the Iowa Code[199], which provides that if the defendant's willful and wanton misconduct is *not* directed specifically at the plaintiff, or at the person from which the plaintiff's claim is derived, the court should first order the payment of applicable costs and fees, after which 25% – which is a relatively small portion and therefore a rather strict rule – of the punitive damages award may be granted to the plaintiff and the remainder to a civil reparations trust fund of the state[200].

Larsen annotated a series of cases in which American courts have established the legitimacy, structure, and implementation of split-recovery statutes[201]. His annotation does not cover cases in which courts autonomously assign a percentage

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196 J. GASH, *Solving the multiple punishments problem: a call for a national punitive damages registry*, *Nw U. L. Rev.*, 2005, p. 1617-1618. See also J. GASH, *Understanding and solving the multiple punishments problem*, in L. Meurkens & E. Nordin (eds.), *The power of punitive damages – Is Europe missing out?*, Intersentia, 2012.

197 M. J. KLABEN, *Split-recovery statutes: the interplay of the takings and excessive fines clauses*, *Cornell L. Rev.*, 1994, p. 157.

198 J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, II, *op. cit*., 2000, p. 21-85, 21-86.

199 Iowa Code, § 668A.1 on Punitive or Exemplary Damages.

200 See e.g. *Fernandez v. Curley*, 463 N.W.2d 5 (Iowa 1990). The purpose of this provision has been defined in *Varboncoeur v. State Farm Fire and Cas. Co. (Varboncoeur v. State Farm Fire and Cas. Co., 356 F.Supp.2d 935 (S.D.Iowa 2005), at § 950)*: "The rationale underlying Iowa's punitive damage legislation is "that a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it." Section 668A.1 "was designed to divert a portion of a resulting punitive damage award to a public purpose".

201 S. LARSEN, *Validity, construction and application of statutes requiring that percentage of punitive damages awards be paid directly to state or court-administered fund*, *ALR* 5th, *1993*. On split-recovery statutes, see also M. J. KLABEN, *Split-recovery statutes: the interplay of the takings and excessive fines clauses*, *op. cit.*, 1994, 104-157.

of punitive damages to a state or charitable fund[202]. This informs us that American courts have seemingly enforced split-recovery even in the lack of legislation. Indeed, while split-recovery statutes are a rather contemporary phenomenon, as early as 1877 the courts showed their favor of splitting punitive damages[203]. Nonetheless, at least one ruling clarifies that in the absence of a statute, the sharing of punitive damages with a state treasury is not essential for windfall avoidance[204].

The adoption of split-recovery statutes has not been without challenges.

Larsen explains that the statutes have been challenged on constitutional grounds: "These statutes have been challenged on various state and federal constitutional grounds as levying excessive fines, violating constitutional provisions against double jeopardy, denying the claimant due process and equal protection, and not affording the right to trial by jury[205]".

The author also offers an insight into court rulings in which split-recovery statutes have been found valid, on the basis that the claimant did not have a constitutionally protected right to an award of punitive damages or because the award to a court-administered fund did not represent a state action[206].

An example cited is the case of *Gordon v. State*, in which the Supreme Court of Florida held that Florida Statute § 768.73(2) (Supplement 1986), on the basis of which 60% of a punitive damages award was allocated to the state, was constitutional[207].

In the opposite, other judgments have reversed split-recovery statutes since punitive damage awards are considered to be acquired property giving the plaintiff a

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[202] S. LARSEN, *Validity, construction and application of statutes requiring that percentage of punitive damages awards be paid directly to state or court-administered fund*, *cit.*, 1993, footnote 2.

[203] *Bass v. Chicago & N.W. Ry. Co.*, 42 Wis. 654, 1877 WL 7100 (Wis. 1877), at § 6.

[204] *Life Ins. Co. of Georgia v. Johnson*, 701 So.2d 524 (Ala. 1997). See also 22 Am. Jur. 2d Damages § 586.

[205] S. LARSEN, *Validity, construction and application of statutes*, *op. cit.*, 1993, § 1.

[206] S. LARSEN, *Validity, construction and application of statutes*, *op. cit.*, 1993, § 2, 3.

[207] *Gordon v. State*, 608 So. 2d 800 (Fla. 1992). The statute provided that in case punitive damages were awarded for personal injury or wrongful death, the percentage should be paid to the Public Medical Assistance Trust Fund, and in other cases it should be paid to the General Revenue Fund: *Gordon v. State*, at § 801. The court stated: "We agree with the trial court that no substantive due process violation occurred. The statute under attack here bears a rational relationship to legitimate legislative objectives: to allot to the public a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney. We also have considered the other constitutional claims raised and suffice it to say that the statute does not violate the right to trial by jury, does not constitute a tax on judgments, does not deny equal protection and is not a special law".

constitutionally protected right to retain the award[208]. Furthermore, as regards the application of split-recovery statutes, the Oregon Supreme Court for example held that informing the jury about the allocation of a punitive damages award on the basis of Oregon Statute § 18.50 (now Oregon Revised Statute § 31.735) constituted a reversible error[209]. The instruction distracts the jury from the appropriate line of analysis, *i.e.* furthering punishment and deterrence, which the jury should follow when awarding punitive damages[210].

The US Supreme Court discussed the matter of whether the Excessive Fines Clause[211] is applicable to punitive damages when a part of the award is paid to a public agency[212]. The Court affirmed that despite the "recognition of exemplary civil damages as punitive in nature, the Eighth Amendment has not expressly included them within its ambit[213]". The precise issue of whether the clause should apply when a private party files suit on behalf of the state, which then participates in the punitive damages award, was left unresolved by the court[214]. If the response positive, any award of punitive damages to a state fund will be covered by the restrictions posed by the Excessive Fines Clause[215].

The apportionment of punitive damages to state funds is particularly sensitive in the public health sector. According to Eggen: "Some states have enacted split-recovery statutes to direct a percentage of each punitive damages award to the state general treasury or a specific state fund. But from a public health standpoint, it would be sensible to require that the portion of the punitive award that the plaintiff does not receive be allocated to a state or private program that will enhance deterrence of the conduct that gave rise to the award in the particular case. States should explore an alternative to the plaintiff's windfall by enacting a split-recovery statute with a fixed percentage allocated to the plaintiff and authorizing the trial

[208] E.g. *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991): a statute requiring one-third of the punitive damages award to be paid to the state is considered an unconstitutional confiscation of private property without just compensation.
[209] *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 797 P.2d 1019 (Or. 1990).
[210] *Honeywell v. Sterling Furniture Co.*, at § 211.
[211] Eighth Amendment to the Constitution of the United States: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'.
[212] *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909 (U.S.Vt. 1989).
[213] *Browning-Ferris*, at § 274-275.
[214] *Browning-Ferris*, at § 276.
[215] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, II, *op. cit.*, 2000, p. 21-87.

court to select a program related to the litigation and to the misconduct for which punitive damages are warranted to which the remaining percentage should go[216]".
In short, the attribution of a fraction of punitive damages to the state treasury, a state fund or a charity is an approved policy in the United States and endorsed by lawmakers and courts. As a consequence, the actor may not be the sole beneficiary of an award of punitive damages. This practice arguably improves the public purpose of punitive damages.

Part III – Legislative restraint and judicial review of abnormal punitive damages awards in the American legal system

16. Introductory remarks

In the aftermath of the so-called punitive damages crisis, American punitive damages law has been affected by two important developments[217]. Firstly, the law has been subjected to legislative reforms to put an end to excessive and improper awards. Secondly, punitive damage awards are controlled by judicial review. Judicial review of punitive damages is a topic of much debate, particularly since the tort law reform movement that even attracted the attention of the U.S. Supreme Court. Starting in the late 1980s, the Court has analyzed the constitutionality of punitive damages in a number of decisions that give a warning to courts to review punitive damages awards thoroughly[218]. These two developments are driven by the notion that punitive damages are 'out of control', by which critics usually mean that there has been an increase in the frequency, size and unpredictability of awards[219].

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[216] J. M. EGGEN, *Punitive damages and the public health agenda*, in J. C. CULHANE (Ed.), *Reconsidering law and policy debates – A public health perspective*, Cambridge University Press, 2011, p. 247. Eggen for instance refers to the example of a health insurer who mishandled a patient's request for a certain kind of chemotherapy which resulted in premature death, and the health insurer therefore had to pay $ 30 million to a cancer research fund. The case reported is *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 781 N.E.2d 121 (Ohio 2002).

[217] J. MALLOR & B. S. ROBERTS, *Punitive damages: on the path to a principled approach?*, *op. cit.*, 1999, p. 1002.

[218] L. L. SCHLUETER, *Punitive damages*, I, *op. cit.*, 2005, p. 346.

[219] A. J. SEBOK, *Punitive damages: from myth to theory*, *op. cit.*, 2007, p. 962; D. D. ELLIS, *Fairness and efficiency*, *op. cit.*, 1982, p. 55; R. D. COOTER, *Punitive damages for deterrence: when and how much?*, *Ala. L. Rev.*, 1989, p. 1145; J. K. ROBBENNOLT, *Determining punitive damages: empirical insights*, *op. cit.*, 2002, p. 159.

17. Statutory and Common law control

In the past years, there has been a trend towards the reform of American punitive damages law. These reforms have been initiated by state legislators and courts which are part of the general tort reform movement in the United States[220]. An attempt of the federal legislator to pass the so-called Fairness in Punitive Damage Awards Act (S. 1554, 105th Congress) failed in 1997[221]. Several state legislators have already enacted, or are considering, a number of measures to control and limit the imposition of improper punitive damages awards[222]. The most important measures will be discussed in this section.

One of the first general reform measures that has been taken by legislators and courts relates to the clarification of vague standards in punitive damages law. As explained in the previous section, this is an important point of critique of punitive damages. Several states have, for example, specified standards relating to measurement, liability, and misconduct to prevent inappropriate awards[223].

Another important measure is the statutory cap on awards to prevent excessive punitive damages[224]. For example, in Colorado the maximum punitive damages award cannot exceed the amount of compensatory damages[225]. Connecticut caps punitive damages in products liability cases at twice the amount of compensatory damages[226]. In North Dakota, punitive damages awards may not exceed two times the compensatory damages award, or a maximum of $ 250,000. § 32-03.2-11(4) of the North Dakota Century Code reads as follows: "If the trier of fact determines that

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[220] D. G. OWEN, *Products liability law*, cit., 2005, p. 1200. See, for an overview of state tort reforms in the United States between 1980 and 2012, R. AVRAHAM, *Database of State Tort law reforms (5th)*, University of Texas School of Law Research Paper n. e555, 2014.

[221] P. DAWKINS, *Damage control: a glimpse into punitive damage reform*, *Law and Society Journal at UCSB*, 2008, p. 84.

[222] J. MALLOR & B. S. ROBERTS, *Punitive damages: on the path to a principled approach?*, *op. cit.*, 1999, p. 1006; J. R. McKOWN, *Punitive damages: State trends and developments*, *Rev. Litig.*, 1995, p. 436. For examples of statutes see *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (U.S.Ala. 1996), at § 615-616.

[223] D. G. OWEN, *Products liability law*, cit., 2005, p. 1201.

[224] See J. KLICK & C. M. SHARKEY, *What drives the passage of damage caps?*, New York University Law and Economics Research Paper n. 09-08, 2009. In another article, these authors are critical of punitive damage caps: 'Using data from the National Center for State Courts, we show, in various specifications, that compensatory awards are higher when states cap punitive damage awards and the effect is generally statistically significant'. This leads them to the conclusion that 'caps alone are a poor way to constrain damages awards'. See C. M. SHARKEY & J. KLICK, *The fungibility of damage awards: punitive damage caps and substitution*, Florida State University Law and Economics Paper n. 912256, 2007, p. 1, 20.

[225] Colo Rev Stat §§ 13-21-102(1)(a) and (3) (1987).

[226] Conn Gen Stat § 52-240b (1995).

exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court[227]".

In Kansas, the maximum amount may not exceed the defendant's annual gross income, or $ 5 million[228]. These are only a few examples of several states that limit punitive damages awards, generally ranging from $ 50,000 to $ 5 million[229]. Interestingly, the tort reform movement also inspired legislators to adopt caps for compensatory damages[230]. This development is primarily supported by the *medical community*.

Furthermore, state legislators have enacted statutes permitting the payment of (part of) the award to the state or state agencies instead of to the plaintiff. See in this regard also section 3.3.5.1.2. The proportion of the award to be paid to the state ranges from 35 to 100%. It is argued that this reform measure diminishes the windfall effect of punitive damages, reduces the incentive for plaintiffs to file a claim for punitive damages and contributes to the prevention of excessive awards[231]. Arizona law, for instance, instructs courts to allocate punitive damages to a victims' fund in certain circumstances[232]. Subject to statutory exceptions, 75% of punitive damages awarded in Indiana are paid to a compensation fund for victims of violent crimes[233]. Kansas apportions 50% of punitive damages in medical malpractice cases to the state treasury[234]. Again, more states allow state recovery of punitive damages awards[235].

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[227] N D Cent Code § 32-03.2-11(4) (Supp.1995).
[228] Kan.Stat.Ann. §§ 60-3701(e) and (f) (1994).
[229] J. MALLOR & B. S. ROBERTS, *Punitive damages: on the path to a principled approach?*, *op. cit*., 1999, p. 1006.
[230] T. J. CENTNER, *America's blame culture. Pointing fingers and shunning restitution*, Carolina Academic Press, 2008, p. 36.
[231] D. G. OWEN, *Products liability law*, *op cit.*, 2005, p. 1210; J. MALLOR & B. S. ROBERTS, *Punitive damages: on the path to a principled approach?*, *op. cit*., 1999, p. 1006.
[232] HR. 2279, 42d Leg., 1st Reg. Sess. (introduced Jan. 12, 1995).
[233] HR 1741, 109th Reg. Sess. (enacted Apr. 26, 1995).
[234] Kan Stat Ann § 60-3402(e) (1994).
[235] The Supreme Court gives an overview of these and other state legislator reform measures in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (U.S.Ala. 1996), at § 615-619.

States have also enacted legislation relating to so-called bifurcated trials, in which questions of liability and compensation are separated from punitive damages issues[236]. A trial may be bifurcated automatically or upon the request of (one of) the parties. It is believed that the reason for bifurcated trials is to prevent improper punitive damages awards that might result from having access to knowledge about the defendant's financial position during the liability phase of a trial. Note that, some jurisdictions already allow the fact finder to take the financial position of the defendant into account when determining the punitive damages award. This is to make sure that the award has a sufficient deterrent and punitive effect. It is nonetheless argued that, by separating phases of a trial, courts promote 'just punishment and deterrence while avoiding prejudice and bias[237]'.

For example, statutes in California, Georgia, Kansas, Missouri, and Montana ask the trier of fact to determine – in bifurcated proceedings – first whether the defendant is liable for punitive damages and then the amount of punitive damages[238]. Other states, such as New Jersey and North Dakota, require separate proceedings for the determination of compensatory and punitive damages[239].

Some states, for example Connecticut and Kansas[240], have legislation that attributes the responsibility for determining the amount of punitive damages awards to the court rather than to the jury in order to prevent biased juries rendering awards that are 'out of control[241]'.

Furthermore, a small number of states have enacted so-called *one-bite* reform legislation in order to limit punitive damages awards to one punishment for a single act or course of conduct[242]. This form of legislation has been created to solve the problem of multiple punishment, *i.e.* a defendant who is subjected to punishment

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[236] See on trial bifurcation also S. LANDSMAN et al., *Proposed reforms and their effects. Be careful what you wish for: the paradoxical effects of bifurcating claims for punitive damages*, *Wis. L. Rev.*, 1998, 297-342; E. GREENE- W. D. WOODY & R. WINTER, *Compensating plaintiffs and punishing defendants: is bifurcation necessary?*, *Law and Hum Behav.*, 2000, 187-205; C. M. SHEA ADAMS & M. G. BOURGEOIS, *Separating compensatory and punitive damages award decisions by trial bifurcation*, *Law & Hum Behav.*, 2006, 11-30.

[237] J. R. McKOWN, *Punitive damages: State trends and developments*, *op. cit.*, 1995, p. 446, 448; J. MALLOR & B. S. ROBERTS, *Punitive damages: on the path to a principled approach?*, *op. cit*., 1999, p. 1006.

[238] Cal Civ Code Ann § 3295(d) (West Supp.1995); Ga Code Ann § 51-12-5.1(d) (Supp.1995); Kan. Stat.Ann. §§ 60-3701(a) and (b) (1994); Mo Rev Stat §§ 510.263(1) and (3) (1994); Mont Code Ann § 27-1-221(7) (1995).

[239] N J Stat Ann §§ 2A:58C-5(b) and (d) (West 1987); N. D. Cent. Code § 32-03.2-11(2) (Supp.1995).

[240] Conn Gen Stat Ann § 52-240b; Kan Stat Ann § 60-3701(a).

[241] D. G. OWEN, *Products liability law*, cit., 2005, p. 1214.

[242] D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1214.

over and over again for a single wrong, for instance in product liability litigation. For example, Georgia law limits punitive damages awards in products liability cases to one award without exception[243].

Another measure to limit improper punitive damages awards is the heightened burden of proof. This control mechanism will filter out claims in which the evidence cannot justify a punitive damages award. The ordinary standard of proof that is required in civil litigation is *preponderance of the evidence*, but several courts and legislators have raised the standard of proof for punitive damages claims, because such damages are 'extraordinary and harsh'[244]. A number of states have enacted a procedural rule that punitive damages must be established by clear and convincing evidence[245].

In Colorado, a punitive damage award may only be based on proof beyond a reasonable doubt, which is in fact a criminal law requirement[246]. Even in the absence of legislation, many courts require a higher standard of proof for the recovery of punitive damages than the ordinary standard[247].

For example, in the products liability case *Wangen v. Ford Motor Co.* the Wisconsin Supreme Court determined as follows: "The issue of whether the defendant acted maliciously or in willful or reckless disregard of the plaintiff's rights, justifying recovery of punitive damages, falls within the "certain classes of acts" for which stigma attaches and is a more serious allegation than the ordinary factual issue in a personal injury action. Therefore, for all punitive damages claims we adopt the middle standard for the burden of proof for the issue of whether the defendant's conduct was 'outrageous[248]'".

The court also explains what it means to require a middle burden of proof: "This burden of proof, referred to as the middle burden of proof, requires a greater degree of certitude than that required in ordinary civil cases but a lesser degree than that required to convict in a criminal case[249]".

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[243] Ga Code § 51-12-5.1(e)(1).
[244] D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1203.
[245] D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1203; J. R. McKOWN, *Punitive damages: State trends and developments*, *op. cit*., 1995, p. 455, citing e.g. Ala Code § 6-11-20 (1993); Alaska State § 09.17.020 (1994); Cal Civ. Code § 3294(a) (West 1994); Fla Stat Ann § 768.73(1)(b) (West Supp. 1994).
[246] Colo Rev Stat § 13-25-127(2) (1987).
[247] See J. R. McKOWN, *Punitive damages: State trends and developments*, *op. cit*., 1995, p. 455-458.
[248] *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (Wis. 1980), at § 458.
[249] *Wangen v. Ford Motor Co.*, at § 457.

In *Hodges v. S.C. Toof & Co*., the Tennessee Supreme Court adopted a clear and convincing standard of proof for punitive damage awards: "Because punitive damages are to be awarded only in the most egregious cases, a plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence[250]".

According to the Court, clear and convincing evidence means 'evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence[251]'. The Maine Supreme Court determined likewise in *Tuttle v. Raymond*: "[…] although punitive damages serve an important function in our legal system, they can be onerous when loosely assessed. The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice[252]".

To conclude, a final measure to prevent excessive punitive damages awards is the already mentioned requirement of proportionality between compensatory and punitive damages. This requirement is usually expressed by the legislator as a ratio, or by state courts as a standard[253]. For example, according to Florida law punitive damages may not exceed three times the actual damages[254], whereas Colorado law states that punitive damages may not exceed the actual damages except in special circumstances when they are limited to three times the actual damages[255]. State courts normally do not set a fixed ratio, but they determine reasonableness on a case-by-case basis[256].

[250] *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992), at § 900.
[251] *Hodges v. S.C. Toof & Co.*, at § 901.
[252] *Tuttle v. Raymond*, at § 1363.
[253] J. MALLOR & B. S. ROBERTS, *Punitive damages: on the path to a principled approach?*, *op. cit*., 1999, p. 1007.
[254] Fla Stat Ann § 768.73(1)(a) (West Supp. 1994).
[255] Colo Rev Stat § 13-21-102 (1987).
[256] L L. SCHLUETER, *Punitive damages*, I, *op. cit.*, 2005, p. 354.

18. Judicial review process: general remarks

In the United States, the amount of a punitive damages award is determined by the trier of fact, which in principle is the jury. Judicial review is a method to control such jury awards. First, both trial courts and appellate courts have the power of *remittitur* and *additur*[257]. Second, an appellate court that finds a jury award excessive may overturn the verdict and order a new trial.

When a court determines that a jury has rendered an excessive award, it can grant a remittitur and reduce the award. Remittitur cannot be granted without the plaintiff's consent[258]. The plaintiff has the option to either accept the reduced award or seek a new trial[259]. A less common form of correcting the jury's verdict is additur. When a court finds that the punitive damages award is insufficient, it can order an additur and add damages to the award. Although the power of additur is highly criticized, it gives the trial judge two interesting options: either the defendant accepts the increase in punitive damages or the judge orders a new trial[260]. The grounds for one of the parties to bring an appeal generally relate to the insufficiency of evidence to justify the punitive damages award or to its excessiveness[261]. Appellate courts are primarily faced with the issue of excessive awards. Not only legislators, but also courts have created standards of review that should be considered when a punitive damages verdict is appealed. The factors on excessiveness outlined by the U.S. Supreme Court are important and will be discussed in detail below. In short, the standard of review of the U.S. Supreme Court is known as the *de novo* standard based on three guideposts that were developed in the case *BMW of North America, Inc. v. Gore*[262]. The guideposts that trial and appellate courts must consider in evaluating whether a punitive damages verdict is unconstitutionally excessive relate to the reprehensibility of the conduct,

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[257] L. L. SCHLUETER, *Punitive damages*, I, *op. cit.*, 2005, p. 366. See, on excessive and inadequate punitive damages awards, J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and practice*, II, *op. cit.*, 2000, chapter eighteen.

[258] E.g. *Thorne v. Welk Inv., Inc.*, 197 F.3d 1205 (C.A.8 (Mo.) 1999).

[259] E.g. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Montoya v. Moore*, 77 N.M. 326, 422 P.2d 363 (N.M. 1967).

[260] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 372. E.g. *Micari v. Mann*, 126 Misc.2d 422, 481 N.Y.S.2d 967 (N.Y.Sup. 1984).

[261] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 377.

[262] *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (U.S.Ala. 1996).

the ratio between punitive and compensatory awards, and the comparison with criminal fines or civil penalties available for similar conduct[263]. If no constitutional issue is raised, the appellate court may apply the *abuse of discretion* standard by which punitive damages are traditionally reviewed. This standard is less demanding than the *de novo* standard and broadly interpreted by the courts[264]. In *Pacific Mutual Life Insurance Co. v. Haslip*, the U.S. Supreme Court endorsed the standard that had been used by the Alabama Supreme Court[265]. The case, which will be discussed below, offered guidance as regards the standard to be used by lower courts. As a general rule, appellate courts may reverse or modify an award for the reason that the jury, or the court sitting as a jury, abused its discretion. As was seen in chapter three, a reasonable basis for the exercise of discretion only exists where there are *aggravating* circumstances to justify punitive damages[266]. Punitive damages awards cannot be based on passion, prejudice or corruption of the jury[267]. Furthermore, on the basis of the reasonable ratio rule, an appellate court may overturn an excessive punitive damages award that is disproportionate to the compensatory damages award[268].

19. The constitutionality matters of punitive damages

There have been numerous attempts to attack the punitive damages doctrine as being contrary to certain constitutional provisions that can be found in the U.S Constitution as well as state constitutions[269]. The U.S. Supreme Court, to start with,

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[263] *BMW*, at § 576. See R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit.*, 2008, p. 80.
[264] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit.*, 2008, p. 80; L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 377.
[265] *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (U.S.Ala. 1991).
[266] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 349.
[267] For an overview of case law, see L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 350, footnote 39.
[268] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 353.
[269] See, on the constitutionality issue in general, L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, chapter three; J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and Practice*, I, *op. cit.*, 2000, chapter three; R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit.*, 2008, chapter two. See also C. M. SHARKEY, *The Exxon Valdez litigation marathon: a window on punitive damages*, *U. St. Thomas L. J.*, 2009, 25-54; C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris vs Williams*, *Willamette L. Rev.*, 2010, 449-478; D. RENDLEMAN, *Common law punitive damages: something for everyone*, *op. cit.*, 2009, 1-24; T. EISENBERG- M. HEISE & M. T. WELLS, *Variability in punitive damages: empirically assessing Exxon Shipping Co. v. Baker*, *op. cit.*, 2010, 5-26; S. P. CALANDRILLO, *Penalizing punitive damages: why Supreme Court needs a lesson in Law and Economics*, *Geo Wash L. Rev.*, 2010, 774-821; J. GASH, *Punitive damages, other acts evidence, and the Constitution*, *Utah L. Rev.*, 2004, 1191-1277; J. GASH, *The end of an era: the Supreme Court (finally) butts*

has repeatedly addressed concerns over the frequency, size and predictability of particular punitive damages awards. But not only the U.S. Supreme Court, also lower federal courts and state courts have addressed the constitutionality issue[270].

According to Schlueter: "Of the many arguments advanced against punitive damages, perhaps the most compelling, but rarely successful, are those based on constitutional grounds. These constitutional arguments usually focus on the procedures by which punitive damages are imposed, especially in light of the similarity in purpose and effect between punitive damages and criminal sanctions. The argument continues that civil defendants who are exposed to punitive liability should be afforded many of the constitutional safeguards which protect criminal defendants. Additionally, arguments against assessment of punitive damages can be made on the constitutional grounds of vagueness, the right of confrontation, equal protection, double jeopardy, cruel and unusual punishment, and free speech[271]".

From the late 1980s onwards, the U.S. Supreme Court decided a series of cases on the basis of two important constitutional challenges: the Excessive Fines Clause and the Due Process Clause. In so doing, the Court established a framework for awarding punitive damages[272]. The focus of attention will be on these two constitutional provisions. However, it should be made clear that – like Schlueter – Kircher and Wiseman mention other important constitutional provisions in relation

out of punitive damages for good, *Fla. L. Rev.*, 2011, 525-597; S. MEAD, *Punitive damages and the spill felt round the world: a U. S. perspective*, *Loy L. A. Int'l & Comp. L. J.*, 1995, 829-860; T. H. DUPREE, *Punitive damages and the Constitution*, *La L. Rev.*, 2010, 421-434; M. H. REDISH & A. L. MATHEWS, *Why punitive damages are unconstitutional*, *op. cit.*, 2004, 1-54; M. I. KRAUSS, *Punitive damages and the Supreme Court: a tragedy in five acts*, *Cato Sup. Ct. Rev.*, 2007, 315-334; A. M. KENEFICK, *The constitutionality of punitive damages under the excessive fines clause of the Eighth Amendment*, *Mich. L. Rev.*, 1987, 1699-1726; V. E. SCHWARTZ & L. MAGARIAN, *Challenging the constitutionality of punitive damages: putting rules of reason on an unbounded legal remedy*, *Am. Bus. L. J.*, 1990, 485-497; A. B. SPENCER, *Due process and punitive damages: the error of Federal excessiveness jurisprudence*, *S. Cal. L. Rev.*, 2006, 1085-1154; M. L. RUSTAD, *The uncert-worthiness of the Court's unmaking of punitive damages*, *Charleston L. Rev.*, 2008, 459-519; M. A. GEISTFELD, *Punitive damages, retribution and due process*, *S. Cal. L. Rev.*, 2008, 263-310; J. A. SEINER, *Punitive damages, due process, and employment discrimination*, *Iowa L. Rev.*, 2012, 735-796.

[270] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit.*, 2008, p. 3-2.

[271] L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 50.

[272] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit*., 2008, p. 38; D. G. OWEN, *Products liability law*, cit., 2005, p. 1216; J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and Practice*, I, *op. cit*., 2000, p. 3-1; L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 49.

to the punitive damages' doctrine, namely double jeopardy[273], freedom of speech and press[274], equal protection[275], and other constitutional grounds, such as right to privacy, undue burden upon interstate commerce and violation of the Contract Clause[276].

The Excessive Fines Clause is used to challenge the constitutionality of large punitive damages awards. This clause, which is traditionally applied in criminal cases rather than civil cases, can be found in the *Eighth* Amendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[277]".

The second constitutional challenge is based upon the Due Process Clause which protects two distinct rights, namely the right of procedural and substantive due process[278]. This clause can be found in Section 1 of the *Fourteenth* Amendment to the U.S. Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws".

An often-heard argument is that the process of assessing the amount of punitive damages violates the Due Process Clause. Furthermore, the requirement that there must be a relationship to a legitimate purpose is – arguably – violated when the punitive damages award is not in proportion to the compensatory damages award. The rationale is that the Due Process Clause is violated when the purposes of punitive damages would be adequately served by a smaller award[279].

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[273] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and Practice*, I, *op. cit*., 2000, p. 3-3, citing the Fifth Amendment of the U.S. Constitution ("…nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb…") and parallel provisions in the state constitutions.

[274] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and Practice*, I, *op. cit*., 2000, p. 3-58, citing the First Amendment of the U.S. Constitution. The First Amendment is especially invoked in defamation cases involving punitive damages.

[275] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and Practice*, I, *op. cit*., 2000, p. 3-59.

[276] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and Practice*, I, *op. cit*., 2000, p. 3-82.

[277] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide, op. cit*., 2008, p. 39.

[278] T. B. COLBY, *Clearing the smoke from Philip Morris v. Williams: the past, the present and future of punitive damages, op. cit.*, 2008, p. 400.

[279] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide, op. cit*., 2008, p. 40.

In the next subsection, some of the most important constitutional law decisions with regard to punitive damages will be analyzed in order to give an impression of the significance of this topic. The Eighth and Fourteenth Amendment have clearly played a central role in the U.S. Supreme Court decision-making.

20. Punitive damages decision-making by U. S. Supreme Court

The earliest U.S. Supreme Court decisions on punitive damages go back to the nineteenth century. In the *Amiable Nancy* decision of 1818[280], the already mentioned *Day v. Woodworth* decision of 1851[281] and the *Missouri Pacific Railway Company v. Humes* decision of 1885[282], the U.S. Supreme Court found punitive damages to be *constitutional* for the reason that the remedy is 'an integral part of the American legal tradition[283]'. Then, from the late 1880s until the late 1960s there have been few U.S. Supreme Court decisions on punitive damages. This is probably the result of a lack of financial incentive, as there were few punitive damages awards at that time. The next series of constitutional cases was decided by the U.S. Supreme Court from the 1970s through to the early 1980s[284]. These cases were primarily defamation cases focused on the constitutionality of punitive damages in light of the First Amendment on freedom of speech and press[285]. It was not until 1986 that the next constitutionality case was decided[286]. The cases that followed were all considered constitutional challenges of either the Eighth or Fourteenth amendments. The U.S. Supreme Court decisions that will be addressed in this section have been categorized into the late 1980s decisions, the early 1990s decisions, the 'trilogy' of due process cases (plus one) decided between 1996 and

[280] *The Amiable Nancy*, 16 U.S. 546, 1818 WL 2445 (U.S.N.Y. 1818).
[281] *Day v. Woodworth*, 54 U.S. 363, 1851 WL 6684 (U.S. Mass. 1851), which is the first U.S. Supreme Court decision in which the punitive damages doctrine was considered 'constitutional': 'It is a well- established principle of common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon the defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.' *Day v. Woodworth*, at § 371.
[282] *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 6 S.Ct. 110 (U.S. 1885).
[283] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide, op. cit*., 2008, p. 40.
[284] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide, op. cit*., 2008, p. 44-45.
[285] E.g. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (U.S.Ill. 1974).
[286] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (U.S. Ala. 1986).

2007[287], and a decision from 2008[288]. This is not an exhaustive enumeration of all U.S. Supreme Court decisions concerning the constitutionality of punitive damages[289]. The main focus will be on cases decided from 1996 onwards, as these are the cases in which the Court for the first time struck down grossly excessive punitive damages awards as unconstitutional. First a brief insight into the cases decided prior to 1996 will be provided.

21. The late 1980s and early 1990s judgments

In the cases that were decided between 1986 and 1989, the Court took a rather reserved stance on the constitutionality of punitive damages awards. In the first two cases, *Aetna Life Insurance Company v. Lavoie* and *Bankers Life & Cas. Co. v. Crenshaw*, the Court did not decide on the question whether the two constitutional clauses were violated[290]. However, the Court's language 'encouraged litigants to challenge punitive damages as violative of the Eighth and Fourteenth Amendments[291]'. The actual development of a punitive damages framework began with the third case, *Browning- Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[292], in which the Court addressed the possible violation of the Excessive Fines Clause. The Court decided that the punitive damages award of $ 6 million for unfair business practices did not violate the Excessive Fines Clause because the action was not prosecuted by the government, and the government did not share in the award[293]. In so deciding, the Court left open the possibility that awards in which

[287] C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris v. Williams*, *op. cit.*, 2010, p. 451.
[288] See, for a similar but more elaborate structure, R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit*., 2008, chapter two.
[289] See for instance D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1216-1225.
[290] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (U.S. Ala. 1986); *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (U.S. 1988).
[291] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit*., 2008, p. 47. In the concurring opinion of *Bankers Life* concern about the constitutionality of punitive damages was expressed: 'This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The court has recognised that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute". Nothing in Mississippi law warned appellant that by committing a tort that caused $ 20,000 of actual damages, it could expect to incur a $ 1.6 million punitive damages award'. See *Bankers Life*, at § 88.
[292] *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc*., 492 U.S. 257, 109 S.Ct. 2909 (U.S.Vt. 1989).
[293] *Browning-Ferris*, at § 263-264.

governmental entities take part may be restricted by the Excessive Fines Clause[294]. The due process issue was not addressed but the Court emphasized its importance and held the door open for a constitutional challenge in an appropriate case[295].

Not surprisingly, in the early 1990s decisions *Pacific Mutual Life Insurance Co. v. Haslip*, *TXO Production Corp. v. Alliance Resources Corp.* and *Honda Motor Co., Ltd. v. Oberg*, the Court addressed the constitutionality of punitive damages under the Due Process Clause[296]. The first case of *Pacific Mutual* concerned insurance fraud. The award of punitive damages ($ 840,000) was more than four times the award of compensatory damages ($ 200,000). The Court decided, among other things, that the punitive damages award assessed against the insurer, although large in proportion to the insured's compensatory damages and out-of-pocket expenses, was not so disproportionately large as to violate due process[297]. Although the Court expressed its concern about punitive damages that 'run wild', it refused to 'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case[298]'.

The Court however stressed the need for reasonableness and adequate guidance when the amount of the award is assessed by a jury and thereby cited the words that had been used two years earlier by Owen: "Yet punitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values[299]".

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[294] D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1217; R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit.*, 2008, p. 53.

[295] *Browning-Ferris*, at § 275-281. According to Justice Brennan: 'Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, you may take into account the character of the defendants, their financial standing, and the nature of their acts." Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.'

[296] *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (U.S.Ala. 1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (U.S.W.Va. 1993); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331 (U.S.Or. 1994).

[297] *Pacific Mutual*, at § 1. See D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1217; L. L. SCHLUETER, *Punitive damages*, I, *op. cit*., 2005, p. 59.

[298] *Pacific Mutual*, at § 17-18.

[299] *Pacific Mutual*, at § 18-19, citing D. G. OWEN, *The moral foundations of punitive damages*, *Ala L. Rev.*, 1989, p. 739.

In determining whether the specific award violated the Due Process Clause, the Court endorsed seven factors that had been developed by the Supreme Court of Alabama to determine whether a punitive damages award is reasonably related to the goals of deterrence and retribution[300]. In so deciding, the Court showed other courts how to control punitive damages awards. The Court concluded that the Due Process Clause was not violated[301].

The next case concerning punitive damages and due process, *TXO*, involves unfair business practices. Although the Court recognized that there was a 'dramatic disparity[302]' between the punitive damages award ($ 10 million) and the compensatory award ($ 19,000) under consideration, it decided not to adopt fixed standards for testing the constitutionality of the size of punitive damages awards[303]. Instead, the Court reiterated its wording from the *Pacific Mutual* case that there is 'no mathematical bright line between an award that is constitutionally acceptable and one that is constitutionally unacceptable[304]'. The Court focused on the reasonable relation between the award and the harm that occurred or was likely to occur from TXO's bad faith conduct[305].

It thereby referred to the decision of the Supreme Court of Appeals of West Virginia, which had affirmed the initial jury verdict against TXO on the basis of three factors relating to the question whether such a relationship existed: (1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future[306]. Taking into account these factors, the Court ruled that the punitive damages sum imposed on TXO was not so grossly excessive as to

[300] *Pacific Mutual*, at § 21-22: 'The following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation'.
[301] *Pacific Mutual*, at § 23-24.
[302] *TXO*, at § 444, 462.
[303] *TXO*, at § 443, 456. See also D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1219.
[304] *TXO*, at § 457.
[305] J. J. KIRCHER & C. M. WISEMAN, *Punitive damages Law and Practice*, I, *op. cit*., 2000, p. 3-16.
[306] *TXO*, at § 453.

violate due process[307]. However, similar to *Pacific Mutual*, the court stated in *TXO* that there should be procedural due process limits on the size of punitive damages awards, in the sense that due to 'a general concern of reasonableness' there should be appropriate jury instructions and meaningful judicial review[308].

The last early 1990s decision, *Honda Motor Co. v. Oberg*, is the first case in which the Court found a violation of the Due Process Clause. The products liability case was about an all-terrain vehicle, also known as an ATV or quad-bike, which had overturned and injured Oberg, the respondent[309]. Oberg brought a product liability case against the manufacturer. The Oregon Supreme Court affirmed the jury verdict consisting of a $ 5 million punitive damages award and a $ 900,000 compensatory damages award. The case before the U.S. Supreme Court focused on the question whether precluding – on the basis of a unique provision in the Constitution of Oregon – judicial review of punitive damages awarded by the jury 'unless the court can affirmatively say there is no evidence to support the verdict' violates the Due Process Clause[310]. The Court decided that this preclusion indeed violates the Due Process Clause, for the reason that punitive damages awards should not be at the discretion of a jury without proper judicial review[311]. The denial of judicial review, including review of the size of awards, was considered *unconstitutional* as it might lead to excessive punishment of the defendant[312].

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[307] *TXO*, at § 443-445. The Court added in § 462 that it was reasonable for the jury to reach the verdict: 'In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.'

[308] *TXO*, at § 443. See also D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1219.

[309] D. G. OWEN, *Products liability law*, *op. cit.*, 2005, p. 1220; R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit.*, 2008, p. 75.

[310] *Honda*, at § 415.

[311] *Honda*, at § 434-435: 'In support of his argument that there is a historic basis for making the jury the final arbiter of the amount of punitive damages, respondent calls our attention to early civil and criminal cases in which the jury was allowed to judge the law as well as the facts. As we have already explained, in civil cases, the jury's discretion to determine the amount of damages was constrained by judicial review. The criminal cases do establish – as does our practice today – that a jury's arbitrary decision to acquit a defendant charged with a crime is completely unreviewable. There is, however, a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property. The Due Process Clause has nothing to say about the former, but its whole purpose is to prevent the latter. A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment.'

[312] *Honda*, at § 416: 'This Court has not hesitated to find proceedings violative of due process where a party has been deprived of a well-established common law protection against arbitrary and inaccurate adjudication. Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically

22. The "trilogy" of Due process cases

The following decisions are also known as the 'trilogy of punitive damages cases', in which 'the U.S. Supreme Court has erected an edifice of constitutional due process review superimposed upon state common law practice of punitive damages[313]'. These cases differ from the earlier cases in the sense that the Court for the first time used its power to strike down grossly excessive punitive damages awards as unconstitutional[314]. Although this also happened in the *Honda* case, that decision was based on the unconstitutional preclusion of judicial review, whereas these cases focus on the unconstitutional *excessiveness* of punitive damages awards. One additional case that is described in this subsection does not form part of the trilogy, as Sharkey names it, but it was decided some years after the first case in the trilogy and is relatively often cited as an important U.S. Supreme Court decision on the constitutionality of punitive damages.

22.1. *BMW of North America, Inc. v. Gore*

In *BMW of North America, Inc. v. Gore*[315], BMW had sold a 'new' car to Gore, the respondent. Gore did not know that the car had sustained acid rain damage in transit to the United States and had been repaired and partially repainted before it was delivered to him[316]. When he found out about this he felt cheated, sued BMW and claimed, among other things, that 'the failure to disclose that the car had been repainted constituted suppression of a material fact[317]'. An Alabama jury initially awarded $ 4,000 in compensatory damages and $ 4 million in punitive damages. Because BMW had engaged in similar conduct across the country, the compensatory damages award was multiplied by a thousand, the estimated number

leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses. Oregon has removed one of the few procedural safeguards which the common law provided against that danger without providing any substitute procedure and without any indication that the danger has in any way subsided over time'.

[313] C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris v. Williams*, *op. cit.*, 2010, p. 451.

[314] C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris v. Williams*, *op. cit.*, 2010, p. 451.

[315] *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (U.S.Ala. 1996).

[316] *BMW*, at § 563.

[317] *BMW*, at § 563.

of cars that BMW had repaired and sold as new[318]. However, the Alabama Supreme Court reduced the punitive damages award to $ 2 million because the jury could not properly have based the award on BMW's sales *outside* the state of Alabama[319].

The U.S. Supreme Court found the $ 2 million punitive damages award to be grossly excessive and therefore in violation of the Due Process Clause for the following two reasons: (1) lawful conduct by a distributor outside Alabama cannot be considered by an Alabama court in assessing a punitive damages award, and (2) a punitive damages award of $ 2 million is grossly excessive given the low level of reprehensibility of conduct and the 500 to 1 ratio between the punitive damages award and the actual harm to the buyer[320].

Thus, according to the Court the jury improperly calculated the amount of punitive damages because its calculation was not limited to the conduct of BMW in Alabama. In other words, state courts cannot award punitive damages for out-of-state conduct[321]. BMW's conduct was actually legal in some other states, where legislation does not require disclosure of minor repairs of new cars. The Court determined that the Alabama jury verdict violated principles of state sovereignty and comity, and made clear that state courts cannot assess punitive damages for conduct in other states[322]. Furthermore – and even more important – the Court provided three guideposts that should be used by trial and appellate courts in evaluating whether a punitive damages award is *unconstitutionally* excessive: (1) the reprehensibility of the conduct, (2) the ratio between punitive and compensatory awards, and (3) the comparison with criminal fines or civil penalties available for similar conduct.

The Court reasoned as follows: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might

[318] *BMW*, at § 564; D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1221.
[319] *BMW*, at § 567.
[320] *BMW*, at § 559.
[321] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide, op. cit*., 2008, p. 80.
[322] *BMW*, at § 568-574.

impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the § 2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases[323]".

The Court then discussed these considerations one by one. As regards the *first* guidepost, the nature of the conduct should be evaluated independently[324]. Conduct reflecting reasonable executive decisions and an intention to comply with existing laws will not be considered reprehensible. BMW's conduct was not considered reprehensible by the Court for the following reason: "In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages[325]".

With regard to the *second* guidepost, the ratio between the punitive and the compensatory award of 500 to 1 was rejected. In doing so, the Court again cited *Pacific Mutual* and *TXO*. The Court started by explaining why a mathematical formula to determine the constitutionally acceptable is rejected and in which situations a higher ratio may be justified: "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high

[323] *BMW*, at § 574-575.
[324] R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide, op. cit*., 2008, p. 80.
[325] *BMW*, at § 576.

compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach[326]".

The Court continued its reasoning: "Once again, we return to what we said … in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that a general concern of reasonableness … properly enters into the constitutional calculus[327]'".

And the Court concluded as follows on this point: "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, the award must surely raise a suspicious judicial eyebrow[328]".

As regards the *third* guidepost, the Court found that the $ 2 million punitive damages award was substantially higher than the statutory fines available in Alabama and elsewhere for similar conduct: "In this case the $ 2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance. […] The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion-dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case[329]".

[326] *BMW*, at § 582.
[327] *BMW*, at § 582-583.
[328] *BMW*, at § 583.
[329] *BMW*, at § 583-585.

For the reasons given, the U.S. Supreme Court ruled that the punitive damages award imposed on BMW was grossly excessive and violated the Due Process Clause. The judgment of the Alabama Supreme Court was reversed and the case remanded.

22.2. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*: a focus on the *de novo* standard

In the next case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[330], which does not form part of Sharkey's 'trilogy' but is still worth mentioning at this point, the U.S. Supreme Court determined that U.S. Courts of Appeals should apply a *de novo* standard when reviewing a district court's determination of the constitutionality of a punitive damages award. Appellate courts must thereby apply the three guideposts of the *BMW* case[331]. This changed the standard of federal appellate review from abuse of discretion to a more demanding standard of review. If no constitutional issue is raised, appellate courts may use the *abuse of discretion* standard[332].

Cooper Industries had been sued by Leatherman, manufacturer of a multi-function tool comparable to the classic Swiss army knife. Cooper Industries nearly copied Leatherman's tool and accompanying advertisement and was sued for trademark infringement, false advertising, and unfair competition[333]. A jury awarded damages for unfair competition: $ 50,000 in compensatory damages and $ 4.5 million in punitive damages. The Court held that the Court of Appeals for the Ninth Circuit, which upheld the jury verdict, made a mistake by applying the normal abuse of discretion standard when reviewing the award of the district court. According to the Court, punitive damages operate as a quasi-criminal private fine designed to punish a defendant rather than to assess actual damage suffered by a plaintiff: "Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former is

[330] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 121 S.Ct. 1678 (U.S.Or. 2001).
[331] *Cooper Industries*, at § 424-425.
[332] *Cooper Industries*, at § 424; Schlueter 2005a, p. 73.
[333] *Cooper Industries*, at § 424; R. L. BLATT- R. W. HAMMESFAHR & L. S. NUGENT, *Punitive damages. A State-by-State guide*, *op. cit*., 2008, p. 83; D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1222.

intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" is intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation[334]".

The Court recognizes the broad discretion that States have with respect to the imposition of both criminal penalties and punitive damages, but it also makes clear that the Due Process Clause imposes substantive limits on that discretion[335]. The Court then makes clear that it is convinced that appellate courts should apply the *de novo* standard when reviewing district courts' determinations of the constitutionality of punitive damages awards[336]. According to the Court, this decision is supported by the *Pacific Mutual* case: "[…] our decision today is supported by our reasoning in [*Pacific Mutual*]. In that case, we emphasized the importance of appellate review to ensuring that a jury's award of punitive damages comports with due process[337]".

The concerns raised by Leatherman with regard to his right to trial by jury, *i.e.* the Seventh Amendment to the Constitution, were not subscribed to by the Court: "Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury. Because the jury's award does not constitute a finding of "fact," appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its *amicus*[338]".

Thus, the *de novo* standard of appellate review is not constrained by the right to jury trial. The case was remanded, as the Court's own application of the three *Gore* factors 'reveals a series of questionable conclusions by the District Court that may not survive the *de novo* review[339]'.

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[334] *Cooper Industries*, at § 432; See D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1223.
[335] *Cooper Industries*, at § 433.
[336] *Cooper Industries*, at § 436.
[337] *Cooper Industries*, at § 436.
[338] *Cooper Industries*, at § 437.
[339] *Cooper Industries*, at § 441.

The *Cooper* case has been criticized. It is argued that the decision implies a radical shift of control over punitive damages determination from juries to courts[340]. However, it appears that the change in the standard of review has little practical impact on either state courts or federal courts[341]. This is for example reflected by the opinion of the New Mexico Court of Appeals in *Seitzinger v. Trans-Lux Corp.*: "We do not interpret *Cooper Industries, Inc.* to impose de novo review as a matter of federal constitutional imperative. Rather, it appears to be an appellate procedural option for the federal courts. We are thus free to apply our own standard as a matter of constitutional law[342]".

Likewise, a federal court decided in *Todd v. Roadway Express Inc.* that the *Cooper* decision has no bearing on how punitive damages are awarded, only on how a jury's award is reviewed[343].

22.3. *State Farm Mutual Automobile Insurance co. v. Campbell*

The U.S. Supreme Court continued to stress its due process concerns in *State Farm Mutual Automobile Insurance Co. v. Campbell*[344]. Similar to the *BMW* decision, this was an 'economic harm case[345]'. The Campbells had negligently caused a car accident in which one person died and another person became disabled. Nevertheless, their insurance company State Farm refused offers by the victim and the deceased's inheritors to settle the case within the policy limits of $ 50,000 of Campbell's car insurance. Furthermore, despite the advice of one of its own investigators, State Farm started court procedures and – inaccurately – promised the Campbells that their personal belongings were safe, that they were not liable for the accident, that State Farm would represent their interests and that they did not need a separate counsel[346]. Not surprisingly, a jury verdict of $ 185,849 was

[340] D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1223, citing L. LITWILLER, *Has the Supreme Court sounded the death knell for jury assessed punitive damages? A critical reexamination of the American Jury*, *USF L. Rev.*, 2002, 411-472.
[341] D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1223.
[342] *Seitzinger v. Trans-Lux Corp*., 40 P.3d 1012 (N.M.App. 2001), at § 1023.
[343] *Todd v. Roadway Exp., Inc*., 178 F.Supp.2d 1244 (M.D.Ala. 2001).
[344] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (U.S. 2003).
[345] C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris v. Williams*, *op. cit*., 2010, p. 452.
[346] *State Farm*, at § 413.

awarded against the Campbells. When State Farm refused to pay at first, Campbell and his wife thought for a period of eighteen months that they had to sell their house[347]. State Farm had simply told them: "You may want to put for sale signs on your property to get things moving[348]".

The Campbells sued State Farm for bad faith failure to settle, fraud, and intentional infliction of emotional distress[349]. They introduced evidence that State Farm worked on the basis of a fraudulent scheme (the so-called 'Performance, Planning and Review' policy) to randomly minimize claim payouts in order to maximize profits and that this fraudulent behavior was conducted not only in their home state Utah but in numerous states for over *twenty* years[350]. For that reason, a Utah jury awarded $ 2.6 million in compensatory damages, and $ 145 million in punitive damages, which the trial court reduced to $ 1 million and $ 25 million respectively[351]. Both parties appealed.

The Utah Supreme Court reinstated the $ 145 million punitive damages award: "Relying in large part on the extensive evidence concerning the PP & R policy, the court concluded State Farm's conduct was reprehensible. The court also relied upon State Farm's "massive wealth" and on testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability," and concluded that the ratio between punitive and compensatory damages was not unwarranted. Finally, the court noted that the punitive damages award was not excessive when compared to various civil and criminal penalties State Farm could have faced, including $ 10,000 for each act of fraud, the suspension of its license to conduct business in Utah, the disgorgement of profits, and imprisonment[352]".

Thus, in light of, among other things, the insurer's 'massive wealth' and the unlikelihood of being caught and punished due to the secret nature of its activities,

[347] *State Farm*, at § 426; C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris v. Williams*, *op. cit*., 2010, p. 452.
[348] *State Farm*, at § 413.
[349] *State Farm*, at § 414; D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1223.
[350] *State Farm*, at § 415.
[351] *State Farm*, at § 415.
[352] *State Farm*, at § 415-416.

State Farms fraudulent conduct was reprehensible and therefore compatible with the *BMW* guideposts[353].

State Farm appealed to the U.S. Supreme Court. According to the insurer, the verdict was excessive and violated the Due Process Clause because the Utah courts had considered conduct outside the state of Utah and had otherwise violated the *BMW* guideposts[354]. The U.S. Supreme Court agreed with State Farm. As regards the first *BMW* guidepost on reprehensibility of conduct, the Court acknowledged the offensiveness of State Farm's fraudulent behavior. However, the Court also made clear that due process precludes courts from basing punitive damages on misconduct that is unrelated to the respondents' harm, especially conduct outside the state. Punitive damages may not be used 'as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country[355]'.

According to the Court: "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortuous, but that conduct must have a nexus to the specific harm suffered by the plaintiff[356]".

The Court continued: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here[357]".

Also, the second *BMW* factor, the ratio guidepost, was further refined in the *State Farm* decision. Although again refusing to impose a 'bright-line ratio' that punitive damages awards may not exceed, the Court warned lower courts to be careful: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process

[353] *State Farm*, at § 415-416; D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1224.
[354] D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1224.
[355] *State Farm*, at § 420.
[356] *State Farm*, at § 422.
[357] *State Farm*, at § 423.

guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff[358]".

In general, the Court said that few punitive damages awards *exceeding* a single-digit ratio between punitive and compensatory damages will in practice satisfy due process to a significant degree[359]. The Court emphasized that a punitive award should be both reasonable and proportionate to the harm and to the general damages recovered[360]. The 145-to-1 ratio used in this case was not considered reasonable and proportionate: "The compensatory award in this case was substantial; the Campbells were awarded §1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, and not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, were likely based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurers; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See Restatement (Second) of Torts § 908, Comment *c*, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes both")[361]".

The third guidepost on comparable civil and criminal penalties was also addressed. It appeared that the comparable penalty under Utah legislation for similar fraudulent behavior was a $ 10,000 fine[362]. Because the *BMW* guideposts were not sufficiently taken into account, the Court concluded that the $ 145 million punitive damages award was unconstitutionally excessive and violated due process, as it

[358] *State Farm*, at § 425.
[359] *State Farm*, at § 425.
[360] *State Farm*, at § 426.
[361] *State Farm*, at § 426.
[362] D. G. OWEN, *Products liability law*, *op. cit*., 2005, p. 1225.

'was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant[363]'.

22.4. *Philip Morris USA v. Williams*

The last case in the due process trilogy is *Philip Morris USA v. Williams*[364]. Unlike *BMW* and *State Farm*, this is not an economic harm case but a personal injury case involving wrongful death[365]. A similarity between the three cases is that they all involve 'consumer-protection punitive damages because the defendants' misconduct had caused widespread public harm[366]'.

Philip Morris was sued by respondent Williams for causing the death of her husband, who died of lung cancer after years of smoking Philip Morris cigarettes. Her lawyer had asked an Oregon jury to punish Philip Morris, not only for the death of Mr. Williams, but also for the harm caused to thousands of other smokers in Oregon who had been injured by smoking Philip Morris cigarettes[367]. The jury found that smoking was the cause of Mr. Williams' death, that he smoked in significant part because he was taught that it was safe, and that Philip Morris had knowingly and falsely misrepresented the risks of smoking. According to the jury, Philip Morris was negligent (as was Mr. Williams) and had engaged in deceit; it therefore awarded $ 821,000 in compensatory damages (of which $ 800,000 was for noneconomic damage) and $ 79.5 million in punitive damages. The trial judge reduced the punitive damages award to $ 32 million because of its excessiveness[368]. Both parties appealed. The Oregon Supreme Court then reinstated the $ 79.5 million award, because the conduct of Philip Morris 'caused a significant number of deaths each year in Oregon' and that 'using punitive damages to punish a defendant for harm to nonparties' does not violate the Constitution[369].

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[363] *State Farm*, at § 429.
[364] *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057 (U.S.Or. 2007) (*Philip Morris*).
[365] C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris v. Williams*, *op. cit*., 2010, p. 453.
[366] D. RENDLEMAN, *Common law punitive damages: something for everyone*, *op. cit.*, 2009, p. 12.
[367] *Philip Morris*, at § 350. See T. B. COLBY, *Clearing the smoke from Philip Morris v. Williams*, *op. cit.*, 2008, p. 399.
[368] *Philip Morris*, at § 350.
[369] *Williams v. Philip Morris Inc*., 340 Or. 35, 127 P.3d 1165 (Or. 2006), at § 1170, 1175, 1182.

Colby compared this situation with the *BMW* case decided ten years earlier: "In *BMW of North America, Inc. v. Gore*, the Court held that federalism concerns preclude a state court from using punitive damages to punish a defendant for harm caused to out-of-state victims, at least where the defendant's conduct was legal in the other state, but the Court clearly, albeit implicitly, endorsed the notion that there is nothing wrong with allowing the jury to punish the defendant for the harm caused to all in-state victims, even those not before the court[370]".

Indeed, there was an obvious trend toward so-called *total harm* punitive damages that punished the defendant for the harm caused to society, rather than the harm caused to the actual plaintiff(s)[371]. Then again, as was seen in the previous section, in the *State Farm* decision the Court determined that 'a defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business[372]'. In practice, the decisions of *BMW* and *State Farm* caused uncertainty to courts across the country as to whether punitive damages for harm to *nonparties* were either allowed or prohibited[373]. In the *Philip Morris* case, the Court puts an end to this uncertainty. Two questions were presented to the Court: firstly, a procedural due process question regarding punishment for harm to nonparty victims and, secondly, a substantive due process question relating to the 100-to-1 ratio used in the case[374].

With regard to the first question, the Court decided as follows: "A punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties amounts to a taking of property from the defendant without due process[375]".

According to the Court, juries may consider harm to third parties in determining the amount of punitive damages because such harm is relevant to the degree of reprehensibility of a defendant's conduct. However, they may *not* increase punitive damages awards to punish the defendant directly for this harm: "We did not

[370] T. B. COLBY, *Clearing the smoke from Philip Morris v. Williams*, *op. cit*., 2008, p. 398.
[371] T. B. COLBY, *Clearing the smoke from Philip Morris v. Williams*, *op. cit*., 2008, p. 397.
[372] *State Farm*, at § 423.
[373] T. B. COLBY, *Clearing the smoke from Philip Morris v. Williams*, *op. cit*., 2008, p. 399.
[374] C. M. SHARKEY, *Federal incursions and State defiance: punitive damages in the wake of Philip Morris v. Williams*, *op. cit*., 2010, p. 454.
[375] *Philip Morris*, at § 346.

previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now[376]".

In the Court's view, punitive damages cannot be used to punish a defendant for wrongful harm to a third party: "In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense[377]'".

The Court continued: "Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary. For another, to permit punishment for injuring a nonparty victim would add a near standard less dimension to the punitive damages' equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty, and lack of notice – will be magnified[378]".

The second question was not addressed by the Court, 'because the Oregon Supreme Court's application of the correct standard may lead to a new trial, or a change in the level of the punitive damages award[379]'.

The *Philip Morris* case did not end with this decision: what followed is a complicated set of procedures. In short, the U.S. Supreme Court vacated the Oregon Supreme Court's judgment and remanded the case[380]. On remand, the Oregon Supreme Court adhered to its prior decision and decided that the punitive damages

[376] *Philip Morris*, at § 356-357.
[377] *Philip Morris*, at § 353.
[378] *Philip Morris*, at § 353-354.
[379] *State Farm*, at § 348.
[380] *Philip Morris*, at § 358.

award was correctly awarded[381]. Then, the U.S. Supreme Court dismissed the request for appeal to consider the issue again as the writ of certiorari, *i.e.* a request of an appellate court in which a lower court is ordered to send the record of the case for review, was carelessly granted[382]. The manufacturer subsequently paid the compensatory damages award and part of the punitive damages award to the widow, but refused to pay the 60% of the punitive damages allocated to the state under a split recovery statute[383]. A new verdict was therefore issued by the Oregon Supreme Court in 2011. This Court decided that 60% of the *Williams* punitive damages award should indeed be paid to the Oregon Attorney General under the Oregon split-recovery statute[384].

Note that the U.S. Supreme Court's holding from 2007 is still the guiding principle in procedural due process issues, as follows for example from the recent district court decision *Ray v. Allergan, Inc*[385]. In this case, Douglas Ray had filed a civil claim against manufacturer Allergan because he had become disabled due to three Botox injections that he had received to treat a dystonic movement disorder of his right hand. Mr. Ray alleged that he sustained a severe reaction to the Botox which left him disabled. Allergan alleged that Mr. Ray's injuries resulted from a pre-existing neurodegenerative condition. After the jury had imposed compensatory damages of $ 12 million and punitive damages of $ 200 million on Allergan because of negligent failure to warn, Allergan moved for a new trial which was granted[386]. One of the reasons for the decision of the district court to grant a new trial was that the closing argument of Mr. Ray's counsel violated the rule created by the U.S. Supreme Court in *Philip Morris USA v. Williams* that punitive damages cannot be used to punish a defendant for injury that it inflicted upon nonparties: "In closing, Ray's counsel invited jurors to "think of all the Douglas Rays in the United States that were being injected with BOTOX in 2007 for mild to moderate nonlife-threatening conditions." […] Ray contends that his statement was made "in the context of whether the conduct was sufficiently reprehensible" to support an award

[381] *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.3d 1255 (Or. 2008) (on remand), at § 61.
[382] *Philip Morris USA Inc. v. Williams*, 556 U.S. 178 (U.S. Or. 2009).
[383] *Williams v. RJ Reynolds Tobacco Co*., 351 Or. 368, 271 P.3d 103 (Or. 2011), at § 368.
[384] *Williams v. RJ Reynolds Tobacco Co*., 351 Or. 368, 271 P.3d 103 (Or. 2011), at § 387-388.
[385] *Ray v. Allergan, Inc.*, 863 F.Supp.2d 552 (E.D.Va. 2012).
[386] *Ray v. Allergan, Inc.*, at 552.

of punitive damages. The Supreme Court recognized that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible," but it also cautioned that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties[387]".

The district court therefore decided as follows: "The argument here runs afoul of *Williams*, and thus the argument was improper for that reason. It also was improper because there was no evidence in the record about how many people were injected with BOTOX who thereafter sustained injury upon migration of the toxin to the central nervous system, much less to the brain. In other words, the contention was sheer speculation".

This is an example of a recent case in which a punitive damages due process principle introduced by the U.S. Supreme Court was applied by a lower American court.

23. The 2008 decision: *Exxon Shipping Co. v. Baker*

The last substantive U.S. Supreme Court decision on the constitutionality of punitive damages that deserves attention is *Exxon Shipping Co. v. Baker*[388]. Unlike the previous due process cases, in which single plaintiffs raised individual claims, the plaintiffs in the *Exxon* case were part of a mandatory, non-opt-out class action for punitive damages. Furthermore, the *Exxon* case was unique in the sense that it addressed the issue of punitive damages as a common law remedy under federal maritime law[389]. Due to the complexity of the case, this will be a concise description that focuses on the alleged excessiveness of the punitive damages award.

The decision marked the end of two decades of litigation resulting from the oil spill by supertanker Exxon Valdez into Prince William Sound, a part of the Bay of Alaska. The accident was caused due to a mistake made by the intoxicated captain,

[387] *Ray v. Allergan, Inc*., at 565.
[388] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605 (U.S. 2008).
[389] C. M. SHARKEY, *The Exxon Valdez litigation marathon: a window on punitive damages*, *op. cit.*, 2009, p. 46, 53.

Joseph Hazelwood. The respondents Baker, who depended on Prince William Sound for their incomes, had brought a claim against Exxon for economic loss.

The trial consisted of different phases in which the jury awarded $ 287 million in compensatory damages to some of the plaintiffs (others had settled their compensatory claims for $ 22.6 million), $ 5,000 in punitive damages against Hazelwood and an exorbitant amount of $ 5 *billion* against Exxon. The Court of Appeals for the Ninth Circuit granted remittitur and the punitive damages award against Exxon was reduced to the, still large, amount of $ 2.5 billion[390]. The U.S. Supreme Court subsequently allowed the request for appeal.

The last of the three questions[391] asked the Court to decide whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law. The Court answered this question affirmatively and gave several arguments to support that conclusion[392].

Most importantly, the Court focused on the problem of the *unpredictability* of punitive damages: "American punitive damages have come under criticism in recent decades, but the most recent studies tend to undercut much of it. Although some studies show the dollar amounts of awards growing over time, even in real terms, most accounts show that the median ratio of punitive to compensatory awards remains less than 1:1. Nor do the data show a marked increase in the percentage of cases with punitive awards. The real problem is the stark unpredictability of punitive awards[393]".

According to Sharkey, the primary aim that the Court had while deciding this case was to find a solution to the problem of the unpredictability of punitive damages[394].

The Court continued as follows with regard to the unpredictability issue: "The Court's response to outlier punitive damages awards has thus far been confined by claims at the constitutional level, and our cases have announced due process standards that every award must pass. […] Our review of punitive damages today,

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[390] *Exxon*, at § 471.

[391] *Exxon*, at § 481. The first question whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents was answered affirmatively, whereas the second question whether the Clean Water Act forecloses the award of punitive damages in maritime spill cases was answered negatively. Both questions fall outside the scope of this case description.

[392] *Exxon*, at § 490-515.

[393] *Exxon*, at § 497-499.

[394] C. M. SHARKEY, *The Exxon Valdez litigation marathon: a window on punitive damages*, *op. cit.*, 2009, p. 26.

then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of a statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another[395]".

The Court found that a punitive damages award must be 'reasonable predictable in its severity[396]'. It then considered three approaches towards a standard for assessing maritime punitive damages. The Court was skeptical about the first approach, *i.e.* the use of verbal formulations or judicial review criteria to prevent unpredictable punitive damages awards[397]. The Court also rejected the second option of quantified limits or setting a hard dollar cap on punitive damages awards[398].

According to the Court, the best approach would be to use a ratio of the punitive damages to the compensatory damages: "The question is what ratio is most appropriate. An acceptable standard can be found in the studies showing the median ratio of punitive to compensatory awards. Those studies reflect the judgments of juries and judges in thousands of cases as to what punitive awards were appropriate in circumstances reflecting the most down to the least blameworthy conduct, from malice to avarice to recklessness to gross negligence. The data in question put the median ratio for the entire gamut at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, awards at or below the median would roughly express jurors' sense of reasonable penalties in cases like this one that have no earmarks or exceptional blameworthiness. Accordingly, the Court finds that a 1:1 ratio is a fair upper limit in such maritime cases[399]".

To conclude, the Court applied the 1:1 ratio to the present case and relied on the District Court's calculation of the total relevant compensatory damages at $ 507.5

[395] *Exxon*, at § 502.
[396] *Exxon*, at § 502.
[397] *Exxon*, at § 473, 503.
[398] *Exxon*, at § 473.
[399] *Exxon*, at § 473-474.

million. Thus, that amount was also the maximum punitive damages award. The case was remanded for the Court of Appeals to reduce the punitive damages award accordingly. As mentioned, *Exxon* concerns maritime common law and is for that reason a rather specific punitive damages case. Nevertheless, as the Court established the 1:1 ratio in the context of the 'stark unpredictability of punitive awards', this case certainly gives an indication of the Court's opinion on punitive damages awards in general[400].

[400] *Exxon*, at § 472.

Chapter Two

1. To start with: principles issued by the Italian Supreme Court with its latest ruling on 5th July 2017, n. 16601

«In the Italian legal system, tort law is not given exclusively the task to make the subject that suffered the injury whole, since it pursues punitive and deterrent functions as well, thus, punitive damages are not ontologically incompatible with the Italian juridical system. However, the *exequatur* of a foreign judgement awarding punitive damages is subject to the condition that it has been issued in a juridical system that guarantees the principle of legality and provides for limits as regard the amount, having only regard to the effects of the foreign act and to their compatibility with the public order[401]».

This is how the Italian Supreme Court answered to the order referred to by the First Chamber[402].

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[401] The above principle was established by the Italian Supreme Court in 2017 (Cass. Civ. Sez. Un., 5th July 2017, n. 16601). The issue decided by that judgment has revitalized, among scholars, the interest concerning the general theme of the compatibility of punitive damages with the principles of the Italian legal system.

This can be evidenced by the publication of recent monographs and commentaries. The former, with regard to the Italian legal system, include S. CARABETTA, *"Punitive damages" e teoria della responsabilità civile. La funzione compensativa del risarcimento punitive*, Giappichelli, 2020; C. DE MENECH, *Le prestazioni pecuniarie sanzionatorie. Studio per una teoria dei «danni punitivi»*, Cedam, 2019; C. CICERO (a cura di), *I danni punitivi*, Esi, 2019; S. BARIATTI - L. FUMAGALLI - Z. CRESPI REGHIZZI (eds.), *Punitive damages and private international law: state of art and future developments*, Cedam, 2019. Prior to the 2017 decision, see P. G. MONATERI – G. M. D. ARNONE – N. CALCAGNO, *Il dolo, la colpa e i risarcimenti aggravati dalla condotta*, Giappichelli, 2014; F. QUARTA, *Risarcimento e sanzione nell'illecito civile*, Esi, 2013.

Amongst the latter, see G. PONZANELLI, *Polifunzionalità tra diritto internazionale privato e diritto privato*, in *Danno e resp.*, 2017, p. 435 ss.; P. G. MONATERI, *Le Sezioni Unite e le funzioni della responsabilità civile*, *ivi*, p. 437 ss.; A. di MAJO, *Principio di legalità e di proporzionalità nel risarcimento del danno con funzione punitiva*, in *Giur. it.*, 2017, p. 1792 ss.; C. CONSOLO, *Riconoscimento di sentenze, specie USA e di giurie popolari, aggiudicanti risarcimenti punitivi o comunque sovracompensativi, se in regola con il nostro principio di legalità (che postula tipicità e financo prevedibilità e non coincide pertanto con il, di norma presente, due process of law)*, in *Corr. giur.*, 2017, p. 1050 ss.; A. GAMBARO, *Le funzioni della responsabilità civile tra diritto giurisprudenziale e dialoghi transnazionali*, in *NGCC*, 2017, p. 1405 ss., M. GRONDONA, *Le direzioni della responsabilità civile tra ordine pubblico e punitive damages*, *ivi*, 2017, p. 1392.

[402] The case concerned an American biker, victim of a road accident, who suffered serious personal injuries, due to a defect of the helmet, which has been produced by an Italian company, AXO Sport, and resold by the American company, NOSA. The latter, on the basis of a settlement agreement, brings an action before the American Court, in order to condemn AXO to pay the total cost, also by way of punitive damages. Subsequently, NOSA applied to the Venice Court of Appeal in order to obtain the *exequatur* of the American judgement. Even though, the Venice Court rejected the existence of a violation of the Italian public order, alleged by AXO, by sustaining that the amount provided for in the settlement agreement did not constitute punitive damages, the issue of the execution of a foreign judgement was considered of "utmost importance" and, consequently, referred to Italian Supreme Court. For commentaries, see C. SCOGNAMIGLIO, *I danni punitivi e le funzioni della responsabilità civile*, in *Corr. giur.*, 2016, p. 912 ss.; M. GAGLIARDI, *Uno spiraglio per i danni punitivi: ammissibile una sfumatura sanzionatoria nel sistema di responsabilità civile*, in *NGCC*, 2016, p. 1289 ss.; P.G. MONATERI, *La delibabilità delle sentenze straniere comminatorie di danni punitivi*

The First Chamber has, in fact, asked for the intervention of the Supreme Court, with regard to a possible contrast to the Italian public order of foreign judgements awarding punitive damages.

As seen from the principle stated by the Court, the outcome is completely different from the previous decisions[403], in which the Supreme Court had stated that foreign judgements awarding punitive damages are not compatible with the Italian public order, since the exclusive task of tort law is compensation, whilst deterrence and punishment are alien. The reasons why the Supreme Court decided to change its approach are, fundamentally, three: (i) the different notion of public order, (ii) the changes introduced as regard to punitive damages and, (iii) the changes introduced as regard to the nature and functions of Italian tort law[404].

As regard to the first reason, the Italian Supreme Court stated that public order does not constitute the complex of fundamental principles that characterizes a national community in a specific historical period, but rather coincides with the fundamental

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finalmente al vaglio delle Sezioni Unite, in *Danno e resp.*, 2016, p. 831 ss.; C. DE MENECH, *Verso la decisione delle Sezioni Unite sulla questione dei danni punitivi tra ostacoli apparenti e reali criticità*, in *Resp. Civ. prev.*, 2007, p. 986 ss.

[403] Cass., sez. III, 17th January 2007, n. 1183, in *Foro it.*, 2007, I, 1460; Cass., Sez. I, 8th February 2012, n. 1781, in *Foro it.*, 2012, 5 p. 1454 f.

The facts of the case occurred in the first here mentioned decision related to the enforcement in Italy, of a U.S. court decision which had ordered an Italian safety helmet buckle manufacturer to pay damages amounting to U.S. $ 1 million as punitive damages to a road accident victim who suffered fatal injuries as a consequence of the defective working of the helmet buckle. The Supreme Court denied enforcement on the ground that the U.S. decision conflicts with the Italian public order, since the function of Italian tort law is compensatory, and, thus, punishment and deterrence must be alien to it. Furthermore, the Court argued that punitive damages are disproportionate to the harm actually suffered by the victim and that they are related to the wrongdoer's conduct and not to the harm done. Finally, the Court stated that the wrongdoer's conduct and wealth are and must be irrelevant to the idea of compensating damages and to Italian tort law more generally.

The facts of the case concerning the second decision here are related to the enforcement of a decision of the Supreme Court of Massachusetts, which awarded U.S. $ 5 million to a worker, due to the production of a defective device by an Italian company and the relative damage suffered. The Court of Appeal of Turin had allowed the *exequatur* of the U.S. decision, due to the fact that, even if the U.S. ruling did not mention the entitlement of such a high amount (which was almost 20 times more than what requested by the plaintiff) and no reference to punitive damages was made (which may have justified the amount), the absence of the reasoning did not constitute an obstacle to the enforcement of the decision. However, in upholding the Court of Appeal's decision, the Supreme Court denied the enforcement of the U.S. decision, based on the fact that, even if there was no reference to punitive damages, such a high amount presumed a punitive function which is extraneous to the Italian juridical system. As we can see, this judgement is almost analogous to the previous one rendered in 2007. In fact, legal scholars have severely criticized this decision, on the ground that there was no proof, confirming that the damages were punitive and contrary to the principle of overall compensation of the damage. With regard, it may be seen G. PONZANELLI, *La Cassazione bloccata dalla paura di un risarcimento non riparatorio*, in *Danno e resp.*, 2012, p. 613.

[404] See G. PONZANELLI, *Punitive damages and the function of reparation: some preliminary remarks after the decision of the Italian Supreme Court, Joint Divisions, 5 July 2017, n. 16601*, in S. BARIATTI – L. FUMAGALLI – Z. CRESPI REGHIZZI (eds.), *Punitive damages and private international law: state of art and future developments*, *op. cit.*, p. 33 ss.

principles derived from the Constitution, the Founding Treaties of the European Union, the Charter of Fundamental Rights of the European Union and, indirectly, the European Convention on Human Rights[405].

It follows that the public order impedes the enforcement in Italy of a foreign judgement only when it contrasts with the fundamental principles derived from the Constitution and, more generally, with the values aimed to protect the fundamental rights of individuals resulting from the supranational order[406].

Regarding the changes introduced concerning punitive damages, the remedy complies with the principle of proportionality and legality. In fact, starting with the famous case of 1996, Gore v. BMW, punitive damages must comply with the due process clause, provided for in the VIII Amendment. Thus, the Anglo-Saxon remedy is guaranteed also by the Federal Constitution and American judges have shown a much more restrictive attitude when awarding punitive damages[407]. Finally, by referring to the changes introduced as regard to the nature and function of Italian tort law, the Supreme Court abandoned the "monofunctionality" of tort law and embraced a "polifunctional" nature, thus, comprising punitive and deterrent functions[408].

Moreover, the Supreme Court, by remembering the previous judgement n. 9100 of 2015 in which the Italian Supreme Court itself highlighted that the punitive function of tort law is no longer incompatible with the general principles of the Italian juridical system[409], considered that the polifunctional nature of tort law is confirmed

[405] European Union law excludes the recognition of foreign judgements only in the case in which they are «manifestly contrary to public policy in the Member State in which recognition is sought», according to article 34 (1) of the Regulation 44/2001.

[406] See G. CORSI, *Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di punitive damages*, in *Danno e resp.*, 2017, p. 431, according to which the judge will deny the *exaquatur* only when there is a permanent contrast of the foreign norm to the entire regulatory framework. Moreover, see G. PONZANELLI, *Polifunzionalità tra diritto internazionale privato e diritto privato*, in *Danno e resp.*, cit., according to which «this more restricted notion of public policy clearly makes the recognition of foreign judgments less severe, and this constitutes the first aspect of the judicial revirement of July 2017».

[407] See G. PONZANELLI, *op. cit. supra*, according to which, «there has been a shift in favor of a constitutional interpretation of punitive damages which has now banished the prospect of so-called grossly excessive damages».

[408] G. PONZANELLI, *Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno*, in *NGCC*, 2017, p. 1414, according to which the polifunctional nature of tort law is flawless, since it realizes an effective legal protection in the best way possible.

[409] Arguments in favor of the "polifunctionality" of tort law can be found also in many judgements of the Italian Constitutional Court. More recently, see Corte Cost., sent. n. 152/2016, in *Foro it.*, 2016, 9, 1, p. 2639;

also by the recent activity of the legislator, which has introduced remedies compatible with the Anglo-Saxon punitive damages[410]. However, according to the Supreme Court, such punitive purpose is admissible in so far as there is a legal norm that provides for it, otherwise there would be an infringement of Article 25, clause 2, of the Italian Constitution and of Article 7 of the European Convention on Human Rights (ECHR).

In fact, the Supreme Court, even if they remembered their previous judgement, in which it has been stated that the national legislator has the possibility to provide for punitive damages as a remedy against violations of European Union law, clarified that the punitive and deterrent function of tort law does not allow judges to increase the *quantum* of damages awarded. This is because there is a limit in article 23 of the Constitution (related to articles 24 and 25), according to which «no obligations of a personal or a financial nature may be imposed on any person except by law[411]». Finally, the Supreme Court focused on the conditions that the foreign judgement must have, so that it does not conflict with the fundamental principles of tort law. It is of utmost importance that the foreign judge issues a decision on the basis of a legal norm that guarantees the principle of legality. Thus, there must be a legal norm that has regulated the subject and has applied principles that do not contrast with the Italian fundamental values, such as the principle of proportionality guaranteed also by Article 49, clause 3, of the Charter of Fundamental Rights of the European Union. Furthermore, the legal norm must provide for limits as regard to the amount of punitive damages to be awarded[412].

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commentaries also of R. BREDA, *La Corte Costituzionale salva l'art. 96, comma 3, c.p.c. e ne riconosce la natura di misura essenzialmente sanzionatoria co finalità deflattiva*, in *Danno e resp.*, 2017, p. 411 ss.; V. VISCONTI, *La Corte Costituzionale e l'art. 96, comma 3, cod. proc. civ.*, in *NGCC*, 2016, p. 1645 ss.; C. ASPRELLA, *L'art. 96, comma 3, c.p.c. tra danni punitivi e funzione indennitaria*, in *Corr. giur.*, 2016, p. 1588 ss.; M. F. GHIRGA, *Sulla ragionevolezza dell'art. 96, comma 3, c.p.c.*, in *Riv. dir. proc.*, 2017, p. 501 ss.; and Corte Cost., sent. n. 139/2019, in *Foro it.*, 2019, 9, 1, 2644; for commentaries, see M. F. GHIRGA, *Corte Costituzionale e "sanzioni" processuali*, in *Giur. it.*, 2020, p. 578 ss.; N. C. SACCONI, *La Corte Costituzionale e i criteri di quantificazione della condanna alla somma equitativamente determinata ex art. 96, comma 3, c.p.c.*, in *Corr. giur.*, 2020, p. 1115.

[410] Such as, art. 96, c.p.c., art. 709-ter, c.p.c., art. 158, L. n. 633/1941 (*Copyright Act*) and art. 125 of Law Decree n. 30/2005 (*Industrial property Act*).

[411] See G. PONZANELLI, *I danni punitivi*, in *NGCC*, II, 2008, p. 25 ss., according to which without a legal norm that provides for a punitive function of tort law the general principle that applies is and will always be the principle of overall compensation.

[412] See M. GRONDONA, *Le direzioni della responsabilità civile tra ordine pubblico e punitive damages*, *op. cit.*, p. 1398, according to which, the principle of correlation and the foreseeability of the *quantum* relate to the

To conclude, the Constitution and the legal traditions still constitute a "breathing limit" against foreign remedies. However, thanks to the last judgement of the Italian Supreme Court, punitive damages are no longer a complete contradiction with the Italian juridical system.

2. Future prospects (mention)

The last rulings of the Italian Supreme Court broke the settled case-law, according to which punishment and deterrence are alien to the system of tort law and, thus, punitive damages are not compatible with the Italian juridical system.

The Supreme Court has now followed the approach of dominant legal scholars and has finally stated that punishment and deterrence are internal to the system of tort law and that punitive damages are compatible with the Italian regulatory framework.

However, the Supreme Court has highlighted that the recognition of foreign judgements awarding punitive damages is not equal to the recognition of punitive damages[413].
Nonetheless, the continuous evolution of the legal reality and of the needs of individual protection, regarding also to the changes of ethical and social values, and the fact that an increasing internationalization of juridical and social relations has rendered the common law and civil law systems much more intertwined do not make so unlike a future revolution of the Italian Supreme Court, by allowing the entrance of punitive damages in Italy.

principle of certainty, to be understood as meaning to prohibit an arbitrary application of legal remedies as to avoid the possibility of foreseeing the outcome of the decision. Of the same Author, cfr. *La responsabilità civile tra libertà individuale e responsabilità sociale*, Esi, 2017.

[413] In this sense, see G. PONZANELLI, *Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno,* cit., according to which in Italy the award of damages is the highest in Europe and it should not be increased, since this will lead to a rise of insurance premiums, that are, as well, the highest in Europe.

Part I – Italian legal system's framework: traditional reasons for non-existence of punitive damages

3. Introduction

In the European civil law countries, the concept of punitive damages is scarcely recognized, since their laws awarding damages do not aim to punish the tortfeasor, but rather serve to compensate the victim for the damage suffered. Despite this, European policymakers and legal scholars are increasingly taking into account the possibility of introducing punitive damages into their tort systems. This derives, in particular, from changing views as regard to law enforcement and the functions of tort law. Accordingly, growing attention is paid to the preventive function of tort law. In fact, inspired by the American experience, it is argued that punitive damages act as financial incentives, because they stimulate injured parties to file civil claims. Moreover, victims of the unjust behavior thereby could help to detect wrongful conduct and to encourage wrongdoers to act properly.
Thus, due to this growing attention, it is important to take a preliminary step backward and examine, first of all, the reasons why Continental Europe is unfamiliar with the phenomenon of punitive damages.

At least three important features seem to prevent the existence of punitive damages in civil law systems worldwide[414].
Firstly, the legal remedy is incompatible with the traditional functions of tort law. The second reason, which relies on the first, is the division between private law and criminal law, which seems to prevent the introduction of punitive damages. Finally, the third issue is that different views on the role of government might explain the absence or presence of punitive damages in a certain legal system.

Those three main characteristics, which form the main justification of the rejection of punitive damages in the European Union, will be now explained.

[414] See L. MEURKENS, *The Punitive Damages Debate in Continental Europe: Food for Thought*, in L. MEURKENS-E. NORDIN (eds.), *The Power of Punitive Damages – Is Europe Missing Out?*, Intersentia, 2012, p. 13 f. M. BUSSANI – M. INFANTINO, *The many cultures of the tort liability*, p. 11 ss., in M. BUSSANI – A. J. SEBOK (eds.), *Comparative Tort Law. Global Perspective*, Elgar, 2015.

4. The Functions of Tort law

The first reason for the absence of punitive damages in European civil law systems relates to the traditional compensatory function of tort law. In fact, civil law systems believe that tort law pursues primarily a compensatory function and see the aims of deterrence and punishment as additional functions that cannot exclusively form the basis of an award for damages[415]. As a consequence, if an injured person brings a civil action for damages and the court rules in his favor, the wrongdoer must exclusively restore the victim to his status prior to the injury (principle of *restitution in integrum*).

Therefore, because of their aims, punitive damages are inconsistent with the traditional compensatory function of tort law and, thus, cannot be awarded. However, it should be kept in mind that perspectives on the functions of tort law are subject to change and are always reflected by desires in society[416]. As an example, unlike in the past, many European Member States have recognized and accepted other functions of tort law, thus, not confining tort law to a purely compensatory aim.

Moreover, some authors[417] believe that the compensatory function should not be overestimated for two reasons. First of all, tort law is not the exclusive source of compensation, since most compensation money in Europe comes from other sources, such as the social security system[418]. This derives also from the idea that

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[415] See U. MAGNUS, *Comparative Report on the Law of Damages*, in U. MAGNUS (ed.), *Unification of Tort Law: Damages*, The Hague, 2001, p. 185. In addition, it might be read D. G. OWEN, *Philosophical foundations of tort law*, Oxford, Claredon Press, 1995; J. OBERDIEK (ed.), *Philosophical foundation of the law of torts*, OUP, 2014; R. STEVENS, *Torts and Rights*, OUP, 2012.

[416] This lesson is well reflected in the popular and acclaimed work of G. CALABRESI, *Ideals, beliefs, attitudes and the Law. Private law perspectives on a public law problem*, Syracuse University Press, 1985. See, recently, L. MEURKENS, *The Punitive Damages Debate in Continental Europe: Food for Thought*, cit., p. 15, «[...] tort law has a "high policy impact", which results in different views on the most favorable approach».

[417] See S. DEAKIN-A. JOHNSTON-B. MARKESINIS, *Markesinis and Deakin's Tort Law*, Oxford, 2008, p. 52. Moreover, see L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, Deventer, 2014, p. 156, « [...] it is incorrect to state that tort law has only one function. Although the one function may be less apparent that the other, none of the[se] functions [...] "offers a complete justification for the law". Tort law has a *combination* of functions, and it depends on societal and political circumstance and per legal system which functions are predominant. [...] to suggest that compensation is the function of tort law would be the same error as to suggest that divorce is the function of divorce. Rather, the primary function of tort law is the determination of *when* compensation is required».

[418] See A. CAVALIERE, *Product Liability in the European Union: Compensation and Deterrence Issues*, in *Eur. J. L. & Econ.*, 2004, p. 307; N. JANSEN, *Law of Torts/Delict, General and Lex Aquilia*, in J. BASEDOW-

tort law is not the most efficient system of compensation[419]. Secondly, by emphasizing the compensatory aim, other important functions are undervalued, such as the restitution one[420]. However, despite these criticisms against the compensatory function of tort law, it is generally accepted that the law of damages, despite the recognition of other functions, is based on the idea of compensation[421]. Anyway, the idea that tort law pursues also other functions is, for example, shown by the Principles of European Tort Law (PETL)[422] and the Draft Common Frame of Reference (DCFR)[423].

In the PETL, article 10:101, on the nature and purpose of damages, states that: «Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm».

K.J. HOPT-R. ZIMMERMANN (eds.), *The Max Planck Encyclopedia of European Private Law*, Volume II, Oxford, 2012, p. 1038; K. OLIPHANT, *Cultures of Tort Law in Europe*, in *JETL*, 2012, p. 155.

[419] See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, p. 158, according to which « [...] the civil procedure is rather costly and time consuming, notwithstanding the existence of procedural mechanisms such as legal aid and class actions [...] that improve access to justice».

[420] See W. VAN GERVEN-J. LEVER-P. LAROUCHE, *Tort Law*, Oxford, 2000, p. 741, according to which the general idea behind restitution is that the tortfeasor should be prevented from being unjustly enriched by his tortious behavior.

[421] See G.E. WHITE, *Tort law in America – An Intellectual History*, Oxford, 2003, p. 62, according to which « [...] it should be recalled that tort actions, prior to 1900, had not principally been conceived as devices for compensating injured persons. Compensation had been a consequence of a successful tort action, but the primary function of tort liability had been seen as one of punishing or deterring blameworthy civil conduct».

[422] The PETL is an initiative of the European Group on Tort Law, which is composed by a group of tort law scholars, established in 1992. The mission statement of the group is formulated as follows: «The European Group on Tort Law aims to contribute to the enhancement and harmonization of tort law in Europe through the framework provided by its Principles of European Tort Law (PETL) and its related and ongoing research, and in particular to provide a principled basis for rationalization and innovation at national and EU level».

[423] The DCFR is a project of the Study Group on a European Civil Code in cooperation with the Research Group on EC Private Law. The Study Group is also a network of European scholars who conduct comparative research in private law. However, contrary to the European Group on Tort Law, which can be seen as a private initiative, the Study Group on a European Civil Code is the result of two Resolutions of the European Parliament activating the legal academic community in order to create a European Civil Code (European Parliament Resolutions OJ C 158, Resolution of 26 May 1989, and OJ C 205, Resolution of 6 May 1994). Furthermore, the DCFR was partly funded by the European Union. Although the Study Group emphasizes that it is a non-political body with a purely academic task, the involvement of the European Union and the task to do research into private law gives the DCFR a different status than the PETL. The aim of the Study Group reads as follows: «The aim of the Study Group is to produce a set of codified principles for the core areas of European private law (patrimonial law). Although the foundation for our work is detailed comparative law research, the principles which we are fashioning will represent more than a mere restatement of the existing law in the various EU jurisdictions from the standpoint of the predominant trends among the diverse legal regimes. Instead the Study Group seeks to formulate principles which constitute the most suitable private law rules for Europe- wide application».

Thus, it can be noted that the compensation of the harm, based on the principle of *restitution in integrum*, is the primary purpose of damages. However, beside the compensatory aim, damages serve also another function: to prevent the harm[424].

In regards to the DCFR, the main purpose of tort law is the protection of human and basic rights at the level of private law through the legal remedies that are made mutually available between citizens. Therefore, article 1:101 of book VI, DCFR, gives the person who suffers legally relevant damage a right to reparation from the liable person (*restitution in integrum*). Moreover, another important function, like the PETL, is the preventive one[425]. However, as stated in the Commentary to the PETL, the Commentary to the DCFR makes as well clear that the punishment of the wrongdoer is not a function of tort law and, consequently, punitive damages should not be accepted[426].
Thus, the conclusion that should be drawn from the above is that damages serve primarily a compensatory function, but this is not the exclusive one, as the preventive aim is too.

Moreover, the fact that both initiatives reject punitive damages does not *per se* mean that there is no support in Europe for punitive damages. Accordingly, notwithstanding the involvement of the European Union in case of the DCFR, both soft law initiatives might guide and inspire the European tort law debate and

[424] According to the Commentary to the PETL, this means that «by the prospect of the imposition of damages a potential tortfeasor is forced or at least encouraged to avoid doing harm to others». However, as regard to a (possible) punitive function of damages, the Commentary clearly states that «the borderline between the aim of prevention and the aim of punishment may be sometimes difficult to draw. But it is clear that the Principles do not allow punitive damages which are apparently out of proportion to the actual loss of the victim and have only the goal to punish the wrongdoer by means of civil damages».

[425] See G. WAGNER, *Punitive Damages*, in J. BASEDOW-K.J. HOPT-R. ZIMMERMANN (eds.), *The Max Planck Encyclopedia of European Private Law*, Volume II, Oxford, 2012, p. 1406, according to which the preventive function should be understood in terms of injunctive relief.

[426] The Commentary to DCFR states that: «These Principles are based on the fundamental maxim that the aim of the law on liability under private law is not to punish. Punishment belongs to the realm of criminal law whereas the function of the law on liability in private law is compensatory, nothing more and nothing less. For this reason, punitive damages do not form part of these Principles». Moreover, see C. VON BAR-E. CLIVE, *Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Volume 4, Munich, 2009, p. 3724, according to which «the punishment of wrongdoers is a question for criminal law, not private law. Under these model rules, punitive damages are not available. They are not consistent with the principle of reparation».

policymakers as well, but they should always be seen as non-binding contributions to the academic debate[427].

5. The stricter Private-Criminal Law Divide

As seen in the previous section, one of the difficulties with punitive damage awards in civil law jurisdictions is that this remedy cannot be accepted in a tort system based on the central function of compensation. However, the idea that tort law has a compensatory rather than a punitive purpose is not only based on the academic analysis of tort law as such, but results also from the strict division between private law and criminal law, which is considered «an achievement of modern legal culture[428]».

In fact, first of all, criminal law has a punitive, retributive and deterrent function which cannot be principally said of tort law[429].

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[427] See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, cit., pp. 166-167, according to which « [...] these two harmonizing initiatives are arguably outdated and not suitable to signal new developments. [...] This insight makes clear that there is room for different views on a punitive function of tort law and punitive damages in Europe».

[428] H. KOZIOL, *Punitive Damages – A European Perspective*, in *LA L. Rev.*, 2008, pp. 755-756. However, the distinction between private law and criminal law is considered as a typical difference between common law and civil law systems. In fact, even if common lawyers respect such division, they do not put so much weight on it. In particular, this has to do with historical and cultural differences. In this respect, see M.L. WELLS, *A Common Lawyer's Perspective on the European Perspective on Punitive Damages*, in *LA L. Rev.*, 2010, p. 560, according to which « [...] lawyers, judges, and legislators trained in the civil law learn that law is a body of rules and are thereby better equipped to maintain the formal distinction between the two domains in the face of policy arguments for exceptions. By contrast, students of the common law study discrete cases and the facts, reasons, and distinctions courts rely on to resolve them. The history of the common law is one of endless innovation and assimilation of new ideas. General principles are always giving way, and students learn that rule-based arguments routinely lose in the battle between form and substance. The acceptance of punitive damages is an illustration of that general theme». Also G. VIRGO, *We do this in the Criminal law and that in the law of Tort's: a new fusion debate*, in S. GA PITEL – J. W. NEYERS – E. CHAMBERLAIN (eds.), *Tort Law: challenging orthodoxy*, Hart, 2013. On the private-public divide, see also J. H. MERRYMAN – R. PEREZ-PERDOMO, *The civil law tradition – an Introduction to the legal systems of Europe and Latin America*, Stanford University Press, 2007.

[429] On the contrary, see H. KOZIOL, *Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusions*, in H. KOZIOL-V. WILCOX (eds.), *Punitive Damages: Common Law and Civil Law Perspective*, Vienna, 2009, p. 751, according to which the idea of a sanction could also be relevant for tort law since «the legal consequences of an act are attached to a violation of a duty and faulty behavior». Moreover, see the statement of Lord Wilberforce in *Cassell & Co. Ltd. v. Broome* (1972), in which he made clear that «English law does not work in an analytical fashion; it has simply entrusted the fixing of damages to juries upon the basis of sensible, untheoretical directions by the judge with the residual check of appeals in the case of exorbitant verdicts. That is why the terminology used is empirical and not scientific. And there is more than merely practical justification for this attitude. For particularly over the range of torts for which punitive damages may be given (trespass to person or property, false imprisonment and defamation being the commonest) there is much to be said before one can safely assert that the true or basic principle of the law of damages in tort is compensation, or, if it is, what the compensation is for (if one says that a plaintiff is given

Moreover, whereas both criminal law and private law deal with unlawful conduct, nonetheless, a crime constitutes a public wrong (a wrong to the society), whilst a tort is a civil wrong (a wrong to the individual victim)[430]. Another difficulty concerning the possible introduction of punitive damages in Europe is the compatibility of this civil remedy with criminal procedural safeguards. In fact, in juridical systems characterized by a strict division between criminal and private law, the imposition of civil sanctions may be considered as a violation of the fundamental principles underlying criminal law[431].

One of the most important procedural safeguards is the principle of legality, also known as the rule of law, according to which a conduct does not constitute a crime and punishment is forbidden unless laid down in the law (*nulla poena sine previa lege*). The problem with this particular remedy is that, through the use of vague norms such as "malice" or "gross negligence", it is unclear what kind of conduct may lead to the award of punitive damages[432].

Furthermore, a second principle that is often brought forward in the punitive damages debate is the principle of double jeopardy (*ne bis in idem*), meaning that prosecution cannot be pursued twice for the same wrongful behavior. In this regard, the question that arises is whether a wrongdoer could be obliged to pay punitive

compensation because he has been injured, one is really denying the word its true meaning) or, if there is compensation, whether there is not in all cases, or at least in some, of which defamation may be an example, also a delictual element which contemplates some penalty for the defendant. [...] It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories: it may have been wiser than it knew».

[430] Critics consider it reckless to transfer public powers to private individuals, because they are influenced too much by their own private interests and lack the objectivity and accountability that is needed in order to exercise public powers. See M.H. REDISH-A.L. MATHEWS, *Why Punitive Damages are Unconstitutional*, in *Emory L. J.*, p. 3-4, according to which in their decision-making, individuals are «free from the ethical, political, and constitutional constraints imposed on public actors».

[431] See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, p. 174, according to which «these principles are important as they have been created to protect citizens against the far-reaching prosecuting powers of the state, and they form part of every modern legal system».

[432] See Law Commission for England and Wales Report, 1997, p. 99, according to which «The 'rule of law' principle of legal certainty dictates that the criminalization of conduct is in general properly only the function of the legislator in new cases: it further dictates that there is a moral duty on legislators to ensure that it is clear what conduct will give rise to sanctions and to deprivation of liberty. Broadly-phrased judicial discretions to award exemplary damages ignore such consideration».

damages when he has already been sanctioned through criminal or administrative law and *vice versa*[433].

Consequently, punitive damages cannot be introduced in the European civil law systems without giving fair consideration to certain problems relating to the division between criminal and private law, particularly as regard to the compatibility with criminal procedural safeguards.

6. The Role of the Government

The third assumed reason for the absence of punitive damages relates to the role of government and the way in which governmental policy choices influence the view on tort law in Continental Europe.
A comparison between the United States and the European Union will be useful, particularly as regarding products liability law.

First of all, it is important to highlight the fact that American civil litigation and, specifically, punitive damages awards pursue a regulatory function as a surrogate for the government. On the other side, in Europe the regulatory function is primarily fulfilled by governmental authorities and not by civil litigation[434].

As regard to products liability law, the United States is known as the home of this particular field of law, since American courts were the first to recognize that victims of a product-related accident should be able to obtain compensation for the damage suffered[435].

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[433] See Law Commission for England and Wales Report, p. 99, which states that «Defendants should not be placed in jeopardy of double punishment in respect of the same conduct, yet this would be the result if a defendant could be liable to pay both a criminal fine following conviction in the criminal courts and an exemplary damages award after an adverse decision in the civil courts».

[434] On this general topic, see T. GINSBURG – R. A. KAGAN, *Introduction – Institutionalist approaches to Courts as political actors*, p. 5, in T. GINSBURG – R. A. KAGAN (eds.), *Institutions and public law – Comparative approaches*, Peter Lang Publishing, 2005; R. A. KAGAN, *American and European ways of law: six entrenched differences*, p. 41 ss., in V. GESSNER – D. NELKEN (eds.), *European ways of law – Towards a European sociology of law*, Hart Publishing, 2007

[435] See *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436, CA. 1944, in which the California Supreme Court stated that consumers need to be protected against business and that the latter should bear the costs of the harm inflicted on consumers.

In this respect, American courts do not award punitive damages in product liability cases as frequently as one might think. This is because punitive damages are far more often awarded in cases concerning intentional torts, defamation, and financial torts than in cases concerning personal injury resulting from product liability, medical malpractice, car accidents, and negligence. Nevertheless, product liability occupies a central role in American law and no other country in the world has similar product liability legislation, which also includes the awarding of punitive damages. This is explained by the fact that, in the United States, product liability litigation is perceived as a surrogate for other compensation mechanisms. Furthermore, contrary to Europe, product liability litigation is used as a regulatory tool[436].

As regard to the European Union, in 1985 the European legislator issued a Products Liability Directive[437], in order to prevent consumers from suffering damage relating to defective products.

However, the European Union deals with the safety of products in a different way than the United States does. In fact, in the European Union the safety of products is mostly left to public regulation and, whereas product liability litigation serves a supplementary preventive role, it has primarily a compensatory function in cases in which a defective product caused damage. On the contrary, in the United States products liability law is the main regulatory tool to monitor and enhance product safety. This is also reflected by the imposition of punitive damages in this particular field of law[438].

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[436] See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, cit., p. 196, according to which « [...] claimants in the United States have more actual interest in a claim than claimants in Europe. [...] the products liability system is more extensively used in the United States, at least when compared to the European Union where products liability law was a "minority area of practice" in 2000. In the past years, this image has not changed drastically». See, particularly, G.G. HOWELLS – T. WILHELMSSON, *EC and US approaches to consumer protection – should the gap be bridged?*, in *YEL*, 1997, pp. 207-268.

[437] Council Directive 85/374/EEC of 25th July 1985. See S. DEAKIN - A. JOHNSTON - B. MARKESINIS, *Markesinis and Deakin's Tort Law*, cit., p. 703, according to which «the model of extended liability was borrowed largely from the law of the United States».

[438] See G.G. HOWELLS, *The Relationship Between Product Liability and Product Safety – Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. position*, in *Washburn L.J.*, 2000, pp. 307-308, according to which «Products liability has, however, two (often conflicting) functions – compensating injured persons and acting as a gate-keeper and deterrent to ensure producers only market safe products. The role of punitive damages in the U.S. suggests that the regulatory function of litigation is

Furthermore, the difference between American and European product safety regulation is clearly demonstrated by the example of defective cars. In fact, in the United States, products liability law has a specific area of automotive litigation, whereas in the European Union, the safety of cars is mainly regulated through product safety law. Thus, the United States developed a litigation strategy, whilst the European Union developed a regulation strategy toward the protection of health and safety in society.

In conclusion, the different perspectives in the United States and Europe, due to the existence of different policy choices, also explain why punitive damages are largely absent in continental European legal systems.

Part II - A necessary step backwards. Radical Changes in the welfare society: experiments and scenarios

7. The so-called revolt against formalism: transformations in modern 'welfare societies'.

Once the framework and the principles that, traditionally, impede the implementation of punitive damages in civil law systems (therefore also in the Italian one) have been described, in this section it is convenient to dwell on the main transformations of the so-called modern welfare societies.

The analysis to be carried out aims to verify whether the radical changes that have taken place in the main industrialized societies - including the Italian one - starting, above all, from the second half of the twentieth century, are (and have been) capable of creating a social, economic and cultural environment such as to induce, in the

important. Moreover, the threat of wide scale products liability litigation can be seen as an incentive for producers to improve the quality of their products, often with fiscal incentives from insurers. Although civil liability rules have a regulatory dimension in Europe, my impression is that product liability is more responsive to the compensatory needs of accident victims than to the regulatory aspects. Many Americans consider Europe to have a weak products liability litigation culture, but I gain the impression that there is sometimes a failure to appreciate the depth of the product safety regulatory regimes, which may explain why there is less need for product liability litigation as a means of regulatory control».

legal context of reference, a change of attitude with regard to the possible implementation of the institution of punitive damages.

However, as the explicit answer to this particular question will only be the epilogue to the whole work, it is now worth addressing the various factors that, in the background, have contributed to triggering and provoking the changes in modern democratic societies.

The route can move on from the following question: what are the causes for which the (inevitably) creative character of the role of judges has become more pronounced in our time, not only in Italy?

The answer may be found in the phenomenon termed revolt against formalism439. But it is in itself nothing more than the symptom, or the mirror, of much more profound phenomena. The simple fact that judges have participated in some way in that revolt may be a demonstration of the extraordinary impact of those phenomena: it is certain that if there is a category which, in almost every country, is anything but revolutionary, it is the judiciary, especially the higher courts. As has been stated incisively, 'judges, like any other category of old men who have lived generally unadventurous lives, tend to be traditionalist in their ideas. This is a fact of nature[440]".

Since professional judges thus naturally tend to be conservative, composed and law-abiding, they are also naturally hostile to developments that tend to highlight and emphasize the voluntary element in their decisions, thereby threatening the mystique of their objectivity and neutrality. What then are the significant phenomena that in recent decades have forced even the category of judges to emerge to some extent from the protective shell of 'formalism'?

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439 With regard to this phenomenon, see the notorious work of M. G. WHITE, *Social Thought in America: the revolt against formalism*, The Viking Press, 1949; within the Italian context, R. TREVES, *Giustizia e giudici nella società italiana*, Laterza, 1972. The significance of this revolt can be determined by the fact that it has led to a counter revolt, the most authoritative exponent of which can be found in R. DWORKIN, *Taking rights seriously*, Duckworth, 1977.

440 Lord DEVLIN, *Judges and Lawmakers,* in 39 *Modem Law Rev.,* 1976, p. l ss., at. p. 16; republished, with the different title *The Judge as Lawmaker,* in P. DEVLIN, *The Judge,* Oxford, Oxford University Press, 1979, pp. 1-17.

First of all, of crucial importance is the radical change that has occurred in the very role of law and the state in modern societies. As a prominent constitutionalist recently wrote, "the form of state that we approximately refer to as the welfare state was mainly the result of legislative activities. The first steps were taken in the area of social policy, through legislation on labor law, health, and social security; but gradually the interventions extended into the sphere of the economy, through anti-monopoly, competition, transport, and agricultural legislation; and finally we have reached the present situation, with the extension of the public sector, with the exercise of comprehensive state control over the economy, with the assumption of state responsibility for employment, with the elaboration of social welfare plans, with the financing of non-profit activities, for example in the arts, in public works and in the regeneration of decaying urban areas[441]".

This remarkable expansion of the role of the state in general, and of the legislative function in particular, appears to be far from over. Further major expansions are to be expected, however risky they may seem to many of us, and despite recent developments to the contrary in several countries. A few years ago, these foreseeable developments were examined by a distinguished American economist. Discussing the "environment" in a broad sense - "not just clean air and water, but environmental aesthetics, health and safety in the workplace, and the characteristics of the products we consume" - Charles L. Schultze said that the role of "government442" is forced to enlarge further into a very vast and still undefined sphere of activity443. The challenge of "externalities", i.e. "finding ways to control the side effects of our production and consumption decisions444", is becoming increasingly more urgent and cannot be ignored by modern States.

Although Schultze only referred to the United States, a considerable amount of what he wrote also applies to the rest of the industrially developed world. Here are

[441] T. KOOPMANS, *Legislature and Judiciary - Present Trends*, in M. CAPPELLETTI (ed.), *New Perspectives for a common law of Europe*, Sijthoff, p. 309 ss., pp. 313-314.
[442]. The term is obviously used here in the sense of Government, which includes not only the executive but also the legislative and judiciary powers.
[443] C.L. SCHULTZE, *Environment and the Economy: Managing the Relationship,* in C. J. HITCH (ed.), *Resources for an Uncertain Future*, Johns Hopkins University Press, 1978, pp. 87-102.
[444] ID., p. 88.

some of the most relevant quotes: "In the U.S., until recently, the role of government was limited to a limited sphere of activities. These included the production of - or support for the production of - goods that private enterprise could not or should not deal with; the enforcement of certain - rules of the game - through contract and antitrust regulations; the redistribution, through taxes and other transfers of wealth, of income misallocation; and the regulation, for one reason or another, of a highly selected sphere of private activities, concerning the transports, the electricity supply and the financial institutions. But the main feature of side effects, environmental and other health and safety effects, is that they are not limited to a well-defined group of activities. They spread everywhere, including the production and consumption decisions of millions of private companies and hundreds of millions of consumers[445]".

The more "prosperous, urban, technologically sophisticated, economically dynamic, and innovative in the field of chemistry a society becomes, the more complex and compelling the problem of externalities becomes, which reinforces the need for government intervention and control. As far as prosperity is concerned, when man earns his daily bread by the sweat of his brow, amenities are not very important. But environmental amenities become terribly important, the less we sweat and the more bread we have446".

The urbanism, of course, 'simply because of the physical proximity' of so many people, causes problems, tensions, environmental damage. And lastly, because of the technological progress, new sources and tools of environmental pollution ... are created. Precisely because of the dynamic economy, business activities and production processes are in constant evolution, so that the environmental standards of each place ... are forced to change in order to adapt to the continuous up-and-down of businesses and factories. And precisely because of inventiveness in the field of chemistry, the number of new chemical compounds is steadily increasing, the side effects of which, as yet unknown, may prove harmful447.

[445] *Op. et loc. ult. cit.*
[446] ID., p. 89
[447] *Op. et loc. ult. cit.*

It is evident, in short, that the problem of environmental externalities requires modern societies and their governments to face the enormous challenge of directing 'millions of individual decisions' so that they may move 'in accordance with certain social goals', without, however, obscuring 'other purposes, especially the growth of the economy and the protection of private individuals' reasonable freedom of choice448'.

To meet such a titanic challenge, modern systems of government cannot rely exclusively on Adam Smith's 'invisible hand', on the free law of the market based on profit maximization. The recent trend, which condemns the 'Big government' derived from the welfare state and which calls for a resurgence of free private initiative and the laws of the 'free' market, if pushed to its extreme consequences, seems doomed to certain failure449.

The inadequacy of the profit-maximization approach, particularly in the field of "pollution" and "congestion", has indeed been very persuasively demonstrated by, among others, the Nobel Prize-winning economist Kenneth J. Arrow. As early as 1973 he wrote that "we have no mechanism through which the costs of pollution, which a company introduces into the surrounding area, are compensated for by it. Consequently, it will tend to produce more pollution than is desirable.... Because it does not bear the costs, there is no incentive, based on profit calculations, for it to set limits. The same argument applies to traffic congestion, where no charge is imposed for increasing the number of cars or trucks on the roads. Such an increase causes delays to others and improves the likelihood of accidents; in short, it imposes a cost on a large number of members of society, a cost that is not sustained by those who cause it ... There are many other examples of the same sort, but these two are sufficient to illustrate the point we are concerned with, that an effort must be made to change entrepreneurial behavior based on profit maximization in those cases

448 ID., p. 90

449 See, for instance, K. J. ARROW, *Two Cheers for Government Regulation. The Inevitable Failure of Ronald Reagan*, in *Harper's Magazine*, March 1981, pp. 18-22. For a similar opinion as expressed by an eminent scholar of the American process, A. S. MILLER, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, in J.R. PENNOCK & J.W. CHAPMAN (eds.), *Constitutionalism (Nomos* XX), New York University Press, 1979, p. 333 ss. (Professor Miller, discussing "Big Government" - but also the related phenomena of Big Business, Big Labor, Big Foundations, Big Farmers' Organizations, Big Veterans' Legions, Big Churches, Big Universities - asserts that «these vast organizations...constitute the administrative apparatus of the 'corporate state'... It is very unlikely that they can be dissolved; on the contrary, it is very probable that they will continue to grow and that they will encompass not only the nation, but the world», p. 358).

where such behavior passes on costs to third parties that are not easily compensated for by an adequate price system[450]".

It is thereby inevitable for the governments of every economically industrialized state to intervene in all these fields, however arduous and even risky such actions may be. In fact, modern states, characterized as welfare states and as "mixed economies", have tested and are still experimenting, with varying degrees of success, with a wide range of methods and instruments to deal with the extremely complex problem of environmental externalities. These methods vary from legislation to regulations, from the setting of priorities by means of long and short-term plans to the elaboration of principles and general directives, from the imposition of taxes and other charges to the creation of indirect incentives.

Initially, state interventions were mainly in the form of legislative precepts, resulting in a phenomenon that a well-known American jurist, Grant Gilmore, has incisively labelled an 'orgy of laws[451]'.

But, of course, an increasingly sophisticated administrative structure had to be created in order to integrate and implement these legislative interventions. The welfare state, originally essentially a 'legislative state', has thus been transformed, and is still being transformed, into an 'administrative state', indeed a 'bureaucratic state452', not without the threat of being perverted into a 'police state453'. The implications of this radical

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[450] K. J. ARROW, *Social Responsibility and Economic Efficiency,* in 21 *Public Policy,* 1973, p. 303 ss., to pp. 306-307. Another distinguished economist, also from Stanford University, in his recent speech as president of the American Economic Association, declared that the rational justification for our "mixed economy", a typical expression of the welfare state, «lies in viewing it as a pragmatic tradeoff between the virtues and failures of decentralized market capitalism and of a pervasive socialism. The aim of the mixed economy is to achieve a certain extent of distributive justice, security and social regulation of economic life, without sacrificing too much of the efficiency and dynamism of private enterprise and market organization». M. ABRAMOWITZ, *Welfare Quandaries and Productivity Concerns,* in 71 *American Econ. Rev.,* 1981, p. l ss., to p. 13.

[451] G. GILMORE, *The Ages of American Law*, Yale University Press, 1977, p. 95. See also the analysis (which opens with GILMORE's definition) provided by G. CALABRESI, in the volume of his «Holmes Lectures», *A Common Law for 1he Age of Statutes*, Harvard University Press, 1982, p. 1.

[452] See, for example, A. S. MILLER, *op. cit. supra,* p. 358; L. FRlEDMAN, *Claims, Disputes, Conflicts and the Modem Welfare State,* in M. CAPPELLETTI (ed.), *Access to Justice and the Welfare State,* Sijthoff-Bruylant-Klett Cotta-Le Monnier, 1981, p. 251 ss., to p. 257.

[453] See A. TUNC, *The Quest for Justice,* in M. CAPPELLETTI (ed.), *Access to Justice, op. cit. supra*, p. 315 ss., p. 349, It should be highlighted, however, that the so-called 'police state' may well be the worst risk, but certainly not the necessary consequence, of the welfare state. See also, among many others, the well-known study of C. REICH, *The New Property,* in *Yale Law J.,* 1964, where on p. 733 the Author suggests that in the increased redistributive role of the government, typical of the welfare state, there is a risk of an overturning of the freedom of private citizens.

transformation of the role of the state and law in modern societies, a transformation of unprecedented scale and magnitude, are of utmost importance. These impacts will be discussed in the following paragraphs: in particular, those that have had a major influence on the role of judges in the contemporary world.

8. Consequences of the major transitions: above all, on the evolving role of the judiciary.

First of all, it should be observed that legislation with a social purpose - welfare legislation - is usually rather different from traditional legislation.

As Professor Koopmans has written: "the nature of this legislation, which is typically designed to operate transformations ... has changed considerably and almost unnoticeably. The older labour laws, for example, were still in line with traditional legislative techniques: they formulated certain rules of conduct on various issues, such as safety and hygiene in the industry, the prohibition of child labour, and the financial obligations of employers or the legal effects of collective agreements. But this same method proved to be no longer appropriate when it came to drafting social security schemes or investment and competition laws. In these sectors, the laws may have also prescribed certain rules of conduct, but they did not limit themselves there: they also established bodies and institutions and gave the executive branch or other bodies certain decision-making powers in concrete cases and also powers of regulation and delegated legislation. As the scope and intensity of public interventions increased, the emphasis of legislative activity gradually shifted from rules of conduct to institutional measures and arrangements. Progressively, a new form of legislation has emerged: laws indicate certain objectives or principles, leaving their details to secondary legislation, to the determination of ministers or regional or local authorities, or to the care of new established institutions, agencies, committees, administrative tribunals, etc. It would be difficult to find traditional rules of conduct in certain modern laws in fields such as price control, regional industrialization, or urban renewal[454]".

[454] T. KOOPMANS, *Legislature and Judiciary*, *op. cit. supra*, p. 314 (with reference to the well-known piece of W. FRIEDMANN, *Law in a Changing Society*, Stevens, 2' ed., 1972).

It is a reality that social or welfare legislation inevitably leads the state to transcend the boundaries of its traditional functions of 'protection' and 'repression'. The role of the government can no longer be confined to that of a 'night watchman'; on the contrary, the welfare state - the 'Etat providence', as the French expressively call it - has to embrace the technique of social control that political scientists often call promotional455. This method consists in prescribing programs of future development and promoting their gradual implementation, rather than merely making choices, typical of classical legislation, between "right" and "wrong", i.e. between "just" and "unjust", right and wrong. And even when social legislation itself creates subjective rights, these are social rather than solely individual rights. Typically, social rights require an active, often prolonged, intervention of the state for their implementation456. In contrast to traditional rights, whose protection requires only that the state does not permit them to be violated, social rights - such as the right to social and medical assistance, housing, employment - cannot simply be 'attributed' to the individual. On the contrary, they necessitate permanent action by the state to grant subsidies, to remove social and economic barriers, in short, to promote the implementation of the social programs that constitute the foundation of those rights and the expectations they confer.

It is quite clear that in these new spheres of the legal phenomenon, very grave implications are placed on the judges. In the presence of a social legislation which often simply defines general purposes and principles, and in the face of social rights which are essentially directed towards a gradual transformation of the present and the formation of the future, the judges of a given country could well adopt - and in fact they have frequently adopted - the approach of denying the prescriptive or 'self-executing' character of such laws and programmatic rights. The Italian legal system has learned something about this, especially in the years between 1948 and 1956, i.e. in the

[455] Cfr., for instance, N. BOBBIO, *The Promotion of Action in the Modem State,* in G. HUGHES (ed.), *Law, Reason and Justice,* New York University Press, 1969, pp. 189-206.
[456] On this issue, see, amongst others M. CAPPELLETTI - B. GARTH, *Access to Justice: the World-wide Movement to Make Rights Effective. A General Report,* in M. CAPPELLETTI (ed.), *Access to Justice,* I, Giuffrè & Sijthoff and Noordhoff, 1978, p. 3 ss., to p. 8.

years between the entry into force of the Constitution and the appointment of the Constitutional Court457.

But sooner or later, as the Italian and other countries' experience has confirmed, judges will have to recognize the reality of a transformed view of law and of a new function of the state, of which, after all, they are also a 'branch[458]'. And then it will be arduous for them not to contribute to the state's attempt to make those programs effective, not to contribute, that is, to give a tangible content to those 'aims and principles': what they can do by monitoring and urging the fulfilment of the state's duty to actively intervene in the social sphere, a duty that is, indeed, statutorily prescribed, so it is up to judges to enforce it.

The markedly creative quality of judicial activity in the interpretation and implementation of legislation and social rights is evident. Of course, it is worth stressing that the difference with respect to the more traditional role of judges is only one of degree and not of essence: it is the case to insist once again that every interpretation is, to some extent, creative, and that a minimum of discretion is always inevitable in judicial activity. But of course, as a general rule, in these new domains that have been opened up to the judges' activity, there will be room for a higher degree of discretion, and therefore of creativity, for the mere reason that the vaguer a law is and the more inaccurate the elements of a law are, the wider also becomes the space left for discretion in judicial decisions. This is therefore a decisive reason for the accentuation of the activism, dynamism and creativity of judges in our time459.

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457 See, for all, P. CALAMANDREI, *Come si fa a disfare una Costituzione* (1955), republished with the title *La Costituzione e le leggi per attuarla*, in *Opere giuridiche* (a cura di M. CAPPELLETTI), III, Napoli, Morano, 1968, pp. 511-595.

458 Professor L. L. JAFFE, *English and American Judges as Lawmakers*, Claredon Press, 1969, reports «we do not sufficiently remind ourselves of the fact that the judiciary is also... one of the big branches of the tree that is the government of a country. By this I mean, firstly, that it is part of the Government, and secondly, that its power is also subject to growth and decline. The conditions which operate on the executive and legislative branches in determining the nature of their powers, also work upon the judiciary. And the form adopted by the other branches of the big tree that is the state is a function of the state courts».

459 A. S. MILLER, *Judicial activism and American constitutionalism: some notes and reflections, op. cit. supra* reminds us, pp. 333-334, of how from the beginning of the 1940s a pivotal scholar, Alexander H. Pekelis, had foreseen the advent of a jurisprudence of welfare. «… acknowledging - says MILLER, *ibidem* - that judges have considerably more freedom than is conferred on them by "myth", precisely the freedom to produce law and design remedies..., Pekelis raised the question: freedom for which purpose? And his answer was "a plea for a greater, and more visible, systemic involvement of the judiciary in the construction of a welfare society".». See, A. H. PEKELIS, *The case for a Jurisprudence of Welfare*, in M. R. KONVITZ (ed.), *Law and social*

9. Continue ...: the crisis and retreat of 'Big Government' and the rise of the so-called 'third branch'. Reasons for the mutual rapprochement between Civil Law and Common Law systems.

A second consequence of the radical, groundbreaking transformations described above is closely linked to the first.

Of course, as Sir Kenneth Diplock remarked, 'the courts could never have created the welfare state460'. It has already been observed that, originally, the creation of this model of state was mainly the legislature's domain. But it is precisely due to the extraordinary increase in the tasks of legislative intervention that a congestion - an 'overload' - of the legislative function has been experienced, and this overload, which represents a central theme of current political science, has become a common feature, indeed a common affliction of modern states, at least those with a pluralistic-liberal rather than authoritarian regime. In such states, parliaments are often excessively plethoric and too absorbed in general and political party matters and discussions to be able to respond with the necessary speed to the enormously increased demand for legislation. Paradoxically, parliaments 'have imposed on themselves so many and such different commitments' that, in order to avoid a paralysis, they have had to 'transfer a significant part of their activity to others, so that their ambitions have culminated in an abdication461'.

And these 'others' to whom the activity has been relocated are mainly 'the executive and its organs and branches', with a whole series of entities and agencies entrusted with both regulatory and administrative tasks[462].

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action. Selected essays of Alexander Pekelis, Cornell University Press, 1950 (reprinted, Da Capo Press, 1970), pp. 1-41, spec. at pp. 5, 29, 40.

460 Sir K. DIPLOCK, *The Courts as Legislators* (Presidential Address to the Holdsworth Club of the University of Birmingham, 26th March, 1965), in B.W. HARVEY (ed.), *The Lawyer and Justice,* Sweet & Maxwell, 1978. p. 263 ss., to p. 279.

461 On this aspect, see again, T. KOOPMANS, *Legislature, and Judiciary*, cit., p. 314.

462 *Op. et loc. ult. cit.* France is an illustrative case, where since 1958 the Constitution inspired by General de Gaulle has reserved the legislative function of Parliament to the matters enumerated in the Constitution itself, while leaving all other fields to the 'regulatory' power of the executive, thus setting up a broad autonomous, essentially legislative power of the executive. See, for instance, L. FAVOREU et al., *Le domaine de la loi et du règlement,* Economica & Presses Universitaires d'Aix-Marseille, 2 ed., 1981, and the comparative analysis of M. CAPPELLETTI, *Loi et règlement en droit comparé, ibid.,* pp. 247-255.

This is the same evolution that is already being mentioned above: the gradual transformation of the welfare state into an administrative state. But what needs to be further highlighted here is the growing perception of disappointment and mistrust not only towards parliaments but also of executive power, public administration, and its several agencies.

On the one hand, parliaments have revealed the unrealistic nature of their ambition to be considered as omnipotent instruments of social progress. Too many acts have been adopted too late, or have rapidly become obsolete; too many have proved to be ineffective, if not counterproductive, to the social goals they were intended to pursue[463]; and there are still too many which have generated confusion, obscurity and discredit for the law. Nor should it be neglected that in pluralistic societies, parliaments are for the most part composed of locally elected members, or electorally associated with certain categories or groups. The values and priorities of these representatives are therefore often local, corporative or group-based[464]. Admittedly, the deterioration in parliamentary accountability is a phenomenon that varies in scale and significance from country to country, but it constitutes, to some extent, a constant feature of the entire Western world.

On the other hand, the emergence of the administrative state has also brought with it problems no less serious. It is hardly worth mentioning the risk of abuse from the bureaucracy; the threat of a situation of paternalistic 'protection', if not of authoritarian oppression, of citizens by an all-pervasive but at the same time distant,

[463] Perhaps the most famous of the many remorseless criticisms of social legislation is that of the American economist and leader of the 'Chicago School', M. FRIEDMAN, *Capitalism and Freedom*, The University of Chicago Press, 1962 (reprinted 1975), pp. 197-200.

[464] "… in their decision-making these politicians do not usually engage in an objective and uninvolved assessment of costs and benefits. A typical example is provided by Italian legislation on tenancy. Three decades of legislation in this area, legislation that certainly had a social and welfare purpose, have resulted in enormously costly and socially disruptive economic perversions. Investment in housing construction has been discouraged; houses are left in a state of abandonment; urban centres are in decline. Under the pressure of local and group interests, a pressure to which politicians, in view of their electoral agenda, are particularly vulnerable, welfare has become a kind of demagogy ... Unproductive industries are being transferred to the public sector, which thus becomes a rescue port for the most non-profitable companies; these will survive, regardless of the costs to society.". See M. CAPPELLETTI, *Introduction*, to the volume *New Perspectives for a common law of Europe*, cit., p. 1 ss., to pp. 20-21.

inaccessible and not citizen-oriented administrative apparatus; the sense of powerlessness and abandonment that comes over all those citizens who are unable - or unwilling - to form strong groups with the ability to have access to the endless ramifications of the bureaucratic system and to put pressure on it; and, finally, the apathy and the anonymity of the vast majority of those who have had the ability or the will to participate in such influential pressure groups. It is surely not at all without good reasons that a large part of modern philosophy, psychology and sociology deals specifically with the burning issues of loneliness and the sense of abandonment and alienation of the modern individual, his 'loneliness in the crowd'. Paradoxically, the general prosperity ideal, on which the so-called 'social state' or 'Etat providence' or 'welfare state' was founded, has finished ploughing the ground in which the tentacular plant of social dissatisfaction grows.

Strictly related to this, there is also the problem of democratic legitimacy. In the words of Koopmans: "government representative systems proudly believed that by their very nature they embodied the consent of the people: the people lived under the rule of a law that they themselves had established through their democratically elected representatives. But today ... the connection between the vote of a citizen for the election of a parliamentary member and the numerous decisions of the public authority which have their impact on the sphere of that citizen has now become extremely far-reaching and fine: it needs a great degree of imagination to think that those decisions are based on a statute that originally had approved them. The citizen thus tends to become increasingly doubtful about the 'legitimacy' of those decisions. And this doubtful attitude is a phenomenon ... that can be encountered in all Western industrialized societies[465]".

Consequently, two significant parallel developments are evident, each revealing the clear symptoms of a profound crisis in the contemporary world. On the one hand, there is the gigantism of the legislative branch, which is asked to intervene, or 'interfere', in more and more vast spheres of subjects and activities; on the other

[465] T. KOOPMANS, *Legislature and Judiciary*, cit., p. 315. Add also the important work of J.H. ELY, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, 1980, pp. 131-134.

hand, there is the subsequent gigantism of a pervasive, potentially oppressive administrative branch.

Most sane societies have attempted and are still seeking to find a solution to these potentially pathological developments. This is not the place to examine the many efforts that have been and are being made in this regard: from legislative decentralization to public involvement in the administrative decision-making process. Here it is sufficient to remark that these developments have also produced important consequences for the judiciary: most importantly, the intensification of its function and responsibilities[466].

Indeed, perhaps with the sole exception of the United States, the courts have generally been reluctant to assume these new heavy responsibilities. Yet the stark reality of modern history shows that the courts - once confronted with the two aforementioned forms of state gigantism, legislative and administrative gigantism - cannot escape an unequivocal "aut aut". They must therefore choose between one or the other of the following possibilities: a) to pertinaciously remain adherent to the traditional, nineteenth century conception of the limits of the judicial function, or b) to upgrade to the level of the other branches, to become, in short, the third giant, which is able to supervise the giant legislator and the leviathan administrative power.

a) If the choice falls into the first alternative, the judicial authority will remain constrained within the peaceful but rather narrow field of the "protective" and "repressive" functions. Its influence will not go outside of what can be considered, in a comprehensive sense, to be private conflicts (be they civil or criminal), since

[466] Professor G. CALABRESI, *A common law for the age of Statutes*, Harvard University Press, 1982, suggests the judiciary's growing creativity as a remedy against the obsolescence of the statutes and the overload and inactivity of the legislative branches. See also M. CAPPELLETTI, *Giudici legislatori?*, Giuffrè, 1984, pp. 34-35, «Since the so-called " Third Branch" cannot simply ignore the profound transformations of the present world, a major new challenge has been posed to judges. Constitutional justice, especially in the form of judicial review of the constitutional validity of statutes, is one side of these new responsibilities. As developments in an increasing number of countries have shown, in the modern state the legislator-giant could no longer, without serious risks, be immune from control. One aspect, perhaps even more pervasive and often antecedent, of these new responsibilities has been the unparalleled growth of administrative justice, i.e. (and more precisely) judicial control of the executive's authority and its agents».

these are still disputes that do not involve the new, proactive, pervasive and usually discretionary roles of the 'political branches' of the state. This is what has essentially happened in continental Europe, both in the West and in the East, without the need for any further qualification or clarification. Here, moreover, the judicial authority has seen its political and social relevance progressively diminish, so that it can be said, without excessive exaggeration, that its impotence in the face of legislative and administrative powers has made the judiciary a weak and almost marginal "survivor" of a time gone by[467]. However, it is also a fact that, sooner or later, the various societies will be led to react - and in fact many of them have already reacted with different degrees of success - to this pathological situation of pernicious disharmony within the state' system of powers. They have progressively established, or are in the process of introducing, quasi-judicial organisms of various types and denominations - agencies, councils, administrative tribunals, ombudsmen, arbitrators and conciliators, even 'state arbitrators[468]' and similar - invested with the function not performed by the ordinary judiciary: precisely the control of the 'political branches', and thereby the protection of citizens, and of society in general, against their abuses[469].

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[467] Cfr. L. FRIEDMAN, *Claims, disputes, conflicts and the modern welfare state*, *op. cit. supra*, pp. 257-258, pp. 257-258, where the traditional judiciary in the welfare state is described as a "vestige of the past".

[468] State Arbitration in Eastern European countries - countries that have all been part of the Civil Law legal family - is a meaningful illustration of the phenomenon described in the text. Civil courts do not, as a rule, have jurisdiction to decide conflicts involving state institutions, so that (given the economic organization in those countries) most conflicts of some social and economic relevance are not brought before them. These disputes are brought before the 'state arbitration' tribunals instead; see, for example, V. KNAPP, *State Arbitration in Socialist Countries,* in M. CAPPELLETTI (Ed.), *International Encyclopedia of Comparative Law*, Vol. XVI *Civil Procedure*, ch. 13, Tubingen & The Hague, Mohr & Mouton, 1973.

[469] France has offered perhaps the most influential and earliest example of this development, an example that goes back to the second half of the last century. It is well known that the French Revolution proclaimed the ideal of a strict separation of powers, a concept whose profound difference from the American doctrine of checks and balances cannot be stressed enough. In accordance with this ideal, the ordre judiciaire, and thus the Courts of Justice, were banned from 'interfering' with either legislative or administrative authority. But gradually an administrative body, the Conseil d'Etat, took on the role, and it adopted the same procedures and acquired a level of independence that are typical of a true court of justice, albeit a 'special' or extra ordinem court and not in fact considered part of the judicial system and the judiciary. The special jurisdiction of the Conseil d'Etat is precisely the resolution of conflicts between citizens and the public administration. The result is a vast system of judicial, or quasi-judicial, control not only of the administration's legal violations, but also of abuses and distortions of the administrative discretion. Similar developments can be found a short time later in Germany with the birth of the Verwaltungsgerichtsbarkeit, in Italy with the litigation function of the Consiglio di Stato, and elsewhere on the Continent. These considerations can be found in M. CAPPELLETTI, *Giudici legislatori?*, cit., pp. 36-37.

Separation of pcwers" e *"séparation des pouvoirs* "are... completely different concepts". Cosi Sir O. KAHN-FREUND, *Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation,* in M. CAPPELLETTI (ed.), *New Perspectives,* cit., p. 137 ss., to p. 159. See also, in general, M. CAPPELLETTI - W. COHEN, *Comparative Constitutional Law. Cases and Materials,* Bobbs-Merrill. 1979. ch. 3.

Lastly, the further fundamental phenomenon of the rise and diffusion in Europe of a new jurisdictional function, namely the scrutiny of the legislature itself, is characteristic of our century, and especially of the period following the Second World War470. Here as well too, however, the traditional fragility, or 'timidity', of the European judiciary has required the institution of new and special constitutional courts, to which has been attributed, essentially on an exclusive basis, this crucial new jurisdictional authority.

b) If, on the other hand, the decision falls into the second alternative - as has occurred, always in principle and with many variations and distinctions, in various Common Law systems and especially in the United States[471] - there will then be the emergence of the judiciary as a 'third giant' in the modern state landscape. The ordinary courts of justice - the 'least dangerous branch', according to Alexander Hamilton's famous definition[472] - will audaciously accept the role of going beyond the traditional function of ruling on mainly private conflicts. Judges, all of them and not merely some newly created special courts (or 'quasi-judges'), will thus become the guardians not only of the (civil and criminal) activities of private individuals, but also of the 'political branches', despite the overwhelming growth of these branches in the modern state, perhaps even as a result of this expansion.

Surely, the rising of a dynamic third giant as guardian and supervisor of the political branches of the new Leviathan state is itself a phenomenon not immune to risks of perversion and abuse473.

In addition, cfr. C. J. HAMSON, *Executive Discretion and Judicial Control. An Aspect of the French Conseil d'Etat.*, Stevens & Sons, 1954. And, M. CAPPELLETTI, *Liberté individuelle et justice sociale dans le procès civil italien,* in 23 *Revue internat. de droit comparé,* 1971, p. 533 ss., at pp. 536-537.

[470] For a comparative study of this further course of development that is now characterising the constitutional existence of many countries, see M. CAPPELLETTI, *Il controllo giudiziario di costituzionalità delle leggi nei diritto comparato,* Giuffrè, 1968, (reprinted 1979), as well as M. CAPPELLETTI – W. COHEN, *Comparative Constitutional Law. Cases and Materials*, cit., spec. ch. 1-5.

[471] As far as England is concerned, a certain affinity with the European-continental systems is bearable in this field, at least as far as the relations between the judicial and legislative powers are concerned. British judges, notes a learned American observer, - L. FRIEDMAN, *Claims, disputes, conflicts and the modern welfare state*, *op. cit supra,* p. 258, - have persisted proudly and solemnly in their habits and parrots; but they have seen a steady decline in their real power, as has the Crown in whose name they act.

[472] Alexander HAMILTON's definition, in 78th *Federalist,* has become almost two centuries later the title of the best-known publication of A. M. BICKEL, *The Least Dangerous Branch,* Bobbs-Merrill, 1962.

[473] For a powerful description of these risks and the inherent flaws of judicial dynamism, see Lord DEVLIN, *Judges and Lawmakers, op. cit.*, p. l ss.

There is rather a certain similarity between these risks and those deriving from the other expressions - legislative and administrative - of state gigantism: risks of authoritarianism, of slowness and weightiness, of inaccessibility, of irresponsibility, of police inquisitorialism; even if it must be straightly said that, with regard to the judiciary, these are generally less serious risks, for no other reason than that the branch in point is by its very nature and structure the 'least dangerous474'. In addition, as far as the judiciary is concerned, there are more specific and more probable risks. They consist first of all in the difficulty for the judges to control the proper use of legislative and administrative discretion, especially when a serious supervision would require the use of sophisticated expertise or specialized techniques, which, while they might be at the disposal of the legislature and the government, are instead often not easily obtainable, if only for financial reasons, by the courts.

It would be quite difficult for a judge, for example, to carry out or to commission empirical investigations, econometric computations, or sophisticated laboratory research. Then, there is also the risk of ineffectiveness: how can courts verify the accurate implementation of judicial pronouncements which, operating by definition in the field of welfare state obligations, in order to be effectively enforced often imply an ongoing activity on the part of, for example, administrative entities or even the legislature? And finally, there is the problem of democratic legitimacy.

It is admittedly true that in the modern state this problem, as already noticed, also arises sharply with regard to legislation and, even more, to administrative action. The point remains, however, that, in the view of many, resides a greater degree of 'legitimacy' in the legal creativity of democratically elected legislators and politically responsible public officials than in 'judicial activism', i.e. the legal creativity of a judiciary which is characterized by its own tradition of political impartiality and isolation.

[474] The study of Prof. A. S. MILLER, *Judicial activism and American Constitutionalism*, cit., p. 333 ss., spec. at p. 335 and *passim*, is mainly a response to Professor Glazer's criticism and in general to those 'neo-conservatives', according to whom the "activism, i.e. the creativity, of judges makes the Courts of Justice 'authoritarian', to such an extent that «a free people feel more and more subject to the arbitrary law of inaccessible authorities». N. GLAZER, *Towards an Imperial Judiciary?,* in 41 *The Public lnterest,* Fall 1975, p. 104 ss., at p. 122.

Even in those countries where the ordinary courts of justice have never abandoned the mission to protect the citizen including from the state - therefore not limiting themselves to a role of protection of citizens in their relationships with each other -, the magistrates of those courts have often proved to be very unreliable judges particularly in the burning field of social legislation and administrative action related to welfare issues475. The mindset of those judges was too deeply entrenched in the traditional functions of civil and criminal justice to be able to readily adapt to the different attitude that seems to be necessary for the interpretation and implementation of promotional, programmatic, forward-looking laws.

Their social and cultural background was also such that they were not particularly well equipped, especially in the early stages of the major transformation of society, to meet the needs arising from that revolution. They also lacked the kind of specialist skills and expertise which are needed for an adequate awareness of the new, complex life situations in which welfare state measures are often intended to operate. Perhaps most importantly, they were too few and far between and were too devoted to a 'litigious' or 'adversarial' approach to conflict resolution[476]- with procedures that were themselves excessively rigid, slow, expensive and, as Roscoe Pound denounced as early as 1906, 'unpopular[477]' - in order to be able to

[475] In the extensive literature on the subject, it might be quoted the recent work of J. A. G. GRIFFITH. *The Politics of the Judiciary*, Manchester University Press, 1977, which is one of the most unambiguous verdicts condemning the English judiciary. It should also be said, however, that this verdict is biased towards one-sidedness, since it does not take into account those important developments that are discussed in the course of this paragraph, and which have had significant expressions in England, especially in the post-war period.

[476] Regarding the relevance of a non-controversial conception of conflict resolution, in the new areas of the welfare state see, also for further references, M. CAPPELLETTI, *Appunti su conciliatore* e *conciliazione*, in *Riv. trim. dir.* e *proc. civ*., 1981, p. 49 ss., at pp. 61-63.

[477] See the famous and, in several aspects, prophetic speech of R. POUND, *The Causes of Popular Dissatisfaction with the Administration of justice*, in 40 *American Law Rew*., 1906, p. 729 ss., republished in 8 *Baylor Law Rev.*, 1956, p. 1 ss., and, lastly, in the volume *The Pound Conference: Perspectives on Justice in the Future. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (A.L. LEVIN - R. R. WHEELER eds.), West Publishing, 1979, pp. 337-353.

successfully extend their function to the new fields of conflict that were spreading rapidly[478].

As a result, the last few generations have witnessed the development of two major evolutionary tendencies that are, in part, convergent. In some countries, especially within the Civil Law family, the ordinary courts have, in principle, been barred from entering the new arenas of social conflict: here, however, new special organisms have gradually emerged, as exemplified by the 'Councils of State' and later by the 'Constitutional Courts', with the mandate of fulfilling the vast and profound vacuum in jurisdictional protection. In other countries, in contrast, especially within the common law tradition, the traditional courts - although they were never, in principle, prevented from tackling the issue of the control of the two emerging political powers (as in America), at least one of them (as in England), - have demonstrated an insufficient attitude and competence to perform this fundamental function. Hence, also in these countries, a multitude of new quasi-judicial bodies - adjudicatory agencies, tribunals, etc. - have been created in order to integrate, if not to replace, the two emerging political giants.

A number of relevant lessons can be drawn from the developments described above. First, it should be acknowledged that in modern countries the judicial scenario has become much more complex, multifaceted, and fragmented than in the past. If one wants to consider the reality and not be limited to appearances, one has to recognize that today it does not make sense to describe 'judges' and 'judiciary' only those who operate in ordinary courts.

The judiciary is at present only a part, and indeed a minor part, of the real judicial power. Judges, professional and non-professional, also serve in numerous other

[478] As a result, the need was felt, especially in America, to create a multifaceted system of agencies, invested not only with regulatory tasks, but also with judicial or quasi-judicial functions, at least in an early stage of judgement of merit: and this with the expectation that these agencies, acting as special administrative tribunals, would be more sensitive to a welfare philosophy and its concrete needs, and would employ procedures that were faster, simpler, more affordable and accessible than those of the ordinary courts. In Britain - especially in the time immediately following the Second World War, when Labor administrations embarked on a gigantic welfare agenda - there have been not so different trends, with a tremendous surge in a complex system of *administrative tribunals*. On these matters, see V. VARANO, *Organizzazione e garanzie della giustizia civile nell'Inghilterra moderna,* Giuffrè, 1973, cap. V, p. 269 ss.

institutions; they and their activities cannot be ignored if one is to comprehend the actual role of the "third branch" in modern legal systems.

Secondly, it is obvious that the twentieth century has witnessed a tremendous growth of the state. The 'giant state' or 'Big Government' - with what has been caustically called 'legal pollution', i.e. the immense input of legislative and administrative activities into the social environment - is a phenomenon that may be frightening, but it remains a reality of the present time. It may be tempting to try to limit this phenomenon, or to stop it, or even to invert its direction; or, perhaps more realistically, it can be a matter of designing a system of appropriate controls around it. And in any case, one cannot fail to recognize that the modern expansion - and "fragmentation", as described above - of the third branch scenario is a serious attempt, perhaps the most serious effort, to establish such a system of controls. It is indeed rather hard to conceive that any effective system of checks and balances could be created today without that growth and fragmentation of the judiciary power mentioned above.

It is worth emphasizing this last statement, because it is a point of vital importance for the survival of freedom itself in modern societies. The thing is that there cannot be a remote probability of that survival unless a well-balanced system of mutual checks is ensured and preserved. As Alexander Pekelis has argued with incisive acumen, “an effective legislative or administrative activity is not at all incompatible with an intelligent judicial control of the same activity, ... on the contrary, a balanced coexistence of such activity and its control is the very essential core of a constitutional regime[479]”.

Extremely informative are the tragic experiences of continental Europe in the last two centuries, during which the ideal promoted by the civil liberties enthusiasts was, with a diligence worthy of a better cause, an ideal of too strict 'séparation des pouvoirs', rather than of reciprocal checks and balances. As has been seen, the ideal of the strict

[479] A. H. PEKELIS, *The case for a Jurisprudence of Welfare*, in M. R. KONVITZ (ed.), *Law and social action. Selected essays of Alexander H. Pekelis*, Cornell University Press, 1950 (reprinted, Da Capo Press, 1970), p. 13.

separation of powers has resulted in a perilously weak judiciary, essentially confined to 'private' conflicts.

That ideal has thus meant, until relatively recently, the existence of a completely uncontrolled legislature, in addition to the presence of a practically unrestrained executive, at least until a separate system of administrative justice was able to develop, imposing itself as the guardian of government. On the other hand, also in the interaction between the legislative and the executive branches, that ideal of rigid separation, rather than of balanced counterweights, has meant in practice a continuous and pernicious transition from periods in which power was, in practice, consolidated in the legislative assemblies and in the political groups that dominated them (for example pre-Fascist Italy or Weimar Germany, but also France's Fourth Republic), to other periods in which power was instead concentrated in the executive (apart from the tragic extremes of the dictatorial regimes that led to the Second World War, think of the France of the Fifth Republic, especially in the first years following the 1958 Constitution). The truth is that only a coordinated system of reciprocal checks and balances can allow a strong legislature, a powerful executive, and a robust judiciary to coexist without threatening freedom. It is precisely this balance of power, of checks and balances and of mutual safeguards that is the main secret of the undeniable success of the American constitutional system[480].

As the distinguished economist, Nobel Prize winner Milton Friedman, has very effectively observed, "the main threat to freedom is the concentration of coercive power, whether in the hands of a monarch, a dictator, an oligarchy, or a transitory majority. The preservation of freedom requires the eradication of such a concentration of power, to the greatest extent possible, and the dilution and distribution of that extent

[480] To put it simply: Congress 'controls' the executive and the judiciary, both because its legislations are imposed on each, and because the approval of the Senate is necessary for the executive's spending and for the appointment of officials and judges (at least at the federal level); the Senate also has the power of impeachment of officials and judges. The executive in turn 'controls' the judiciary especially with the appointment of judges, and 'controls' the legislature with the presidential power of veto, The judiciary finally, with its judicial review power, 'controls' both the Acts of Congress and the work of the executive. This creates three powers, each of them very powerful, each with a high degree of autonomy (confirmed, in particular, by the fact that the executive power, vested in the president, does not depend on parliamentary majorities, and the judges, except for impeachment, generally serve as judges for their whole lives), but none of them unchecked.

of the power which cannot be eliminated: that is, a system of checks and balances481 ...".

It is certainly true that Milton Friedman composed these sentences in support of his well-known thesis, which can be considered "conservative": that is, that "the organization of the economic activity" should be "removed from the control of political authority" and left instead to "the free market", thus eliminating "a dangerous source of coercive power482".

However, what has happened during the last century illustrates that the modern systems of government have been inclined to 'interfere' in ever larger areas of human activity and that this powerful evolutionary trend is far from over[483].

Rather than merely attempt to reverse this tendency, or (for those who, as Milton Friedman and his adherents, prefer it) to make such an attempt, liberty-seeking societies should instead try to keep the same tendency under control: which is exactly what the sane societies are aiming to do.

And to this purpose, as Professor Friedman has correctly pointed out, the most suitable instrument is precisely that of a checks and balances system. A system in which the "growth" of the judiciary is obviously a necessary ingredient of the balance of powers[484].

A final concluding remark. It seems clear that the modern phenomenon of the growth of the third branch offers a further explanation for the question posed at the beginning of this part of the work: how to justify the particular intensity of judicial creativity in the current era. This emphasis can be very well explained and justified,

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[481] M. FRIEDMAN, *Capitalism and Freedom*, cit., p, 15. See also C. REICH, *The new Property*, cit., p. 787.
[482] M. FRIEDMAN, *Capitalism and Freedom*, p. 15. See, e.g., the opposite position, equally authoritative, of the Nobel Prize winner K. J. ARROW, *In Defense of Socialism*, 12 n° 1 *Dialogue*, 1979, pp. 6-10.
[483] Consider the arguments expressed in paragraph 7, *supra*.
[484] The foundation and growing importance of the administrative and Constitutional Courts in Europe - and not only in Europe - can be regarded precisely in this light. Even the great proliferation in recent decades of constitutionally and even transnationally guaranteed Bills of Rights with effective forms of judicial protections can be considered as a further aspect of this crucial development. See M. CAPPELLETTI, *Giustizia costituzionale soprannazionale*, in *Riv. dir. proc.*, 1978, p. 1 ss., spec. p. 24 ss. and, in general, M. CAPPELLETTI - W. COHEN, *Comparative Constitutional Law. Cases and Materials*, *op. cit.*, ch. 3; and see already M. CAPPELLETTI, *La giurisdizione costituzionale delle libertà*, Giuffrè, 1955, reprinted 1976.

of course, in the light of the emergence of a judiciary whose role has increased as a consequence of, or in conjunction with, the incomparable expansion of the other branches of the modern state. It is hardly worth noting, indeed, how futile would be the claim of those who wish to hide this new flourishing role behind the skinny screen of an old fiction: that of the 'merely declaratory', 'purely logical' nature of judicial interpretation[485].

10. Continue ...: the role of the Judiciary in class litigations and the protection of collective and diffuse interests.

A third consequence of the substantial transformations discussed in the previous paragraphs is now to be considered[486], although it is largely implied by the other two.

The phenomena of the welfare state emergence and the legislative and administrative branches growth were, of course, themselves the result of a historical event of an even more fundamental importance: the industrial revolution, with all its vast and profound economic, social and cultural consequences. This huge revolution has been characterized by a peculiarity that may well be summarized in an inelegant but very expressive word: "massification". All the most advanced

[485]Significantly, Prof. Jaffe explains, L. L. JAFFE, *English and American Judges as Lawmakers*, cit., p. 26, that "those judges who persist in affirming a parliamentary monopoly in law-making", are the same ones "who will also be reluctant to exercise any control over the executive" as well as the legislative.

[486] For a more detailed examination of the theme addressed in this paragraph, and for comparative background and references, see M. CAPPELLETTI, *Appunti sulla tutela giurisdizionale di interessi collettivi o diffusi,* in *Giur. it.,* 1975, IV, cc. 49-63**;** ID., *Formazioni sociali e interessi di gruppo davanti alla giustizia civile,* in *Riv. dir. proc.,*1975, pp. 361-402; ID., *La protection d'intéréts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile),* in *Revue internat. droit comparé,* 1975, pp. 571-597; ID., *Governmental and Private Advocates far the Public lnterest in Civil Litigation: A Comparative Study,* in M. CAPPELLETTI (ed.), *Access to Justice,* vol. II, *Promising Institutions* **(**M. CAPPELLETTI- J. WEISNER, (eds.), Giuffrè & Sijthoff and Noordhoff, 1979, pp. 767-865; ID., *Vindicating the Public lnterest Through the Courts: A Comparativist's Contribution.* in M. CAPPELLETTI, vol. III, *Emerging Issues and Perspectives* (M. CAPPELLETTI - B. GARTH (eds.), Giuffrè & Sijthoff and Noordhoff, 1979, pp. 513-564. Ved. da ultimo altresì M. CAPPELLETTI - B. GARTH, *The Protection of Diffuse, Fragmented and Collective lnterests in Civil Litigation,* in W. J. HABSCHEID (ed.), *Effektiver Rechtsschutz und verfassungsmiissige Ordmmg, Die Generalberichte zum VII. Internationalen Kongress fur Prozessrecht, Wurzburg, 1983,* Bielefeld, Gieseking-Verlag, 1983, pp. 117-159; M. CAPPELLETTI, *Finding an Appropriate Compromise: A Comparative Study of lndividualistic Models and Group Rights in Civil Procedure,* in 2 *Civil Justice Quarterly,* 1983, pp. 111-147. In recent decades, a considerable amount of literature has been dedicated to this topic in Italy as well; in addition to the two papers mentioned at the beginning of this note, see above all the collected volumes A. GAMBARO (a cura di), *La tutela degli interessi diffusi nel diritto comparato*, Giuffrè, 1976, e *Le azioni a tutela di interessi collettivi* (Università di Pavia, N.S. vol. 17), Cedam, 1976; also V. VIGORITI, *Interessi collettivi* e *processo. La legittimazione ad agire,* Giuffrè, 1979.

societies of our contemporary world are in fact characterized by an economic organization in which production, distribution and consumption have massive proportions. However, this is a feature that goes far beyond the economic sector alone: it also refers to relationships, behavior, feelings and social conflicts.

As an influential author once observed, “more and more frequently, because of the phenomena of massification, human actions and relationships are assuming a collective rather than a merely individual dimension: they refer to groups, categories, classes of persons, rather than to one or a few individuals alone ... And indeed, with increasing frequency, the complexity of modern societies produces situations in which a single human act can benefit or harm a large number of people, with the consequence, inter alia, that the traditional scheme of the judicial proceeding as a 'dispute between two parties' and a 'thing of the parties' is completely unsuitable. For example, false information disseminated by a major corporation may affect a large number of investors in that company's shares; the infringement of an antitrust rule may harm all actual or potential competitors; a contractor's non-observance of a collective employment agreement may cause harm to all its employees; ... the release of pollutants into a lake ... may prevent everyone from enjoying its waters; defective or unhealthy packaging of certain food products may harm all consumers of those products. The possibility of such 'mass injury' is a distinctive feature of our age[487]”.

In recent times, people involved in such conflicts, violations and mass damages have tried to design effective legal remedies not only in the political process, but also in the judicial one. "Class actions" and "public interest litigation" in the United States, and similar mechanisms in other civil law systems, have become the symbols of a new and increased role of the courts: these fundamentally new ways of legal action and litigation have become typical procedural illustrations of the phenomenon of massification described above, the importance of which it is difficult to overstate. A profound metamorphosis of procedural law - indeed, a real outbreak of its traditional concepts,

[487] M. CAPPELLETTI, *Vindicating the Public lnterest Through the Courts: A Comparativist's Contribution*, cit. *supra*, pp. 518-519.

rules and structures - has been evoked and, at least in some measure, achieved in some countries488.

The standing to sue to protect the interest of the public in general, or of categories and classes of people not present at the trial, has been conferred on "ideological parties[489]" and "private attorneys general"; and such plaintiffs - individuals or organizations - have been considered as the "adequate representatives", even if "self-appointed as such", of the "absent parties", many of whom will be unaware that an action has been brought "in their interest". Damages have thus been claimed, and often obtained, in favor of hundreds, thousands, perhaps millions of absent parties so represented - with thousands of years of conceptual certainty about res judicata and its limits submerged like fragile overloaded boats.

No one will doubt that events of this nature are very risky and questionable[490]. But it was and is, in the opinion of many, a risk that was and is necessary to take. The point is that, challenged by the aforementioned phenomena of massification, the individual on his own is simply incapable of adequately protecting himself. In present-day societies, the solitary individual is defenseless. The traditional rules on legal standing, in particular, would require that, in the case of damage caused by a product to hundreds, thousands, millions of consumers, each of them would bring

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[488] See the publications referred to in footnote 86 above. In particular M. CAPPELLETTI, *Formazioni sociali e interessi di gruppo davanti alla giustizia civile*, cit. *supra*, p. 361 ss. and ID. *The Protection of Diffuse, Fragmented and Collective lnterests in Civil Litigation*, cit., p. 117 ss. Some of the most profound and varied analyses include: A. CHAYES, *The Role of the Judge in Public Law Litigation,* in 89 *Harvard Law Rev.*, 1976, pp. 1281-1316; M. GALANTER - F. S, PALEN - J. M, THOMAS, *The Crusading Judge: Judicial Activism in the Trial Courts*, in 52 *Southern Calif. Law Rev.*, 1979, pp. 699-741; T. EISENBERG - S. C. YEAZELL, *The Ordinary and the Extraordinary in Institutional Litigation*, in 93 *Harvard Law Rev.*, 1980, p. 465 ss.; in the most recent European literature, in addition to the outstanding contribution of V. DENTI, at the introduction to the volume, *Le azioni a tutela di interessi collettivi, supra* nota 99 (published also with the title *Le azioni a tutela di interessi diffusi.* in *Riv. dir. proc.*, 1974, p. 533 ss.), see the well-argued overview of M. TARUFFO, in the volume *La giustizia civile in Italia dal '700 ad oggi*, Il Mulino, I980, p. 328 ss., spec. a p, 361 ss. Cfr. also, among many others, H. SMIT, *La procédure civile comme instrument de réforme sociale,* in *Revue internar. droit comparé,* l 976, pp. 449-460; and at a more theoretical level, V. DENTI, *Il processo come strumento di politica sociale,* in ID., *Processo civile* e *giustizia sociale,* Milano, Edizioni di Comunità, 1971, p, 53 ss. It may also be viewed in the compiled studies in M. CAPPELLETTI, *Giustizia e società,* Edizioni di Comunità, 1972 (ristampa 1977).

[489] In addition to the literature mentioned in footnotes 86 and 88 above, mention should be also made of the seminal study of L. JAFFE, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or ldeological Plaintiff,* in 116 *Univ. of Pennsylvania Law Rev.*, 1968, pp. 1033-1047.

[490] The most serious risk is that the courts will be breaching those "natural" guarantees of the judicial process. Yet, if the risk is real, one does not believe that such a violation, which would certainly be intolerable, is an unavoidable consequence of "class action" in particular and "public interest litigation" in general; these points are extensively addressed in the works cited in footnote 86, to which reference is made.

legal action to recover the damage suffered individually. This is purely out of reality.

While the whole damage may be immense, the fragment of harm suffered by each consumer is normally far smaller to justify the cost - economic, psychological, loss of time, etc. - of an individual action. - Moreover, the defendant's "power" - economic, information, or organization - is usually much greater than that of the consumer. It follows that a viable possibility of protection in such situations of conflict is subject to the replacement of purely individualistic conceptions and structures of the judicial process - a solution that has to be adopted with due prudence and adequate safeguards, so as not to compromise non-negotiable values. The problems arising in this field are very similar to those discussed, in another context, in paragraphs above. Here again, in fact, the option is quite evident. Judges may well embrace an approach of pure rejection, or avoid entering the arena of collective and class conflicts. Such a negative attitude would, though, have the practical consequence of precluding the judiciary from exerting influence and control over exactly those conflicts which have become increasingly important in modern societies.

In this way, the judiciary power, entrenched in its nineteenth-century picture, would eventually become a survivor, respectable perhaps but irrelevant and obsolete, because unable to adapt to the needs of a radically changed world; and sooner or later, other "quasi-judicial" bodies and procedures would be established, or gradually adapted, to meet the new urgent social demands. In short, phenomena similar to that of the gradual emergence and consolidation of special forms of administrative and constitutional justice will be reproduced, in addition to - or in place of - the 'ordinary' one, which has shown its inadequacy. The other option, however, is that judges themselves should be able to "evolve", reaching up to these new compelling expectations, and that they should be able to become guardians not only of traditional individual rights, but also of the new "diffuse", "collective" and "fragmented" rights that are so peculiar and important in our mass civilization.

The affinity with the considerations expressed in the earlier paragraphs can be further specified here. In fact, the question is whether judges are capable of serving as effective guardians, not only of the "political branches" - of the "Big Government" - but also of a different "gigantism", which is often associated and overlapped with that of the state and which is no less in need of control: the gigantism of economic and social organizations, the "Big Business", the "Big Labor", the "Big Organization" - the gigantism, in other words, which in every sector, including the private one, is inherent to contemporary societies, meaningfully defined as "corporate societies".

If judges follow the second of these two alternatives, it is inevitable that new responsibilities will be placed on them and that they will be invested with new powers. First and foremost, procedural powers. As an eminent Austrian-American expert, Professor Homburger, wrote in 1974: “the most salient factor in class litigation ... might perhaps be seen as the extraordinarily active role which the judge is supposed to assume in the control and the direction of the procedure. The public interest involved in such a judicial process is much stronger than in a normal civil litigation: it is the court's mission to ensure the protection of this interest and that of the «absent members» of the class491”.

But it is not only an expansion of procedural powers but also, and it might be claimed above all, of those previously mentioned powers of judicial creation and legal development. Very often, in fact, 'class litigations' involve those social legislations and rights referred to in the previous paragraphs above. What has been argued in that context about the consequently changed role of the judiciary therefore also holds true here: since those laws and rights are usually so vague, liquid, and programmatic, a high level of activism and creativity is unavoidable on behalf of the judge who is called to interpret and implement them.

[491] A. HOMBURGER, *Private Suits in the Public lnterest in the United States of America,* in 23 *Buffalo Law Rev.*, 1974, p. 343 ss., at p. 349; cfr. also M. TARUFFO, *Some remarks on group litigation in comparative perspective,* in *Duke Journal of Comp. & Int. Law*, 2001, p. 405 ss.

Furthermore, those controversies are often disputes in which, directly or indirectly, governmental entities are involved: to make an example, if a social benefit is suspended or abolished through a governmental act, such an act may be detrimental to large categories of people, and may thereby, in some countries, be the target of a 'class action' or similar judicial procedure of a meta-individual or collective dimension. On the other hand, as already noted, even when governmental bodies are not involved, class disputes often concern large private institutions of power, so that, from the individual's perspective, a litigation against such powerful institutions is as difficult and complex as a lawsuit against the strongest branches of the state.

It follows that the same rationales, discussed above, that nowadays are demanding the 'growth' of the third branch in order to keep under scrutiny the expanded legislative and administrative powers of the 'Leviathan state', equally require an analogous growth of the judiciary with the aim to ensure an effective control of these other 'Leviathans', which even in the private sector characterize our western world. Whether this supervision, in the absence of which the individual is condemned to be the unarmed victim of abuse and oppression, could be provided by the traditional and ordinary judiciary, or whether it would require new, special and expert bodies, is a different matter for which the same considerations before discussed and pointed out are analogically valid.

It nevertheless remains clear that in front of Big Business, as in the face of Big Government, only a Big Judiciary can stand as an adequate guardian and effective counterbalance. And it is barely worth restating the observation that, if the vision of jurisdiction as a merely declaratory, passive, and mechanical function is always artificial and precarious, it will appear even more obviously delicate and artificial when a "big judiciary" is committed to the task of settling disputes of this magnitude. The creative, dynamic and active spirit of a judicial process, whose effects by definition need to go far beyond the parties physically present in court, cannot be ignored.

Chapter Three

Part I – The evolution and the multiple sides of Tort law in the Italian legal experience

1. The Seventies and the social demand: an overview

It would be wrong, however, to consider the phenomena described in the previous chapter as singular and isolated. Certainly, if one cannot deny the peculiarities of the Italian case, the 1970s can be read within a wider framework in which they reflect changes closely analogous to those that occurred in other systems.

The 1970s can in fact be considered as the extreme edge of a beach still lapped by the long wave of the "social demand"[492]. An idea that has already undergone a wide series of adaptations well beyond the European borders within which it was born. At the same time, however, these are also the years that mark the beginning of its radical transformation. A process through which the social idea will be slowly metabolized within the more complex intellectual structure that still characterizes the contemporary era, an era in which the acquisitions of the social combine, in different ways, with those characteristics of the previous era[493].

By "social" we mean in fact that movement whose birth dates back to the end of the last century and whose wide diffusion can be considered a real form of *ante litteram* globalization that tends to supplant and overlap with the previous one started at the beginning of the nineteenth century[494]. At its foundation was the criticism of the individualism that characterized the previous period and of the system built around it, which was considered incapable of responding to the needs of a social reality that was by then undergoing profound transformation. In the new perspective, society was characterized as a strongly interdependent structure that needed a different law with more solidarity and flexibility; with the public

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[492] See M. BARCELLONA, *L'"idea del sociale" nella teoria del diritto privato: il caso italiano (ma non solo)*, in *Riv. trim. dir. proc. civ.*, 1997, 717 ss.

[493] The model is that of sedimentation or stratification used by Du. KENNEDY, *Two Globalization of Law and legal thought*, 36 *Suffolk U.L. Rev.* 631 and ID., *The globalizations of law and legal thought in the new law and development: a critical appraisal* (D. Trubek - A. Santos *eds.*), 2006.

[494] Synthetically, it finds its origin and assumes the difficult inheritance of Jhering who had reinterpreted law as political action, describing it as "a teleological concept, situated in the middle of a chaotic interweaving of human aims, struggles and interests". Among the many others, see L. LOMBARDI VALLAURI, *Saggio sul diritto giurisprudenziale*, Milano, 1967.

interest constituting the guide for the different reform processes, mediating conflicts between opposing groups (classes) and thus ensuring the protection of the weakest subjects. The "social" was thus a response to the system inherited from individualism: its aim was to make subjects responsible for the consequences of their actions, redeeming the role of the jurist and the possibilities of law in the construction of society.

Using the opposition between liberal individualism and the social, however, is not indicative. The social, at least in our tradition, is an open concept[495]; not only can the social allow for different adaptations in different experiences and in different time frames, but it can also produce different adaptations within the same experience and the same time frame, as happens if we look at the law of the market and the law of persons (and of the family) in which the reference to the social can serve to spread values different from those it spreads in the former. The social is also compatible with two other distinct projects, that of more (social) legislation and that of the attribution of power to the judge.

In reality, in Italy, before the 1970s, the idea of the "social" had already undergone *various* epiphanies - adaptations, if not contradictory, certainly of different signs - but its influence cannot yet be considered definitively concluded[496]. In Italy, as is well known, after its initial progressive affirmation, the social takes on a particular connotation, typically conservative in the fascist experience, testimony to the ambiguities that this idea was inevitably destined to bring with it[497].

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[495] The social tends to remain ambiguous and can now assume the capacity to mask the irreducible political datum present in the elaboration of private law, for some ideas G. MARINI, *La giuridificazione della persona. Ideologie e tecniche nei diritti della personalità*, in *Riv. dir. civ*., 2006, 359 ss. and M.R. MARELLA, *The old and the new limits to freedom of contract in Europe*, in *ERCL*, 2006, 257 ss.

[496] The same happens in other countries as well, see Du. KENNEDY, *The globalizations*, cit.

[497] There is no doubt, in fact, that legal socialism in Italy had long since launched a critical analysis of the way in which the codes and institutes of private law were considered and treated by the official culture; its scarce capacity to respond to the interests of the community through those institutes and the tendency instead to exalt the selfishness of the individual had already been put in the dock at the end of the 1870s. Even then, the answer to this way of seeing things was to be found in the exaltation of the limits that can be imposed on private law in the name of solidarity. Unlike other experiences, the program of reform was mainly entrusted to the intervention of the state, which would have had to take on the difficult task of mediating conflicts between classes and improving the position of the weakest subjects (jurists were convinced of the extraneousness of jurisprudential law to the political-distributive affair, considered at the same time "conservative" and favoured by conservative societies). See L. LOMBARDI VALLAURI, *Saggio*, cit., 353; P. UNGARI, *In memoria del socialismo giuridico*, in *Pol. dir.*, 1970, p. 241 and the essays collected in *Quaderni fiorentini*, 3/4, 1974-75. This anxiety for reform would find ample space in the debate on the proposals for recodification and then in individual interventions in special legislation. But the programme of an integral re-foundation of society and its political structures had to wait a few more decades and found space only later with the advent of the Fascist regime. And the state was no longer the simple guarantor of freedom and individual interests, but the bearer of the "higher" interests of the social organism; the state could now be

Although there have been degenerations, there is at the same time a certain dissatisfaction with an experience that is not yet considered definitively archived and of which it seems necessary to recover all the potential in the face of a reaction that seemed excessive.

In Italy, therefore, the "social" has various and deep roots and cannot be considered only as the heritage of Marxist culture. With it the "social" enters into a complex relationship which, because of the antagonistic vision espoused by these orientations, often becomes conflictual.

However, the difficulty of responding to the questions raised by a more active economic policy with a strong redistributive characterization on the one hand and, on the other, to the theoretical knots posed by the process of decomposition of the abstract subject, which gives way to a series of new subjective figures that are different because of the materiality of the relationships in which they are placed and the social relations that characterize them, will make their survival difficult.

2. Tort law as a tool of the new welfare private law

Once freed from individualistic mortgages and the centrality of the general clauses has been restored, the rules of civil liability, not unlike the others of private law, are open on one hand to legislative intervention, with respect to which the points of intersection multiply, and on the other to the judge who has the task, in an equally "natural" way, of gradually making the necessary conciliations between social solidarity and the values of economic rationality.

It will be precisely this acknowledged flexibility that will allow a wider penetration of the "social" within the institution, laying the foundations for a significant change of sign compared to the previous era.

Civil liability was therefore a candidate to regulate new phenomena, without having to wait for the intervention of the legislator (which was slow to materialize

looked upon as the entity capable of ensuring, in the best possible way, forms of social rationalization (cf. D. CORRADINI, *Il criterio della buona fede e la scienza del diritto privato*, Milan, 1970, p. 347; S. RODOTA', *Gli studi di diritto contemporaneo*, in Acquarone, P. Ungari and S. Rodotà, *Gli studi di storia e diritto contemporaneo*, Milan, 1968, 96; C. SALVI, *Le immissioni industriali*, Milano, 1979, 147). But see also U. BRECCIA, *Continuità e discontinuità negli studi di diritto privato. Testimonianze e divagazioni sugli anni anteriori e successivi al secondo conflitto mondiale*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 28 (1999), 330.

due to the strength of industrial interests), ensuring flexibility to the judge, so as to avoid the risks of a rigid discipline and adapt the law to an ever-evolving reality. However, it did not hide the possible provisional nature of its interventions, in fact, it was recognized that "in the longer term, it is indispensable to look at instruments capable of having a more direct impact on the decisions of enterprises, in order to create a planned framework within which the choices relative to economic development are no longer uncontrollable by the community, as happens at present"[498].

Civil liability can be considered emblematic of the 'new' private law of the *welfare state*. The centrality of private law could now be reaffirmed - without necessarily having to remain anchored to the idea of private law as an "order removed from contingencies", i.e. an expression of institutions that arise prior to and independently of state regulation, endowed with an intrinsic rationality - precisely by virtue of its capacity to constitute the fundamental junction for the achievement of economic and social policy objectives and for the distribution of resources. These were the years in which civil responsibility began to be found more and more frequently in competition with other institutional mechanisms to ensure the pursuit of those objectives.

All of the premises of a process of diversification of the judgement of responsibility are then laid - according to the type of interests harmed and the nature of the harmful activity, distinguishing between the various hypotheses: production for consumption, road traffic, the environment and so on - which imposes a reflection on the maintenance of its unitary function which is constituted by the compensation of damages understood as patrimonial compensation (from the point of view of the victim) and as the administration of the economic costs of the damage (from the point of view of the system).

This marks the start of an intense phase of experimentation in which the occasions in which civil liability will be called upon will multiply, enhancing its natural frontier function. This overwork to which civil liability is called, however, multiplying its tasks and functions, will be destined to raise the urgent question of the institute's loss of unity - which had been one of the main concerns of the

[498] S. RODOTA', *Ipotesi sul diritto privato*, in *Il diritto privato nella società moderna*, Bologna, 1971, 20.

innovators of the 1960s.

The 1970s then left on the ground, together with the concern to reconstitute the unity of the institute, the concern to clarify the notion of damage, compensation and, objectives which in fact occupied mainly the doctrine of the following decade[499].

3. Access to collective and diffuse interests: the issue of intangible values

The rules of civil responsibility are also called into play because, at this stage, the protection of new interests come into play. It is no longer a question of attributing relevance to the "new properties", i.e. to those interests that have gained positions in the scale of values culminating with the absolute right par excellence, property, nor of offering solutions to "inter-property conflicts", such as those between static and dynamic property, typical of emissions, but of responding to harmful events that, by endangering the health of entire communities, the environment or ecological balance, affected so-called "weak" interests, in the more specific sense of interests that cannot be formalized through subjective rights.

In those years the demand for participation and control was not only directed towards political decisions, but also concerned social and economic ones. This request was not followed by any response, nor was there any horizon of an organizational restructuring of the system to provide it. In this framework, it was quite natural to turn our attention to "new" themes such as the protection of the collective and widespread interests and to pose the problem of the role that the judges could occupy. In fact, there was a clear lack of confidence in public intervention, judged incapable of escaping the logic of capitalism and of strong interests, and the recourse to civil law techniques became crucial in order to protect interests not adequately considered by other forms of intervention such as the administrative and penal one.

The problem was re-proposed as that of the conflicting demands between the needs of businesses and the needs of the public. The latter were identified in a series of non-patrimonial values, the protection of which could be realized by

[499] Significant observations at the beginning of the 1980s were made by A. DI MAJO, *La tutela civile dei diritti*, Rome, 1980 and C. SALVI, *Il paradosso responsabilità civile*, in *Riv. crit. dir. priv.*, 1983, 123 ss.

attributing relevance to those interests which escaped an individual dimension to assume a collective valence.

In reality, the elaboration around injustice moves precisely from the need to put the liability rule protection to work, seeking in the recovery and re-elaboration in a collective sense of private action a more or less provisional solution to those problems. The expansion of responsibility to protect these interests would in fact have made the remedy actionable, even independently of damages of an economic and individual nature, making it available to the realization of a social control of economic activities.

In those years the jurisprudential attempts to respond to this kind of injury through the instruments of private law multiplied, as well as the effort to recognize procedural forms of protection adequate to ensure the effectiveness of the protection[500].

Obviously, the social nature of damage puts the techniques of compensation to the test, the heart around which the remedies offered by civil responsibility revolve. Its elasticity and expansive potential is tested in the face of the need to guarantee not as much, and no longer, the simple compensation of victims, but the restoration of the *status quo ante* to allow the community to fully enjoy the damaged good[501].

The coexistence within unjust damage of a technique aimed at removing the patrimonial damage through compensation for equivalent with that of reparation in kind (article 2058 Civil Code) which, aiming at restoring the altered material state, is on the same level as the restitutory or reintegration protection typical of the implementation of the violated right, opens a new scenario[502].

In this framework there is also the attempt to use art. In citing the 844 Civil Code:

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[500] On the problem see AA.VV., *Il controllo sociale delle attività private*, Genova, 1972. In the conference held in Salerno in 1974 reference was made to the alternative use of figures such as *torts*, see G. ALPA, M. BESSONE, A. GAMBARO, *Aspetti privatistici della tutela dell'ambiente: l'esperienza americana e francese*, in *La tutela degli interessi diffusi nel diritto comparato*, Milano, 1976, 297; S. RODOTA', *Introduzione*, in AA.VV, *La responsabilità dell'impresa per i danni all'ambiente e ai consumatori*, Milano, 1978, 19; M. CAPPELLETTI, *Appunti sulla tutela giurisdizionale degli interessi collettivi o diffusi*, in *Giur. it.*, 1975, IV, 49; A. CORASANITI, *La tutela degli interessi diffusi davanti al giudice ordinario*, in *Riv. dir. civ.*, 1978, I, 180; V. VIGORITI, *Interessi collettivi e processo. La legittimazione ad agire*, Milano 1979.

[501] Clearly S. RODOTA', *Proprietà ed industria. Variazioni intorno alla responsabilità civile*, in *Pol. dir.*, 1978, 429 ss.

[502] Thus, already at the end of the seventies, the question arose as to whether the institute could be considered exclusively as a "source" of obligations or open, through the reintegration in a specific form of article 2058 of the civil code, to eliminating the *source of the damage* (cf. A. DI MAJO, *Obbligazioni e contratti*, Roma, 1978, 90, taking up some ideas about atmospheric pollution by V. ANDRIOLI, *Giustizia civile e inquinamento atmosferico*, in *Il controllo sociale*, cit., 445).

outside the specific context of interproperty relations and forcing the logic of ownership to protect the right to health. At the beginning of the 70's the jurisprudence of merit began to build a parallel system for the protection of health[503], recognizing the legitimacy to act not only to those who are holders of less "intense" subjective positions, such as the right of enjoyment or residence, but also more simply to the holders of unqualified interests (such as the "use" of environmental assets). In this perspective, the recourse to art. 844 of the Italian Civil Code allows to achieve a further objective: to provide the protection of an effective remedy such as the injunction, which is considered typical and therefore not usable outside the hypotheses legislatively provided, and to use the criterion of "normal tolerability" as a *test* of lawfulness of the immissions. Article 844 of the Italian Civil Code is invoked in this direction in order to give entry above all to claims deriving from "cumulative emissions", i.e. from forms of pollution which alone would not be sufficient to constitute an emission with respect to a single fund, but which may become so when they are associated with others.

In 1974, the Constitutional Court intervened, according to which recourse to art. 844 Civil Code is excluded, but not to art. 2043 Civil Code for the protection of health and the environment (the criterion of normal tolerability only concerns the protection of property and is not valid for the purposes of qualifying the lawfulness of immissions that prejudice other interests) and that this interest "belongs to the community"[504].

A reading that does not close the door to a further investigation of art. 844 cc to verify whether the constitutional principles cannot prompt a revision of its current interpretation, squeezed exclusively between the two poles of the balance of the needs of production with the reasons of ownership, but without altering the

[503] It is a case of noise emissions from a factory that opens the way (Trib. Vigevano 27 March 1973, in *Giur. it.*, 1973, I, 2, 1085, for the compensation of patrimonial and non-patrimonial damage; Pret. Vigevano 6 April 1978, in *Giur. merito*, 1978, 671, which admits the possibility of an emergency measure *ex* art. 700 c.p.c.; Pret. Vigevano 15 June 1979, in *Giur. it.*, I, 2, 218) for the protection of health, which represents a limit that cannot be reduced even after payment of compensation. On this jurisprudence see F. CAMERIERI, *Responsabilità per danni da immisioni e da inquinamenti*, in G. Alpa - M. Bessone, *La responsabilità civile*, in Giur. sist. annotata, III, Torino, 1987, 10.

[504] Corte Cost. 23 July 1974 no. 247, in *Giur. cost.*, 1974, 2371, on which see C. SALVI, *Legittimità e «razionalità» dell'art. 844 c.c*, in *Giur. it.*, 1975, I, 1, 585 ss.

conditions of legitimacy[505], which are calibrated for the purpose of protecting the exclusive enjoyment of the property[506]. On the one hand, there are those who side with the solution hypothesized by the Constitutional Court, leaving to play a merely residual role of indirect protection of the healthiness of the places to art. 844 Civil Code. On the other hand, there are those who hope for a reinterpretation of art. 844 Civil Code in a constitutional key. The constitutional values in fact militate against a conception that is exhausted all and only in the protection of the interest in the productive use of goods[507] and therefore require the re-discussion of art. 844 Civil Code.

But the interpretation offered by the Court is above all a reading that leaves the question of the legitimacy of meta-individual interests completely open. On the contrary, it looks at the administrative jurisprudence for the decision on the legitimacy to act of Italia Nostra for the protection of the environmental values of the areas of landscape interest of the Italian territory, a decision that has aroused a wide debate[508]. The Court of Cassation, on its part, only after having tightened the connections between private property and health damage, should reaffirm the need to protect man's safety not only in the isolation of his own house, but also with respect to his associated life, "in the places of the various aggregations in which this is articulated and in reason of its effectiveness to the preservation of the indispensable conditions for his health"[509].

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[505] The legitimacy to act will then be recognized to the tenant and to all the owners of neighbouring and not only contiguous land (Cass. S.U. 9 March 1979 no. 1463 maintains the link with the right in rem with significant openings).

[506] More open to recognizing the instrumental character in the pursuit of collective interests U. BRECCIA, *Proprietà, impresa e conflitto di interessi costituzionalmente protetti, divieto d'immissioni e disoccupazione delle maestranze*, in *Foro pad.*, 1974, II, 61 ss.

[507] In this perspective, not only the interest in the receipt of the land rent must be considered, but also the interest in the use of the property for recreational purposes. The "adaptive" interpretation of the norm concerns the criteria for the judgment of tolerability and for the determination of the content of the indemnity protection and the modalities of the judgement of balance, which involves the sector administrative legislation as an integrative parameter. See C. SALVI, *Immissions*, cit., 375, according to whom only when this does not exist can the judge derogate from these parameters.

[508] Cons. Stato 9 March 1973 no. 253, in *Foro it.*, 1974, III, 34 with a note by Zanuttigh, in which the Court bases its decision on the juridical personality of the body and on its statutory aims (differently, Cons. Stato 14 July 1972 no. 475, in *Giur. it.*, 1973, I, 3, concerning the appeal of the hotel operators against the establishment of a chemical industry on the coast with prejudice to the landscape and environmental heritage). But see the closure in Cass. S.U. 8 May 1978 no. 2207, in *Giust. civ.*, 1978, I, with a note by Postiglione.

[509] Cass. S.U. 6 October 1979 no. 5172, in *Foro it.*, 1979, I, 2302 with a note by Lener, which recognizes together with health also the right to the preservation of the places where the associated life of the individual takes place" and Cass. 9 March 1979 no. 1463, in *Giur. it.*, 1979, I, 1, 726, which recognizes that the inhabitants interested in the location of a nuclear power station have not only a subjective right to health, but also a right to the environment granted in view of the "particular link that, in concrete cases, is established between the individual and the environment that surrounds him".

There is thus still room to attribute relevance to the truly collective dimension of the conflict in which the ownership of productive goods is opposed to the interest, not (only) of individuals, but of a determined community, in the preservation of a balanced environmental order.

The tight debate that follows brings to light all the complexity created by the intertwining of values around environmental resources. The right to health of art. 32 Cost., the "social function of property" of art. 42 Cost. and through the balancing mechanism provided by art. 41 Cost. The private economic initiative comes into play with the limits respectively of social utility on one side and of "security, freedom and dignity" on the other side.

Through the reinterpretation of traditional legal categories and in particular with the development of the legal asset, it becomes possible to draw on a series of conceptual tools capable of removing the generic nature of the debate on environmental protection[510]. This could now be configured as an autonomous legal asset, characterized by its own specificity, definitively removing its protection from the narrows of art. 844 Civil Code and the logic of ownership that inevitably accompanies it.

The connection between the right to health and the environment gives the former a concrete objective reference that broadens its scope, involving that web of conditions and (environmental) factors that allow the individual to fully develop as a person and makes its collective scope clearly perceptible. The judicial conformation of environmental assets offers wide enough margins to attribute the ownership of a situation of advantage also to different subjects who may be interested in the way those assets are used.

The object of protection is then a good, consisting of the overall conditions of healthiness of a given environment, also qualified as collective, whose ownership is due to a plurality of subjects, not as a sum of individuals, but as a collective unified by its roots in the same territorial entity. On the basis of this reconstruction, the legitimacy to act can then also be attributed independently from the presence of an exponential body, that is, only by virtue of the effective social aggregation,

[510] In this perspective S. RODOTA', *Le azioni civilistiche*, in *Le azioni a tutela degli interessi collettivi*, Padova, 1976, 100 ss.

established on the basis of criteria that can be inferred from regulations[511].

The identification, under the civil law profile, of a legal asset in the strict sense on the basis of articles 32 and 41, 2c. Const. opens completely new scenarios in terms of civil protection. This can now proceed on a double level - that of the civil illicit and that of the damaging fact from which the responsibility derives - whose remedies with the relative presuppositions, in line with the acquisitions of the previous decade[512], will be clearly diversified. The injunction resulting from the injury of the legal asset - and therefore not the violation of a simple legal rule for the protection of the environment or public health - will be recognized as playing a crucial role in the protection of the collective interest. The remedy is a candidate to constitute the main instrument with which the control of productive activities (and not only of single legal acts)[513] can now be carried out. The indemnification protection is not put out of play, however, it only remains to occupy the interstices left free by the first. In front of it, there are two possible paths: that of the aggregation of actions for compensation carried out by individuals or that of moral damage through the constitution of civil part of the associations[514].

In reality, the rich discussion to which the actions for the protection of collective interests gave rise was progressively frozen. The solutions which the jurisprudence of the Supreme Court adopted at the end of those years almost totally disregarded it.

In the meantime, the question of whether the request based on a widespread or collective interest was admissible was answered in the negative by jurisprudence, which underlined how our system grants protection only to "differentiated" situations, i.e. typical of a specific subject[515].

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[511] The most complete elaboration is in C. SALVI, *Note sulla tutela civile della salute*, in *Tutela della salute*, cit., 477, where also the reference to Pret. Rome 18 March 1977, in *Pol. dir.*, 1977, 21.

[512] Among Others, R. SCOGNAMIGLIO, *Illecito*, cit., 164; S. RODOTA', *Il problema della responsabilità*, cit., 50; P. TRIMARCHI, *Illecito*, cit., 90.

[513] On this point, in those years, the work of A. FRIGNANI, *L'injunction nella common law e l'inibitoria nel diritto italiano*, Milano, 1974, contributes to removing many of the prejudices against injunctions as a general remedy against torts lasting in time (iterative or continuous).

[514] Among others, Pret. Sampierdarena 13 February 1974, in *Foro it.*, 1974, II, 419, which recognized the compensation of the inhabitants of an illegally subdivided district who had taken part in the civil action. On the debate in those years, L. ZANUTTIGH, *La tutela de gli interessi collettivi (a proposito di un recente convegno)*, in *Foro it.*, 1975, V, 73; V. DENTI *Relazione introduttiva*, in *Le azioni a tutela di interessi collettivi*, cit.

[515] Court of Cassation 8 May 1978, no. 2207, cited above, excludes the legitimacy of the bodies carrying widespread interests because they do not have a "differentiated" situation, i.e. recognized by the law as their

A second decisive step towards the definitive re-absorption of the question of diffuse interests within the conventional framework was to be taken by the Court when it subsequently translated - while placing all possible emphasis on the content of sociality that colours the right - the right to the environment into a "right to a healthy environment" along the lines of German case law. In this perspective, in fact, environmental degradation becomes the cause of the deterioration of individual health and no longer the object to which protection is directly addressed[516]. In fact, the protection of the environment as a value in itself is different from the protection it gives rise to insofar as it is connected with property or individual health.

This is the area of diffuse interests where the question of the legitimacy of the judge and the limits to his "substitution" was destined to explode, in all its problematic nature.

This arose from the difficulty of a truly "Herculean" intervention such as that which the judge was called upon to carry out in order to offer protection to the environment without interfering with the interests of the company (and the workers). In reality, intervention in favor of health or the environment was not only fraught with technical difficulties, but also brought in a conflict, which could no longer be reduced to the classic inter-subjective dimension typical of private law. The possibility of carrying out an injunction, paralyzing the productive activity (or allocating all the costs of repairing the damage to the company with the consequent exit from the market) to protect the environment, obviously tends to affect not only the private economic initiative, but also produces consequences for those who work in the company, jeopardizing their rights.

The reorientation of the model of development which brought to the center of attention issues such as the environment, energy, the "quality of life" and the criticism of profit as the dominant value, did not slow the collision between the problem of employment and therefore with the need to protect and broaden the

own; see also Court of Cassation 9 March 1979, no. 1463, cited above (however, it opens up to an indirect protection with the legitimacy of the territorial bodies in the constitution of a civil plaintiff. S.U. 21 April 1979 in *Foro it*., 1979, II, 402, outlining a trend more favorable to the penal judge that will be confirmed over the years).

[516] Decidedly on the path of personality rights see S. PATTI, *La tutela civile dell'ambiente*, Padova, 1979, and ID., *Ambiente*, in *Dizionari del diritto privato, Diritto civile* (edited by N. Irti), Milano, 1980, 31.

productive base. Certainly, conflicting goals that, for a satisfactory solution, would have required an adequate planning of economic and productive processes.

Faced with this conflict, however, the answer that the judge can offer is not considered technically adequate, nor politically legitimate. The idea that the judge, through his decisions, should not and cannot dispose of what is at stake makes it necessary to recover a different solution, a solution that refers to some form of political mediation.

It is in this context that the idea that only a plurality of instruments of intervention is capable of ensuring an effective control of private activities is also gaining ground; in short, it is the "integrated legal strategy" that was proposed a few years ago that is coming to the fore[517].

Within this framework, the solutions for the protection of the environment are sought in recourse to legislative intervention and in the determination by the administrative authority of ad hoc *standards* capable of giving concrete form to legislative formulations, correcting their abstractness and the generality in the field. In the background is the aspiration to achieve a more comprehensive renewal of the institutional framework, bringing in the *expertise* of technicians to enrich it and simplifying its functioning through less formal procedures. In short, they look to the American model of *agencies.*

All that remains for judicial intervention, then, is a more circumscribed role. As to how the judge should perform in the rooms left free, voluntarily or not, by public intervention, opinions are not univocal. It could be residual, possibly even corrective of the administrative activity, with respect to private activities contained within the standards, but in any case, harmful, or directed to defend interests not contemplated by public intervention and in any case deserving of protection (not excluding those of groups). Thus, even within the mechanisms of art. 844 Civil Code, the judge must adapt to the choices of the sector legislation

[517] The reference is to S. RODOTA', *Il controllo sociale*, cit., but see also M. BESSONE - V. ROPPO, *Strumenti amministrativi e principi di tort law nei programmi di tutela dell'ambiente*, in *Foro Pad*., 1974, II, 73; G. ALPA - M. BESSONE, *Iniziativa economica privata e tutela dell'ambiente*, in *Riv. dir. comm.*, 1974, I, 248; M. BESSONE, *Tutela dell'ambiente, amministrazione per agencies e funzione giudiziale di controllo*, in *Riv. trim. dir. pubbl*., 1978, 1020; M. BESSONE, *Politica dell'ambiente, "judicial role" e interessi diffusi*, in *Pol. dir*., 1979, 185. On the problem, more generally, see AA.VV., *Il governo democratico dell'economia*, Bari, 1976.

when they exist, variously configured as criteria to give substance to the judgement of balancing the immissions to be considered intolerable by the second paragraph of art. 844 Civil Code[518].

However, the slow eclipse of collective action and the consequent downsizing of environmental issues will leave some acquisitions in the field.

In the meantime, the depth of a survey remains, which has clarified the complexity that accompanies this type of controversy, the different damaging events (which can affect individual interests together with collective interests or only the latter) which determine them and as such require differentiated analyses. However, different typologies to which one can add micro damaging events, i.e. injuries of such little importance that they discourage the individual from starting an individual dispute, which cannot be repaired if not considered in their collective dimension (this is the case of some torts against consumers and users).

The question of the limits of the indemnity protection was then underlined, once and for all, both in the sense of its concrete articulation, and more generally with respect to the problem of the "monetization" of non-patrimonial values. Themes that will then engage the jurists for the whole of the following decade and beyond[519]. The collective nature of certain conflicts is an acquired fact. And this reassessment brings to light the need to escape from the dichotomy between public law, the activation of which is entrusted to state bodies, and private law, the latter understood not only in the sense of a form of protection entrusted to individual initiative, but also in the sense of a form of protection of interests with an exclusively patrimonial content. The rapid decline of this "third way" will not, however, allow us to investigate and verify, beyond single episodes in the field of the theory of goods and procedural law, all the other ways in which it is possible to re-attribute - through civil law - power to "weak" groups (collectivities, classes, classes).

[518] Thus C. SALVI, *Le immissioni industriali*, Milano, 1979, 400.
[519] Beginning above all with A. DI MAJO, *La tutela civile dei diritti*, Rome, 1981.

4. The emergence of diffuse or collective legal interests and relationships, and the lack of capacity of the isolated individual to defend them

In this context, a growing number, in number and importance, of relationships and activities, involve not only single subjects, taken in isolation, but groups, classes, and entire categories. Interests typical of this new world, such as those to health and the natural environment, have a "widespread", "collective" character, since they do not belong to individuals as such but to the community. The protection against their violation assumes very particular characteristics and an importance hitherto unknown in the history of civilization and law.

It is clear that the individual alone cannot adequately protect himself against this type of violation; it is clear that something new must be born, and yet this something no longer consists only of those few types of "intermediate societies", which were discussed (and it was a very advanced discussion at that time) at the time of the Constituent Assembly and in the 1950s and 1960s. The pioneers of all this discourse are well-known[520]. But today the problem of intermediate societies is a problem that must be enormously enlarged: it is no longer a matter of those typical "social formations" - family, school, church, trade unions, parties -, which have already emerged in the Constitution, today new and no less important types of intermediate societies are imposed, whose development was perhaps not even foreseeable a quarter of a century ago. Today, in our "consumer civilization", it becomes more and more essential for the individual-consumer (as it was a century ago for the individual-worker) to organize himself into a "consumer society" in order to defend himself against abuses and other problems unknown to previous civilizations; today it becomes equally more and more essential for the individual to organize himself in order to protect the natural environment against blind selfishness and the folly of defacement and pollution, which can even endanger the very survival of humanity. And a similar speech can be made for the level of protection, for example, of the small and medium saver and shareholder against the abuses of banks and joint stock companies and other groups of economic and financial power.

[520] Amongst many others, see in the Italian scholarship P. RESCIGNO, *Persona e comunità*, Il Mulino, 1966.

5. The influence of economic analysis of law (in Calabresi's contribution)

The 1970s also saw the beginning of a certain curiosity about economic analysis and North American law, a curiosity that in some cases even turned into a veritable idyll. In times like ours, when economic analysis has been marked by the mark of conservation, the association may even appear strange. Yet it was not always so. Indeed, in the early days, economic analysis even had a progressive colouring, only later reworked to secure "politically neutral" solutions. In fact, it is one thing to try to understand the economic effects produced by certain juridical rules, recognizing that law has the task of guiding the process of distribution of resources, and that therefore a functional analysis can start from the examination of some allocative hypotheses in order to analyze the effects that the system produces, either directly or indirectly[521]. On the other hand, it is one thing to attribute a prescriptive coloration to it, calling it in support of the principle of conforming the law so as to "mimic the market"[522].

In 1975 Calabresi's work on the Cost of Accidents, which had been published in the United States in 1970, was translated, accompanied by an introduction by Rodotà (quoted at least as much as the work itself, but read perhaps even more)[523]. In that book Calabresi, taking a position on the problem of the liability regime for the circulation of motor vehicles, which had been the subject of an intense discussion in the United States in those years, makes a significant re-reading of civil liability. In this work, which was destined to become famous, Calabresi clearly places the question of civil liability within the framework of a basic

[521] In this perspective state intervention has costs that reduce overall welfare, so it is necessary to select those interventions to mimic what the parties would have done if there had been no settlement costs. The reference in that period is mainly to Posner's work; see a *summary* in R. POSNER, *The economics of justice*, 1981 (ed una discussione in J.L. COLEMAN, *The normative basis of the economic analysis: a critical review of Richard Posner's «The economic of justice», 34 Stan. L. Rev. (1982), 1100*). Da noi R. PARDOLESI, *Luci ed ombre nell'analisi economica del diritto (appunti in margine ad un libro recente)*, in *Riv. dir. civ.*, 1982, II, 718 ss. E per la responsabilità G. ALPA, *Colpa e responsabilità oggettiva nella prospettiva dell'analisi economica del diritto*, in *Pol. dir*., 1976, 631.

[522] The secret of allocative efficiency, promising to make both parties *better off*, is to ensure that they do not take part in the social struggle, that they do not alterize the antecedent distribution, indeed that they produce the result which the parties would have produced but for the transactional costs, see Du. KENNEDY, *Distributive and paternalist motives in contract and tort law, with special reference to compulsory terms and unequal bargaining power, 41 Md. L. Rev. (1982)* and P. SCHLAG, *An appreciative comment on Coase's The problem of social cost: a view from the left, 1986, Wisc. L. rev. 919*.

[523] G. CALABRESI, *Costo degli incidenti e responsabilità civile. Analisi economico-giuridica* (transl. it. with presentation by S. Rodotà), Milano, 1975, immediately reviewed and discussed among others by P. TRIMARCHI, *Economia e diritto nel sistema della responsabilità civile*, in *Pol. dir.*, 1971, 353 and by A. GAMBARO, *Costo degli incidenti e responsabilità civile*, in *Resp. civ. prev.*, 1975, 375.

political choice: to consider *torts* - to use the terminology introduced by Dworkin - as matters of *policies* and not of *principles*. Calabresi looks at the problems posed by motor vehicle traffic not simply from the classical perspective of avoiding at all costs the damage caused by accidents, but also and above all from the more realistic perspective of containing the costs that the community has to bear because of accidents. Among these Calabresi includes not only the cost of avoiding accidents (the costs of prevention) and that caused by the need to redistribute them (the costs of redistribution), but also the cost of administering these systems[524]. In short, Calabresi's objective is the minimization of the costs of accidents and of the activity necessary to avoid them. An objective that must be achieved in a way that respects justice and fairness.

Calabresi, first of all, posing the problem of accident prevention, concludes that it is rational only when the costs of prevention are lower than those expected from the accident. If this is not possible, the costs must not remain on the victim, but must be redistributed, with whatever instruments are available, in such a way as to reduce the impact on individuals. In this way the analysis could not make it clearer that, considering accidents as a social problem, there will always be two issues to be solved: the minimization of costs and their distribution.

Calabresi proposes that it is precisely those who are in the best position to make choices according to the cost/benefit analysis who should be placed, by the law, in a position to do so[525].

At the same time, however, the doubt is beginning to arise that, sometimes, the party that can really reduce the cost of accidents is not among the two (or more) parties to the dispute before the court. Neither with regard to prevention, nor with regard to compensation, does looking within them seem the optimal solution[526].

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[524] These are respectively the *primary, secondary* and *tertiary costs* at the centre of the analysis of G. CALABRESI, *Costo degli incidenti*, cit.

[525] Calabresi responded to Posner and to the ethical veins of his analysis when he posed a problem of overall legitimation of the system of civil liability within the framework of the system, based on the primacy of the principle of fault, to which he in fact contrasted a different form of legitimation based instead on *strict liability*. On the point in those years, G. ALPA, *Colpa e responsabilità civile*, cit.

[526] With respect to the first objective the sanction comes up, it is evident that it is necessary to reduce the risks, whether or not they translate into damage for individuals; with respect to the second objective the system of automatic indemnity comes up, through the institution of funds the process is in fact costly. But these too have their problems, as will also be clarified later: cf. G. CALABRESI, *Costo degli incidenti, efficienza e distribuzione della ricchezza*, in *Riv. crit. dir. priv.*, 1985, 7.

Taking Calabresi seriously, then, means recognizing that civil liability is not actually the best means to achieve those goals, but simply a compromise. And, as such, it needs constant adaptation and monitoring.

Calabresi highlights the presence and complexity of the distribution profile and of the relative choices: in fact, the losses can remain where they fell (on the victim and on his family) or be transferred to the damaging party (and therefore on the entire category of subjects of which he is an exponent, the drivers or the manufacturers) or to his insurance company, or through automatic compensation systems still on the drivers as a class or, through the State, on all the citizens who pay taxes.

In reality Calabresi's book was destined to change the entire way of considering civil liability. The classic question that scholars had been asking until then, namely whether and when a subject should compensate another for the damage he had caused, was replaced by another: what society should do about the damage (caused by accidents). And the law of responsibility is one of the possible answers: an instrument to solve a social problem.

Calabresi's vision makes it possible to realign the problem of responsibility with the logic of welfare: faced with an unfortunate event that causes a loss, civil responsibility, through the insurance mechanism, promises to share the costs, achieving a minimum impact on the injured parties[527].

Calabresi's vision also leads to the overturning of the perspective through which civil liability had been considered in the *mainstream*: it is no longer a question of looking only at the past in order to restore the assets of the damaged party, but it becomes necessary to look at the future as well, recovering a preventive function for civil liability. In fact, no result can be considered truly efficient when it is limited to merely shifting the loss *ex post* from one subject to another; instead, it is also necessary to induce individuals (or entire groups) to take all the necessary precautions *ex ante* to prevent damage from occurring. Whether this function is

[527] The expansion also poses the role of society in the face of inequality: what difference is there between the costs caused by accidents and those caused by other events in life and by the conditions of existence? Cf. C. SALVI, *Il paradosso della responsabilità civile*, in *Riv. crit. dir. priv.*, 1983, 123 ff. and ID., *La responsabilità civile*, in Tratt. dir. priv. *Iudica-Zatti*, Milano, 2005.

then to be achieved through the market or otherwise is a different matter. The (rule chosen for the) solution of the conflict is therefore destined to have an impact not only on the single subjects involved in the damaging event, but on the whole society.

Considering civil responsibility as a social problem, however, also laid the groundwork for its eventual overcoming in the face of other systems that could be judged better able, from the very same perspective, to achieve the objectives of responsibility.

There is no clearer demonstration of how private law, through its institutions, can become the engine for social change and especially how this goal can be efficiently achieved.

If anything, the problem became how complex aims of the type outlined by Calabresi could be administered by a mechanism like civil responsibility, without the intervention of the legislator. In any case, it had become clear that the individual function of repairing damage (corrective justice), could not by itself exhaust the explanation of the institution, alongside it a wider social function was now present and clearly recognizable. Now it was only a question of delimiting the boundaries of this function and finding a principle in the system that could justify it[528].

6. Civil liability costs between prevention and distribution

Beyond the frank acknowledgement in favor of economic pressure as the only weapon capable of working to realign the (private) action of business with social interests, doubts remain. In fact, the reading of civil liability within market mechanisms continues to raise perplexities.

Yet a more careful reading of Calabresi could have offered all the necessary corrections to move with a fair degree of security within the market. In fact, in

[528] Solidarity will again be looked at, this time not to extend the area of indemnifiable damage, but to identify on which subjective sphere the cost of the damage must be allocated, and before that the burden of avoiding it, cf. C. CASTRONOVO, *Problema e sistema nel danno da prodotto*, Milano, 197, 599, who, in the framework of a reconstruction, moves in the sense of shifting the attention from the product to the activity that precedes it and "from what comes after (the damage) to what constitutes the reason (the activity of production and distribution)". (C. Castronovo, op. cit., 696).

Calabresi's model of liability insurance and the consequent distribution of costs are constantly combined with accident prevention. In fact, it is precisely on this basis that his decisive criticism of fault can be conducted, concluding that strict liability is accredited as a decidedly superior tool, in many sectors, for achieving the typical aims of a civil liability system.

Calabresi does not deny the tension that sometimes arises between the two objectives, but he acknowledges that neither function can be pursued optimally while the other is being pursued.

Calabresi shows how both the injured party and the damaging party are potentially in a position to take precautions that reduce accidents (so that not only the damaging party, but also the victim can take precautions to avoid the damage) and to distribute losses (so that not only the damaging party, but also the victim can take out insurance, in short, it depends on the circumstances to identify the *cheapest cost avoider*), opening the way for a more sophisticated evaluation[529]. Above all, Calabresi tries to clarify how the weakening of the deterrent efficacy, caused by insurance, works only if the point of view of the individual is taken; the same does not happen if the point of view of the category is taken.

The possibility for the insurance company to be able to distribute the risk in an optimal manner that depends on the ability to differentiate the premium between the various categories of insured based on the typical risk of each of them: therefore, the less differentiation that can be achieved among the insured, the greater the distribution and vice versa, that is, the greater the differentiation, the less the distribution. The outcomes with respect to prevention operate in the opposite direction to those of distribution. Thus, in the second case (i.e. when the distribution is lower because it has been possible to differentiate with a certain precision between the various categories), on the other hand, the incentive to prevent the accident increases[530]. And consequently, it also becomes clear that if

[529] Among the many, particularly significant are the works of R. COOTER, *The costs of Coase, 11 J. Leg. St. (1982), 1*; ID., *Prices and sanctions, 84 Col. L. Rev. (1984), 15* and ID., *Unity in tort, contract and property: the model of precaution, 75 Cal. L. Rev. (1984), 1*, which will be destined to exercise a fundamental influence also on a part of the Italian doctrine.

[530] Thus, in the classic case of the defective lawnmower, if the costs are left on the victims, according to insurance practices they can insure them as generic damages to health or personal integrity, which certainly do not specifically reflect this type of damage, escaping a rational calculation on the part of the victims. For research on the role of insurance and the relative dynamics see G. ALPA, *Teoria e ideologia nella disciplina dell'illecito*, in *Riv. trim. dir. proc. civ.*, 1977, 812; V. ROPPO, *Sul danno causato da automobili difettose.*

the system fails to combine the two elements of risk distribution and prevention, it is because of an insufficient distribution of risk, because of the costs of building risk categories, because of the inability of individuals to assess risk, because of the inability to buy insurance or because it is impossible to do so if one is not wealthy enough[531].

Therefore, an element that varies according to the circumstances, leading to different conclusions depending on whether one moves from the context of motor vehicle accidents to that of corporate liability. In fact, in the latter sector, it is almost always possible to differentiate the insurance premium by tailoring it to the degree of risk posed by the various activities (and individual entrepreneurs). The same is not always the case in other sectors, such as motor vehicles, which require partially different considerations.

Since then, if it has been possible to continue declining solidarity, expressed by third party liability, with prevention, it has been done on this basis, i.e. thinking that the insurance mechanisms were - through the categorization of risks and other instruments (capable of conditioning the behavior of the insured) - in any case capable of transferring the pressure on the author of the damage (through the price of the policy), even if the conclusions are far from univocal[532].

And always a more careful reading would have allowed a fine-tuning of the problem of "non-monetizable" costs. Calabresi insists on the presence of these kinds of costs right from the start when he addresses the need to dispel two myths: that society is willing to protect life at all costs and that economic calculation can offer an answer to all questions. Not all costs are monetizable, that is, reducible to economic calculation, but even those that are, sometimes, cannot be effectively dealt with through the (method of) the market. With respect to the former, Calabresi distinguishes the hypotheses in which costs cannot be monetized, that

Tutela dei dan- neggiati, regime di responsabilità e incidenza dell'assicurazione obbligatoria, in «Giur. it.», 1978, IV, 130.

[531] G. CALABRESI, *Costo degli incidenti*, cit., 63 and for producer liability, 78 (but much earlier in G. CALABRESI, *Some thoughts on risk distribution and the law of torts, 70 Yale L. J. (1961) 499, 519* and G. CALABRESI, J. T. HIRSHOFF, *Toward a test for strict liability in torts, 81 Yale L. J. (1972) 1055*).

[532] Among others R.A. EPSTEIN, *Products liability as insurance market, 14 J.leg. St. 645 (1985)*; G.L. PRIEST, *The current insurance crisis and the modern tort law, 95 Yale L.J. 1521 (1987)*; S. SHAVELL, *On liability and insurance, 13 Bell J. of econ. 120 (2001)* e K.S. ABRAHAM, *Distributing risks: Insurance, legal theory and public policy, Yale University Press*, 1986, 64; J.D. HANSON, K. LOGUE, *The first party insurance externa- lity: an economic justification for enterprise liability*, *76 Corn. L. Rev. (1990)*; S.P. CROLEY, J.D. HANSON, *Rescuing the Revolution: the revived case for enterprise liability, 91 Mich. L. Rev. 683 (1993)*.

is, they cannot find an equivalent value in the market, from those in which there is a "moral" component that enters in various ways into the evaluation, making it impossible to translate them into market mechanisms[533].

And it is here that the idea of *specific deterrence* emerges as a form of collective intervention that induces actors to take into account the different estimation of costs, according to the evaluation of the law or of society, avoiding that they are ignored (i.e. they remain on the victims). Calabresi does not ignore the complexity of these interventions, which are based on a political evaluation of activities considered excessively risky, and the Herculean effort that is sometimes necessary to successfully incorporate them into the various mechanisms[534], stressing on several occasions the inevitable intertwining that is created between the two methods: *general* and *specific deterrence*[535].

It is opportune to remember how this detailed treatment of non-monetizable costs, three years later, will be the basis on which Calabresi will lay the foundations of one of the three rules, the *inalienability rule*, which together with the better-known *property rule* and *liability rule* characterizes the arch-famous grid of the "other view of the Cathedral", and marks precisely the limits beyond which the logic of the market cannot extend.

Seen against the light, the explanation of the *inalienability rule* - moreover very often ignored by the literature, which has shown great attention, even in our country, to the other two rules - is in fact quite far from the traditional terrain of economic analysis. If we consider it as an extreme solution able to respond to situations in which, because of too high transaction costs, neither the rule of

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[533] The former is different from the latter, which depends on a moral judgement, which tends to become autonomous, even where it is initially linked to non-monetizability; although it corresponds to a judgement that is widespread in the community, an even significant number of its adherents do not adapt themselves to it voluntarily. On this point G. CALABRESI, *Costo degli incidenti*, cit., 99.

[534] Unlike *general deterrence*, *specific deterrence* requires the global evaluation of both the value of the activity and its costs. S. Rodotà insists on the integration of the two methods, in his presentation of the book by G. Calabresi, *Costo degli incidenti*, cit.

[535] On these issues F.I. MICHELMAN, *Pollution as a tort: a non-accidental perspective on Calabresi's Costs, 80 Yale L.J. (1970), 647*, for other cases in which the allocation of responsibility on the firm does not produce a set of costs that can be immediately reflected on the quality of the product and therefore recovered through its market price. And again, in this perspective, Calabresi's model (contrast between primary and secondary costs) sheds light on a fundamental problem for this kind of litigation, the way in which one should respond to the probability that an injunctive remedy may push the firm out of the market and thus cause some severe (though theoretically temporary) local problems. In fact, the problem of secondary costs can be solved through a state intervention that deals with minimizing these costs (by resorting to integrated forms of control), without giving up the deterrent effectiveness of liability.

ownership (because of the lack of or impossible coordination of all the interested parties), nor the rule of responsibility (because of the chain externalities that it may cause) are able to work, it is evident that what is under discussion is precisely the recourse to the market and the (political) decision not to entrust it with the solution of certain problems. Rather than correcting the errors of the market through mechanisms inspired by its own logic, the *inalienability rule* tends instead to take away some of its resources, putting it out of the game with respect to them[536]. 18.Perhaps it is opportune to start again from this sort of selective reading of the "Cost of accidents" that we can witness in those years. It comes to light an overall tendency of the legal culture (of the left, but not only) to underestimate, almost to the point of completely ignoring, some features of Calabresi's analysis. And strangely enough, it is precisely those that most highlight his realist matrix. Emblematic among them is the reading of the two methods of control, represented by *general deterrence on the* one hand and by *specific deterrence* on the other. This is mainly interpreted as a contrast between the market and legislation. In this perspective, there is a radicalization between the two worlds which also involves the vision of civil responsibility. This, considered as a simple factor in economic calculations, can be reabsorbed entirely into the sphere of the market and thus detached from that of collective intervention, which then remains an isolated phenomenon, destined to operate *ad hoc* only in specific sectors.

On the contrary, in Calabresi's works, once the screen of the separate treatment of the two methods has been overcome, a different vision clearly emerges in which there is a continuous "problematization" (of the legal structure) of the market. Calabresi recognizes the role of law in the construction of the market and in the determination of values, undermining the distinction between the private, natural and non-political area constituted by the market and the public world of politics and state legislation. The two "worlds" and the different allocative methods to which they give rise are constantly compared on the basis of their respective costs

[536] The point will be clarified later by M.J. RADIN, *Market-inalienability, 100 Harv. L. Rev. (1087), 1879,* which underlines how the subtraction of some resources from the market, does not necessarily mean subtracting them entirely from social relations through the models of *incomplete commodification* and *modified market inalienability*. And on the distributive effects see S. ROSE ACKERMAN, *Inalienability and the theory of property rights, 85 Col. L. Rev. (1985), 931*.

of constitution and operation.

Thus, the choice between the market method and the collective method (regulation) is always the result of a *policy*[537] decision. And so, the choice for regulation, unlike what the classical approach considers, never requires a *surplus of* justification with respect to the market. A perspective that allows us to continue to fight the separation between public and private also because of the ideological value inherent in the creation and maintenance of the two different fields. In spite of the continuous criticism to which it has been constantly subjected, the dichotomy continues in fact to survive, carrying out a subtle rhetorical function since it allows to continue to keep separate a series of relationships, ascribed to the private area, from others, ascribed instead to the public, with the not irrelevant consequence of denying in the former the legitimacy of the regulatory intervention.

Even if we proceed, more often than not, to a separate treatment, it appears evident how *specific deterrence* understood as collective ("centralized") decision-making is in most cases intertwined with *general* ("decentralized") *deterrence.* On the contrary, in the concrete life of systems, there are always structural modifications of one and the other, which are never found in their pure form. Strict liability itself cannot be separated from a significant intervention of a "collective type" that allows the decision to be "centralized", at least as regards the activities to which it is to be attributed and the evaluation, which is entirely left to the courts, of the extent of the damage.

It is then simply a question of perspective. The same technique, such as the imposition of a sanction or of another burden on a certain activity, may in fact be considered, from one perspective, as a form of *specific deterrence* necessary to achieve the internalization of a cost which the mechanism, to which the matter is delegated, does not consider itself capable of achieving ("centralization"); but the same technique can, equally, be considered, seen from another perspective, as a

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[537] "Responsibility for decisions lies with the community, not with economic laws. And when we decide, in spite of the market, to prohibit a dangerous activity, even if it would be able to compensate for the damage it causes, or, on the contrary, to encourage an activity that would not have such a possibility, we do not see absolute laws. We operate, in substance, the same kind of choice between accidents and dangerous activities that the market would operate, but we decide, for perfectly valid reasons, to do it in a different way". See G. CALABRESI, *Costo degli incidenti*, cit., 40.

form of *general deterrence*, since it leaves a certain space for individual decisions ("decentralization"), compared to an absolute prohibition to carry out a certain activity.

In reality we are always faced with "mixed" techniques, as is made clear by the title of another important work, written in 1972, but translated and published in Politica del diritto only in 1978, in which Calabresi is able to characterize the entire system of civil responsibility as the law of the "mixed society"[538]. This was precisely to underline the flexibility of civil liability that allows it to function as a hinge between collectivist and liberalist drives (between inertia and intervention by the legislator) - here again taking up the realist theme of "disguised public law" - that is, as a functional substitute for deliberate policies. Civil responsibility would allow the coordination of activities that one does not openly want to prohibit, allocating to them all the costs they cause.

Liability would therefore have several advantages over legislation. First of all, it does not force the *decision-maker to make* a final choice, as happens in all those cases in which he has to decide to prohibit a certain activity, thus deferring the decision and leaving him a certain margin for experimentation. The way of responsibility then also makes it possible to avoid the public affirmation of the disvalue of a given activity which would instead result from an express legislative ban.

This means, however, to give back centrality to the role of the judge and to the mechanism of functioning of the responsibility.

Always faithful to its realist origin, then, Calabresi's book does not disavow the distributive effect of the rules of private law, the whole treatment brings out how the choices on liability can have an impact on the distribution of resources: the profile of the efficient allocation of resources is constantly integrated with the distributive one. The questions posed by decisions on how to allocate losses or on the liability rule to be adopted are always placed against the background of wealth distribution, i.e. how different solutions can favor greater equality in the overall distribution of resources or how they can affect a particular category of subjects,

[538] G. CALABRESI, *La responsabilità civile come diritto della società «mista»*, in *Pol. dir.*, 1978, 665 (trad.it. di *The Law of a mixed society, 56 Tex. L. Rev. (1972), 519*).

favoring those who appear socially deserving[539].

The presence of this distributive dimension, which private law can exercise, raises many questions[540]. It seems, however, evident that not everything must be resolved by public law and in particular by the tax system, through a subsequent transfer of wealth. And this, together with the function of the judge, reallocates importance not only to the way of determining keywords such as guilt, injustice, and non-patrimonial damage, but also to all the other "little" rules of thumb that accompany their application, but determine their concrete results.

Of course, the redistributive scope of civil liability between different groups will again vary according to the different situations. It cannot be enormous, in fact, in the case of motor vehicle accidents; since the injured parties are not ascribable to particular classes and, if the damage is allocated to the motorist, redistribution operates, if anything, within the same *pool* made up of all motorists. This is not the case, as we shall see, with product liability.

Although they share many points of departure - in particular the need to overcome the abstraction of the classical vision in which the starting legal situations are formally placed on a level of equality - the analysis in distributive key will never be able to meet, however, with that which moves from the conflictuality and antagonism of the interests at stake.

7. The redistributive effect of liability rules

And yet, choices regarding distribution are a recurring theme in Calabresi's work. In the same period of time, two other works appeared (one of which was never translated in its entirety), in which the issue was openly addressed. In the "other view of the Cathedral" Calabresi, dealing with the question of the rival use of resources, deepens the idea that the judge can, by intervening *ex post*, modify the

[539] G. CALABRESI, *Costo degli incidenti*, cit., 115; G. CALABRESI, J.T. HIRSCHOFF, *Strict liability*, cit., 1081. The point is now well documented in the context of Calabresi's entire work by V. GREMBI, *Guido Calabresi e l'analisi economica del diritto*, in *Riv. crit. dir. priv*., 2006, 449.

[540] Calabresi does not exclude that it is theoretically possible a system of civil responsibility leading to a better overall distribution of resources, but he finds it extremely difficult to hypothesize, in practice, a mechanism capable of achieving it without compromising allocative efficiency. Certainly, a system of civil liability that tends to worsen an already bad distribution is unacceptable, even if it should prove to be allocatively efficient, since it can turn out to be so disruptive. The distributive dimension, above all at a category level, is well understood, even if not problematized by C. CASTRONOVO, *Problema e sistema nel danno da prodotto*, Milano, 1979, 632.

initial distribution of the resources, operating a reallocation[541]. It is therefore the judge who carries out the allocation through the configuration of the remedy, in a way completely independent of the initial ascription of the right[542]. In the second work, distribution is analyzed in the even more critical field of "Tragic Choices". Emblematic is the discussion on the values put into play by the allocation of tragically scarce resources, whose treatment is removed from the purely philosophical level to be *tested* according to the impact (also distributive) actually produced in different societies. In this perspective, not only are the ways in which these choices are made by the various institutional apparatuses analyzed, but above all the ways in which, after having made them, these choices can be concealed are revealed.

The progressive inattention to this aspect will allow the economic analysis to take on, in time, even in our country, a completely different sign, detaching itself from the original project. The use that will be made of the "other view of the Cathedral" is proof of this.

In “The Cost of Accidents” the observer is immediately projected into a dense debate that deals with the complex series of social aims that the tort system can fulfil, and with the possible reasons that justify the relative choices. Calabresi's reconstruction leaves no doubt as to the *policy* choices - whatever the reasons of distributive justice, corrective justice or allocative efficiency that justify them - that must be made through the tort system. And, entirely in line with the *cliché* of legal realism, such is also considered the decision to leave the loss where it is.

There is no way out, then. In any case, in fact, the law (of civil responsibility) must protect the interest of one individual to the detriment of that of the other. Civil responsibility, if it expands the freedom of action of one subject (or of a category of subjects), exempting him from compensation for the damage he causes, reduces the security of another (or of another category) and vice versa; if it guarantees the

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[541] G. CALABRESI, A.D. MELAMED, *Property rules, liability rules and inalienability: one view of the cathedral, 85 Harv. L. Rev. 1089 (1972)*, which will appear in a revised version in *Interpretazione giuridica ed analisi economica* (a cura di Alpa, Pulitini, Rodotà, Romani) Milano, 1982.

[542] G. CALABRESI, P. BOBBIT, *Tragic Choices*, W.W. Norton & Co., New York, 1978, translated into Italian as *Scelte Tragiche*, on which the review by F. Pulitini, *«Scelte tragiche». Nuovi sviluppi della analisi economica del diritto*, in *Pol. dir.*, 1978, 457.

sphere of one, it contracts the freedom of action of the other. In this panorama, the choice of a rule favors some interests to the detriment of others, leaving winners and losers in the field[543]. All other considerations, starting with those related to efficiency (as well as to distribution and other objectives of justice) can remain in the background.

In the system exhibited in the Cathedral, Calabresi, and Melamed deal instead with a different case. In contrast to accidents, in the rival use of resources, the possibility of preventing damage regains its place. In allocating the costs of liability, the law now has no longer two, but (at least) three different options: letting the activity take place freely, preventing it with an injunction (and possibly a criminal sanction), allowing it to take place but bearing the full cost of the damage it causes: *liability rules* allow illegal actions, they just make them more expensive.

Putting aside the *inalienability rule* (with all the complex problems posed by the decision to put a resource and the variables of which it is susceptible out of the market altogether), it is possible to overcome the antagonistic vision of the "Cost of accidents", bringing to the forefront considerations of allocative efficiency. On the contrary, now judges can derive from that principle a basis for assigning liability to the parties, in a way that is completely independent from other considerations that may concern the quality of the assets, i.e. they are able to come up with a "politically neutral" solution that revolves around the "scientific" detection of the settlement costs.

It is not by chance then, that, when later (in the following decade), the reconstruction will arouse the attention of Italian jurists - which will happen at least in two significant occasions - the distributive dimension will be generally neglected. This outcome is all the more surprising if we consider the strong dose of realism that pervades both attempts.

This is the case of the civil protection of rights where the example of the Cathedral

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[543] F. MICHELMAN, *There have to be four*, in *Calabresi's Costs of Accidents: A generation of impact on law and scholarship, 64 Maryland Law Review (2005)*, 136. Emphasizes the dualism of the Hohfeldian scheme with connotations of *policy* and distribution, J. SINGER, *The legal rights debate in analytical jurisprudence: from Bentham to Hohfeld, 1982 Wisc. L. Rev., 975*; see also J.M. BALKIN, *The hohfeldian approach to law and semiotics, 44 U. Miami L. Rev. (1990), 1119*.

will push towards the full recovery of the dimension of the remedy, decisively reaffirming the substance of the protection over the form of the contents with which the protected subjective situations are characterized. In this framework, moreover, the centrality of the judge in the definition of the structures of interest will also be maintained: in the perspective of a distinction between forms and techniques of protection, in which the former are the leading categories placed by the legislator in function of identified needs of protection, it will be in fact the judges who will have to concretely satisfy these needs through the latter[544]. The redistributive values of the remedies will remain, however, entirely in the background.

The same will happen with the comparison, where Calabresi's grid will serve to solicit a more rigorous control between statements and jurisprudential rules, encouraging the affirmation of the substance of operational rules in order to get rid of the form of conceptualizations. In a perspective that lays the groundwork for a critique of law as a coherent and hierarchically connected set of normative propositions (which will be subsequently addressed to the ideological use of the categories used), no particular attention will be paid to the consequences, other than the efficient allocation of resources, to which the entry of remedies with a potentially redistributive scope and consciously perceived as such may give rise[545].

8. In the middle between public and private: the arduous process of identifying a third way forward

The 1970s then left us with a complex picture. On the one hand, a renewed and multifaceted civil responsibility, now completely detached from the necessary reference to individualistic schemes and to the logic of ownership, available for a project of transformation. On the other hand, a difficulty in translating, within the

[544] A. DI MAJO, *La tutela dei diritti*, Roma, 1980, 243.

[545] In the perspective of a revision of some classic systemological contrasts, U. Mattei, *Diritto e rimedio, nell'esperienza italiana ed in quella statunitense: un primo approccio*, in *Quadr.*, 1987, 341 and ID., *Tutela risarcitoria e tutela inibitoria*, Milano, 1987. Significant indications already in R. PARDOLESI, *Azione reale ed azione di danni nell'art. 844 c.c. Logica economica e logica giuridica nella composizione del conflitto fra usi incompatibili delle proprietà vicine*, in *Foro it.*, 1977, I, 1144 ss.

private system, the complex regulatory mechanisms that Calabresi has been building had clearly been brought to light.

Civil liability once again called into question the traditional distinction drawn between the private, neutral and non-political area of the market and the public and political area of state intervention, contributing to the awareness that the separation between the two does not mark two distinct areas of competence or influence, one characterized by the freedom of the individual, the other by the coercion of the state, since the legal system - through the elaboration of the rules of private law – has always been present in the construction of institutional mechanisms and individual powers, influencing the results produced through the market. From this interconnection, in which the economic dimension was closely linked to the problems of equality and social justice, however, not all the consequences were drawn.

The question of market regulation was thus raised, without however succeeding in fully elaborating the concrete role that the rules of private law can play.

Thus, once politics had been exhausted, the link to the extra-legal dimension, and in particular to the economic one, would be preserved, marking, however, an abrupt change of course with the return to the market, which would then be looked at as a measure to conform entirely to the construction of legal material, re-proposing and renewing the distinction between public and private. Together with it, the perspective according to which legislation always constitutes an intervention in an otherwise neutral and non-political field (the market) and judicial decisions, even if they entirely reformulate the interpretation of a norm, do not constitute a form of *decision-making* with openly distributive consequences.

All the problems will be brought back either to the failure of the market to work, because of a lack of competition or of information, or to other structural causes such as the unequal distribution of wealth or the lack of education. And the solution will still be sought alternatively either in the restoration of the former, through the removal of the *failures* that alter its functioning, or in the correction of the latter, through the structural intervention of social legislation.

Although the civil liability affair has fully highlighted the *policy* choices that the

jurist is called upon to make, repeatedly underlining the intertwining of general interest and private interest, its case can however remain completely isolated with respect to the other institutions of private law. It is precisely this peculiarity that leads us to re-propose the contrast between public and private, this time entirely within private law itself. With civil liability representing precisely because of these intrinsic qualities the public side of private law, in contrast with the other, the private side - almost all of which remains - characterized instead by merely technical matters. There is therefore still a long way to go. In the meantime, it is a question of recomposing the fracture between legislation and the market which, after the 1970s, has remained in the field.

And yet a possible itinerary had been traced in the framework of the search for a "third way" capable of overcoming the *impasse that* had arisen between the structural unsuitability of private techniques to solve highly complex social problems such as those posed by the social control of private activities, and in particular of production, and the equal unsuitability - in that given political context - of public techniques because of doubts about the ability of political power to escape the logic of capitalism.

The solution of a "third way" attempted in fact, through the revaluation of the "collective" character of the interests at stake, to enhance the ultra-individual dimension of the conflict and to achieve a re-attribution of power to the "weak" classes. The reinterpretation of the general clauses - understood, as we have recalled, no longer as instruments aimed at the protection of individualistic interests, but as moments of a widespread social control of the collectivity - made it possible to introduce into the system correctives of a social order to the lack of conflict between the economic action of private subjects and the intervention of public powers. The road, prevalently taken, was that of tracing in the system instruments of action to ensure the public participation of the collectivity, of the territorial bodies and of other bodies such as the unions, recovering the interests of which they are bearers within the private mechanisms, through the mediation of the judge.

The widening of the range of interests that could be protected by private law therefore had to be followed by a renewal of the instruments and categories that

took into account not only quantitative but also and above all qualitative changes to enable them to perform the new tasks that awaited them.

The 'discovery' of this new internal dimension to the rules of private law should not have reduced their scope, in favor of legislation, but on the contrary should have enhanced it. This "third way", however, was not destined to be followed to the end. And this not only because of political events, but also because of other hesitations of a theoretical nature.

It was doubted that old norms (of private law) could be usefully "recycled" to achieve different objectives. This was an outcome towards which different visions contributed. On the one hand, there was the classical, largely ideological view of private law as a block of neutral rules that are rationally developed from the norms of the codes; on the other hand, there was a different view, linked however to the idea that these rules are necessarily the product of determined socio-economic conditions, destined therefore to automatically reproduce those same balances. They then converged into the vision of those who believed in neither one nor the other, but strategically preferred the prospect of their integral renewal, worried by the idea that the weight of the old logics (and of the relative interpretations) would end up suffocating the pursuit of different interests through those structures.

A different solution was to focus not so much on isolated interpretations, but above all on the overall requalification of entire sectors or sub-sectors, leveraging the different (social) logic that emerged from the Constitution and from the special legislation to change the balances within a single sector or sub-sector through the introduction of new ordering criteria. This solution required the mediation of the jurist (doctor and judge). And it had to respond to the double criticism of the fragmentary nature of judicial action as in the case of productive activity and the lack of political legitimacy as in the case of the environment.

The difficulty of responding to the objections raised during the debate was to prove fatal. It remained in the background how much the judge, by his decisions, was already involved in the distribution of resources.

At that time, legislative innovation was seen as an element considered indispensable for change, both from the point of view of introducing radically new solutions, and from that of proposing new ordering criteria to reorganize the old.

The antagonism between judge and legislator was thus destined to recur continuously without, however, managing to find a definitive solution.

9. Tort and social design: civil liability as a matter of a compound community

The reflection, which began in the 1970s, on the function of the courts and their suitability to play the role of institutional actor capable of managing the complex problems of change (not only economic) is still far from over. If the limits of judicial action when it operates within the framework of the process of economic transformation in place of legislation have been widely highlighted and discussed, the same has not been done when it operates as an agent of a decentralized system, alternative to the centralized one (of legislation). Thus, the way in which courts, when administering civil liability, tend to exercise their function as representatives of the values of public opinion and to reflect the gradual evolution of society, projecting shared values and models into their judgments, remains to be discussed. One direction can be taken, once again, by following a Calabrian itinerary. Once the regulatory dynamics of civil liability have been clarified in the perspective of a "mixed" society, we need to verify whether civil liability can play an equally crucial role as a rule for plural societies, i.e. for those societies that, like ours, are crossed by a pluralism of values and cultures. Certainly, the need to ensure compatibility between different values now places civil liability in a privileged position at least with respect to legislative intervention[546]. Unlike the latter, in fact, civil liability - through recourse to the balancing act that the general clause of injustice allows[547] - can systematically avoid a blanket preventive declaration of supremacy (of one value over another) and, by favoring their coexistence, ensure greater respect for the person.

This introduces a tension within the mechanism of civil liability. While it is natural and indispensable that courts tend to anchor their judgments in shared social values and models, it is equally evident how this can prejudice those who do not

[546] This attention to the existence of common principles was already present in S. RODOTA', *Note critiche in tema di proprietà*, in *Riv. trim. dir. proc. civ.*, 1960, 1252, now in *Il terribile diritto. Studi sulla proprietà privata*, 2a ed., Bologna, 1990 and in ID.., *Ideologie e tecniche della riforma del diritto civile*, in *Riv. dir. comm.*, 1967, I, 83; but also more recently ID., *Il tempo delle clausole generali*, in *Riv. crit. dir. priv.*, 1987, 709 and in ID., *Repertorio di fine secolo*, 2nd ed., Roma-Bari, 1999, 166.

[547] S. RODOTA', *Il tempo delle clausole generali*, cit.

fully identify with those values. An outcome which can rightly be considered a necessary price to pay to ensure the functioning of the mechanism. However, it cannot be excluded that, without affecting its overall efficiency, at least some of these potential discriminatory effects could be avoided with greater care. Another subtler one, which might have a vaguely Foucauldian *imprimatur*, is concerned with the way in which the legal system so to speak "disciplines" its users, requiring them - in various ways - to respond to certain social models if they want to obtain compensation for the damage they have suffered.

Categories and techniques that appear to be neutrally constructed may therefore conceal, especially when they are organized hierarchically, a potential for discrimination[548].

Part II – Punitive damages and constitutionally guided interpretation

Section I: The Italian route after the principles of the United Sections

10. Introduction

One of the most remarkable trends that can be observed on a global scale in the legal universe is definitely represented by the progressive rapprochement between the common law systems and the civil law systems, and therefore by the gradual replacement of the classificatory approach around which comparative analyses of legal systems have been structured[549]. The decline of the traditionally clear-cut and dichotomous distinction between these two families of legal systems can be explained, on the one hand, by the purely internal drives of individual systems of government, entrenched in the very framework of modern constitutionalism, and, on the other hand, through dynamics produced by the overall economic and social

[548] In the area of civil responsibility, the hierarchies tend to reproduce themselves notwithstanding the recent jurisprudential interventions that have considerably weakened the effects of the dichotomy between patrimonial and non-patrimonial damage, as V. SCALISI points out now, *Danno ed ingiustizia nella teoria della responsabilità civile*, in *Scienza e insegnamento del diritto civile in Italia* (edited by V. Scalisi), Milano, 2004, 931.

[549] On this subject, see G. MORBIDELLI-L. PEGORARO-A. RINELLA-M. VOLPI, *Diritto pubblico comparato*, Torino, 2016, 63 et seq.; on the relationship between common law and civil law systems, see also G.F. FERRARI, *"Civil law" and "common law": aspetti pubblicistici*, in AA.VV., *Diritto costituzionale comparato*, edited by P. Carrozza-A. Di Giovine- G.F. Ferrari, Roma-Bari, 2017, 645 and following; while with particular reference to the private aspects A. GAMBARO-R. SACCO, *Sistemi giuridici comparati*, in Tratt. Dir. Comp., directed by Sacco, Torino, 2008; as well as V. VARANO-V. BARSOTTI, *La tradizione giuridica occidentale*, I, *Testo e materiali per un confronto civil law common law*, V ed., Torino, 2014.

context, profoundly affected by globalization, which inevitably leads not only to the progressive establishment of a supranational legal dimension but also to a complex interplay of connections between subjects operating within different national legal systems[550]. The consequence has been a considerable transnational flow of legal institutions and models, which, although they have historically appeared within a specific domestic legal 'environment', whose distinctive characteristics have shaped and modelled them, are now - so to speak - implanted in different systems, to whose peculiar features they must necessarily adapt, thus hybridizing themselves and, at the same time, contributing to remodeling the structure of the systems which host them: To put it in a very short way, in this process, which takes on a strongly circular form, the institutions adapt themselves to the host system and to it at the same time; and in this way a phenomenon of endless cross-fertilization takes place between the systems.

A very meaningful example of the mobility of legal institutions is the introduction into Italian law of punitive damages.

11. Predictability, typicality and proportionality of ultra-compensatory damages

The non-unitary study of the purposes attributable to civil liability[551] and the progressive interpretation of the compensation for injuries to non-pecuniary values, in accordance with article 2059 of the civil code, are faced - going further

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[550] On the effects of the globalization phenomenon on the legal system, cfr. M. R. FERRARESE, *Le istituzioni della globalizzazione. Diritto e diritti nella societa transnazionale*, Il Mulino, 2000; P. GROSSI, *Globalizzazione e pluralismo giuridico*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 29 (2000), 551 ss.; F. GALGANO, *La globalizzazione nello specchio del diritto*, Il Mulino, 2005; M. R. FERRARESE, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Laterza, 2006.

[551] On the historical process of transformation of the functions of civil responsibility, C. SALVI, *Il paradosso della responsabilita civile*, in *Riv. Crit. Dir. Priv*., 1983, 123 et seq.; ID., *Il danno extracontrattuale: modelli e funzioni*, Napoli, 1985; ID., voce *Responsabilità extracontrattuale (dir. vig.)*, in *Enc. Dir*., XXXIX, Milano, 1988, 1229 and seq. [with attention also to the literature of the 60s, in particular in the writings of S. RODOTA', *Il problema della responsabilità civile*, Milano, 1964 and R. SCOGNAMIGLIO, voce *Illecito (diritto vigente)*, in *Noviss. Dig. It*., VIII, Torino, 1962, 164 et seq.; ID., *Appunti sulla nozione di danno*, in *Riv. Trim*., 1969, 464 et seq.)]. P. PERLINGIERI, *Le funzioni della valutazione del danno*, 1969, 464 ff. P. PERLINGIERI, *Le funzioni della responsabilità civile*, in *Rass. Dir. Civ*., 2011, 115 ff.; F. QUARTA, *Risarcimento e sanzione nell'illecito civile*, Napoli, 2013, 57 et seq.; C. SCONGNAMIGLIO, *Il danno tanatologico e le funzioni della responsabilità civile*, in *Resp. Civ. Prev*., 2015, 143 et seq; G. ALPA, *Le funzioni della responsabilità civile e i danni 'punitivi': un dibattito sulle recenti sentenze della suprema corte di Cassazione*, in *Contr. Impr*., 2017, 1084 et seq. Of great use are the contributions collected in the volume by P. SIRENA (ed.), *La funzione deterrente della responsabilità civile. Alla luce delle riforme straniere e dei Principles of European Tort Law* (Siena, 16- 21 September 2007), Milano, 2012.

than the boundaries - with the recent case law of the Joint Sections[552], concerning the enforceability of foreign judgements that award "punitive damages "[553].

Due to the solicitation of the referral order[554] and the need to surpass a certain conceptual obstinacy as regards the interpretation of the tort law, the Joint Sections reject the appeal and applying article 363, paragraph, of the code of civil procedure, so as to establish the principle of law in relation to the inadmissibility of a single claim that concerns a question of particular interest. At this point, "a long obiter [... collegially ex cathedra and not by the rapporteur alone"[555] in favor of the effectiveness of foreign sentences imposing punitive damages[556], since they comply with public policy, no longer considered in an exclusively national light, i.e. as a limit to the admission of foreign institutions that could threaten the internal coherence of the current system, but as a set of safeguards and essential principles that can be inferred from the Constitution and supranational sources with a promotional function and the protection of fundamental human rights[557].

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[552] Cass., Sez. un., 5 July 2017, no. 16601, in *Foro It.*, 2017, I, c. 2613 et seq, with comments by A. PALMIERI and R. PAEDOLESI, *I danni punitivi e le molte anime della responsabilità civile*; E. D'ALESSANDRO, *Riconoscimento di sentenze di condanna a danni punitivi: tanto tuonò che piovve*; R. SIMONE, *La responsabilità civile non è solo compensazione: punitive damages e deterrenza*; P. G. MONATERI, *I danni punitivi al vaglio delle sezioni unite*. The judgment is widely commented by the doctrine: see, in this regard, the bibliography cited in the following notes.

[553] On the limits within which the legislator, the judge and the private autonomy can grant compensation exceeding the amount necessary to repair the damage actually suffered, C. GRANELLI, *In tema di "danni punitivi"*, in *Resp. Civ. Prev*., 2014, 1760 et seq. On the differences with respect to the institution, of French derivation, of the astreinte, Court of Cassation, 15 April 2015, no. 7613, in Foro It., 2015, I, c. 3951 et seq. with a note by A. MONDINI, *Astreintes, ordine pubblico interno e danno punitivo*. In favour of the possibility of compensation with a punitive function P. G. MONATERI, *La responsabilità civile*, in R. Sacco (Ed.) Tratt. Dir. Civ., Torino, 1998, 336.

[554] Cass., 16 May 2016, no. 9978, in Corriere Giur., 2016, 909 et seq., with comments by C. SCOGNAMIGLIO, *I danni punitivi e le funzioni della responsabilità civile* (on the subject, also, ID., *Principio di effettività, tutela civile dei diritti e danni punitivi*, in *Resp. Civ. Prev*., 2016, 1120 et seq.) and in *Danno e Resp.*, 2016, 827 et seq., with the comments of P. G. MONATERI, *La delibabilità delle sentenze straniere comminatorie di danni punitivi finalmente al vaglio delle Sezioni unite*, and G. PONZANELLI, *Possibile intervento delle Sezioni unite sui danni punitivi* (in general on the subject already ID., *I "punitive damages" nell'esperienza nordamericana*, in *Riv. Dir. Civ*., 1983, I, 435 et seq.). With particular attention to the incidence of public order, L. NIVARRA, *Ordine pubblico globalizzato e danni punitivi al vaglio delle Sezioni unite*, in giustiziacivile.com., 31.01, 2017.

[555] S. BARONE, *Punitive damages: multiplo risarcimento sanzionatorio-deterrente o iper-ristoro solo cautelativo?* in *Giur. It*., 2017, 1366.

[556] In contrast, previously, Court of Cassation, 19 January 2007, no. 1183, in *Foro It*., 2007, I, c. 1460 et seq., with comment by G. PONZANELLI, *Danni punitivi: no, grazie*; Court of Cassation, 8 February 2012, no. 1781, in *Danno e Resp*., 2012, 609 ff., with note by ID., *La Cassazione bloccata dalla paura di un risarcimento non riparatorio*.

[557] The Court of Cassation, 30 September 2016, no. 19599, in *Corriere Giur*., 2017, 181 ff., with comments by G. FERRANDO, *Ordine pubblico e interesse del minore nella circolazione degli status filationis*. On the necessary consideration of public order according to a constitutional perspective, open to supranational norms, P. PERLINGIERI, *Libertà religiosa, principio di differenziazione e ordine pubblico*, in *Dir. Succ. Fam*., 2017, spec. 183 et seq.: this does not mean adhering to a dualistic conception of public order. It remains a unitary notion, a synthesis of regulations that can be traced back to different sources, but still an expression of the principles identifying the constitutional axiology of a complex historically conditioned civilization. On the

The judgment reaches this conclusion in consideration of the modified legislative framework[558] and given the need to draw a continuum with the pronouncements[559] supporting the polyfunctional nature of tort law. In line with this order of evaluations, it is stated that "in the current legal system, civil liability is not only assigned the role of restoring the patrimonial sphere of the injured party, since the deterrent function and the punitive function of the civil liability are both part of the system. It is therefore not ontologically inconsistent with the Italian legal system to adopt the institution of US origin of punitive damages". The opposite view would imply that the effective protection of rights "would be sacrificed in the monofunctional narrowness "[560].

The compatibility parameter of ultra-compensatory damages with the values characterizing the national system is the establishment of strict operational requirements, the absence of which precludes the judge from ruling on the foreign decision to award damages exceeding the harm suffered[561]. It is outlined as "a minimum guide for the trial courts"[562], briefly describing the conditions - set out in greater detail in the reasoning - of predictability (understood as "clarification of the quantitative limits of the award that can be imposed"), proportionality[563] (between "restorative-compensatory damages and punitive damages", as well as "between the latter and the censured conduct") and typicity, as the precise perimeter of the case, according to articles 23 and 25, paragraph 2, of the Constitution. The purpose, textually declared, is to prevent judges from "imprinting subjective emphases on the compensation paid"[564].

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incidence of the renewed meaning of public order on the punitive function A. MALOMO, *Responsabilità civile e funzione punitiva*, Napoli, 2017, 83 et seq.

[558] By way of example only, see Articles 12, Law No. 47 of 8 February 1948; 96, 3rd paragraph, c.p.c. and 3-5, Legislative Decree No. 7 of 15 January 2016.

[559] Corte Cost., 23 June 2016, no. 152, in *Foro It.*, I, 2016, c. 2639 et seq. and Corte Cost., 11 November 2011, no. 303, *ivi*, 2012, I, c. 717 et seq.

[560] Cass., Sect. un., July 5, 2017, No. 16601, cited above.

[561] In particular, the judgment must "correspond to the condition that it has been issued in the foreign legal system on the basis of regulations that guarantee the typicity of the hypotheses of condemnation, the predictability of it and the quantitative limits, having regard, during the assessment, exclusively to the effects of the foreign act and their compatibility with public policy": Court of Cassation, Unified Division, 5 July 2017, no. 16601, cited above.

[562] So, E. D'ALESSANDRO, *Riconoscimento di sentenze di condanna a danni punitivi*, cited above, c. 2613 et seq.

[563] With reference to the relevance of the principle of proportionality, P. PERLINGIERI, *Equilibrio normativo e principio di proporzionalità nei contratti*, in *Rass. Dir. Civ*., 2001, 334 ff., where the incidence of the principle of proportionality on the configuration of the judge's corrective and conformative power is shown.

[564] Cass., Sect. un., July 5, 2017, No. 16601, cited above.

Despite the clarity and consistency of the reasoning, not all the doubts have been clarified. It is worth mentioning the proportionality requirement: It remains to be clarified whether, by virtue of the emphasis on the punitive function, the quantum appropriate to the punitive function may exceed the amount paid by way of compensation[565] or whether it must be a fixed amount; likewise, the predictability and typicity criteria pave the way for an investigation - not easy for the national courts - into whether the injured party is aware of the quantitative limits of the pecuniary award and into the content of the foreign law regulating the matter in home country.

Leaving aside these doubts, the indication of the pre-mentioned requirements has the virtue of restricting the relevance of the subject to cases involving the recognition of foreign judgments awarding ultra-compensatory damages, and does not imply a generalized punitive function of civil liability[566].

12. The punitive function beyond the lens of the foreign judgments' enforcement

The academic literature, on the other hand, suggests conflicting reconstructions[567]. Although it is unnecessary to relate the compensation duty, under article 2059 of the civil code, to the institution of private punishment[568], it is here agreed that positions should be taken that transcend the contrast between the compensatory function and the afflictive one and find in article 2059 of the civil code a more

[565] On the point, with attention, D'ALESSANDRO, *o.l.c*. On the many problematic aspects, F. BENATTI, *I danni punitivi nel panorama attuale*, in giustiziacivile.com, 2017.

[566] So G. PONZANELLI, *Danni punitivi: oltre la delibazione di sentenze straniere?* in www.juscivile.it, 2018 and F. BENATTI, *Benvenuti danni punitivi ... o forse no!,* in *Banca Borsa*, 2017, II, 575 et seq.

[567] Opposed to the possibility that the judge condemns the payment of a sum of money that is added to the compensation or integrates it in its amount, with a punitive purpose, C.M. BIANCA, *Qualche necessaria parola di commento all'ultima sentenza in tema di danni punitivi*, in giustiziacivile.com. 2018. The attribution of compensation beyond the measure of damage is in contrast with the cardinal principles of our ordinance for P. TRIMARCHI, *La responsabilità civile: atti illeciti, rischio, danno*, Milano, 2017, 9, and, previously, ID., *Illecito (dir. priv.)*, XX, Milano, 1970, § 23 et seq., where fault is a criterion for justifying damage and not for commensuration of compensation.

[568] On the relationship between non-pecuniary damage and the institution of private punishment, G. BONILINI, *Il danno non patrimoniale*, cit., 272 ff. and 296 ff.; F. D. BUSNELLI, *Verso una riscoperta delle "pene private"?*, in *Resp. Civ. Prev*., 1984, 26 et seq.; F. GALGANO, *Alla ricerca delle sanzioni civili indirette: premesse generali*, in *Contr. Impr*., 1987, 531 et seq.; P. CENDON, *Il profilo della sanzione nella responsabilità civile*, in *Contr. Impr*., 1989, 886 et seq.; G. PONZANELLI, voce *Pena privata*, in *Enc. Giur*. Treccani, XXII, Roma, 1990, 1 et seq.; P. GALLO, *Pene private e responsabiltà civile*, Milano, 1996, 96; M. G. BARATELLA, *Le pene private*, Milano, 2006, 85 et seq.; S. LANDINI, *La condanna a danni punitivi tra penale e civile: la questione rimane attuale*, in *Dir. Pen. Proc*., 2017, 262 et seq. On the inadmissibility of private pecuniary penalties in the absence of legal provisions, M. LA TORRE, *Un punto fermo sul problema dei "danni punitivi"*, in *Danno e Resp*., 2017, 426 et seq.

powerful punitive mechanism than in the case of compensation for pecuniary damage, under article 2043 of the civil code[569].

That adherence is grounded not so much in a revival of models of interpretation which disregard the solidarity-based value of protection under tort law or which are not so keen on highlighting the change in perspective which, through the years, has underlined the need to offer protection to the injured party, but rather a dissuasive and afflictive conception of civil liability rebuilt according to a concept different from that of the past and focused not on the principle nullum crimen sine culpa but - in addition to the inter partes effects (i.e. the transfer of costs from the legal sphere of the injured party to that of the responsible party) - on the social costs and consequences that members of society bear[570]. The desirable "multi-functional approach to civil liability"[571] matches the need to ensure that, in the event of injury, an adequate response is given to the prominence of the inviolable rights constitutionally protected, so that, for such torts, the punitive purpose of damages in excess of compensation is justified by the peculiar nature of the protected rights[572].

The effectiveness of the protection of the individual's rights is, in fact, the angle in relation to which the mono-functional approach to civil liability most evidently shows its weaknesses. Against the aforementioned afflictive purpose, it would be

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[569] One of the most important sectors in which punitive damages can be applied is that of "damages, above all non-patrimonial damages, which do not lend themselves to an objective measurement": G. PONZANELLI, *Novità per i danni esemplari?*, in *Contr. Impr*., 2015, 1200, who dwells on the differences between such hypotheses and punitive damages in the North American reality. On the advisability of a rethink of the jurisprudential orientation, contrary to the compensation of punitive damages, and on the overcoming of the principle of equivalence between damage suffered and compensable damage, S. PATTI, *Il risarcimento del danno e il concetto di prevenzione*, in *Resp. civ*, 2009, 166 et seq. He observes, for non-pecuniary damage, the "punitive vein" much higher than that which in general can be seen in the compensation of non-pecuniary damage" V. ROPPO, *Responsabilità contrattuale: funzioni di deterrenza?*, in *Lav. e Dir*., 2017, 420. Similarly, on the afflictive and punitive function of moral damage in tort, M. GORGONI, *Le duplicazioni risarcitorie del danno alla persona*, in *Danno e Resp*., 2010, 16. On the subject, also, A. PROCIDA MIRABELLI di LAURO and M. FEOLA, *La responsabilità civile*, Torino, 2014, 163 et seq.

[570] Thus V. SCALISI, *Illecito civile e responsabilità: fondamento e senso di una distinzione*, in *Riv. Dir. Civ*., 2009, spec. 677, who, on the basis of the difference between liability and unlawful conduct, attributes importance to the offensive capacity of the conduct and, therefore, to the liability of the damaging party, especially in the case of damage to fundamental interests of the community.

[571] Court of Cassation, section one, 5 July 2017, no. 16601, cit. On the end, in the doctrinal elaboration, of what "could be defined as the great narratives: that is, the attempt to reconstruct the aquilian institute around a unifying presupposition", C. SCOGNAMIGLIO, *I danni punitivi e le funzioni della responsabilità civile*, in *Corriere Giur*., 2016, 920. On the topic M. MAGGIOLO, *Microviolazioni e risarcimento ultracompensativo*, in *Riv. Dir. Civ*., 2015, 94 et seq. and therein detailed bibliography; G. CORSI, *Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di punitive damages*, in *Danno e Resp*., 2017, 433 et seq.; G. PONZANELLI, *Polifunzionalità tra diritto internazionale privato e diritto privato*, *ivi*, 436 et seq.

[572] But on this point see P. VIRGADAMO, *Danno non patrimoniale e ingiustizia conformata*, Torino, 2015, 259 ff. and 267 ff.

of no help to raise the argument that there are cases in which the party is required to pay damages on the basis of objective criteria of allocation.

The specificity of the cases to which such consideration refers excludes its general value. It could also be objected that the peculiarities that distinguish the compensability of non-pecuniary damage, i.e. the impossibility of providing full reparation of the injured interest through monetary obligation, the recourse to the criteria of personalization of damage, the relevance of negligence and gravity of the fact, as well as the opportunity of commensurate settlement to the circumstances of the concrete case[573], confirm that "punitive damage is already present, perhaps in disguise, in our system, if not only with respect to non-patrimonial damages"[574].

The reinterpretation of the remedies in a perspective inclined to a distinction according to the functional peculiarities[575] paves the way "to the thinking of the multiform and the plural method [...] differentiating what has been arbitrarily and artificially mixed and combined"[576]. Civil liability, understood as an autonomous remedial technique, "cannot have just a single function, but rather a plurality of functions (preventive, compensatory, sanctioning, punitive) that can coexist"[577].

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[573] Opposed to the use of tabular criteria which do not commensurate the objective result with the concrete case, Court of Cassation, 25 May 2004, no. 10035, in Danno and Resp, 2004, 1065 ff. (with comment by G. RAMACCIONI, *La palingenesi dell'art. 2059 c.c.: dove conduce il (nuovo) diritto vivente?*), according to which "in the equitable liquidation of the non-patrimonial damage deriving from an illicit fact, the magistrate must take into account the effective suffering suffered by the injured party, the gravity of the illicit act of criminal importance and all the elements of the concrete case, so as to make the liquidated sum suitable for the particular concrete case". P. PERLINGIERI, *La responsabilità civile tra indennizzo e risarcimento*, cited above, 1082, points to proportionality and reasonableness as the necessary correctives in the operation of quantifying damages.

[574] M. GRONDONA, *L'auspicabile ''via libera'' ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale*, cit. So also M. PALISI, *Il danno morale soggettivo: il vaso di coccio nel nuovo danno non patrimoniale?*, in *Resp. Civ. Prev*., 2005, spec. 798 et seq. and C. SALVI, *Le funzioni della responsabilità civile e il volto italiano dei danni punitivi*, in *Foro It*., 2018, I, 2054.

[575] On the flexibility of remedies, in a functional key, P. PERLINGIERI, *Il "giusto rimedio" nel diritto civile*, in *Giusto proc. civ*., 2011, 4 et seq.; on the relationship with fundamental rights, D. MESSINETTI, *Sapere complesso e tecniche giuridiche rimediali*, in *Eur. Dir. Priv*., 2005, 605 et seq., and spec. 610; G. VETTORI, *Contratto giusto e rimedi effettivi*, in *Riv. Trim*., 2015, 787 et seq. On the need to choose the axiologically more adequate remedy, G. PERLINGIERI, *Alla ricerca del "giusto rimedio" in tema di certificazione energetica. A margin of a book by Karl Salomo Zachariae*, in *Rass. Dir. Civ*., 2011, 666 et seq. On the effectiveness of remedies and judicial protection, more extensively, S. PAGLIANTINI, *Diritto giurisprudenziale, riconcettualizzazione del contratto e principio di effettività*, in *Persona e Mercato*, 2015, 112 et seq. For an analysis of civil liability in the perspective of remedies, A. di MAJO, *La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente*, in *Eur. Dir. Priv*., 2008, 289 et seq. (on the subject, also, M. BARCELLONA, *La responsabilità nella prospettiva dei rimedi. A proposito del libro di Adolfo di Majo, Profili della responsabilità civile*, Torino, 2010, in *Eur. Dir. Priv*., 2011, 1231 ff.) and M. ASTONE, *Responsabilità civile e pluralità di funzioni nella prospettiva dei rimedi. Dall'astreinte al danno punitivo*, in *Contr. Impr*., 2018, 276 et seq.

[576] V. SCALISI, *Illecito civile e responsabilità*, cit., 658.

[577] Thus P. PERLINGIERI, *Le funzioni della responsabilità civile*, cit., 119.

The prevalence of one over the other can only be defined as a function of an evaluation, in practical terms, of the nature of the values that require protection, of the level of fault of the responsible party and of the aims that, from time to time, are to be achieved. In this context, the punitive reconstruction of compensation for non-pecuniary damage assumes a singular significance, such as to transcend both the angle focused on the recognition of the corresponding foreign judgments and the perspective that limits its recourse to torts that integrate criminally relevant offences[578]. In this way, civil law protection is given to situations that might otherwise be kept outside the scope of criminal law.

13. Atypical nature of ultra-compensatory awards and criteria of assessment of damages

The findings achieved so far are further explained in the light of the constitutionally oriented reading of article 2059 of the Italian Civil Code.

The methodological approach adopted by jurisprudence, which is geared towards interpreting article 2059 of the civil code in accordance with the implementation of constitutional principles, has made it possible to overcome the restrictive interpretation that, by virtue of the connection with article 185 of the Italian Criminal Code, has identified the non-pecuniary damage with the moral damage caused by a crime, affirming, on the contrary, a broader meaning such as "damage caused by injury to the values that are inherent to the person, and no longer only as "subjective moral damage"[579]. Specularly, the rule of law, enshrined in this article, is not seen as a reference to a single legislative act: "the reference to the cases in which the law allows compensation for non-pecuniary damage can well be referred, in fact, after the coming into force of the Constitution, also to the provisions of the Fundamental Law, given that the acknowledgement in the Constitution of the inviolable rights concerning the person that do not have an economic nature tacitly, but inevitably, requires their protection, and in this way it represents a case established by the law, at the highest level, of compensation

[578] With reference to the non-pecuniary damage caused by micro-violations, M. MAGGIOLO, *Microviolazioni e risarcimento ultracompensativo*, cit., 110 ff., admits overcompensation only where the harmful fact is provided for by law as a crime.

[579] Court of Cassation, 31 May 2003, no. 8827, cited above.

for non-pecuniary damage"[580].

On the strength of the combination with personal instances, Article 2059 of the Italian Civil Code, historically structured as a norm evoking typical cases, accesses a broad and, by definition, atypical catalogue of inviolable rights protected by the constitution. In the face of this evolution, the typicity - required by the Joint Sections' ruling on punitive damages, under articles 23 and 25, paragraph 2, of the Italian Constitution, which links ultra-compensatory damages to the existence of a regulatory provision that textually provides for them - does not fit in well with the "atypicality" of inviolable rights and with the revised meaning of the principle of legality[581]. The atypicality of fundamental rights is a consolidated aspect of the constitutional interpretation and follows immediately from the normative nature of the principles[582], so that the reference in article 2059 of the Civil Code to the Constitution embraces the concept of constitutional legality and not formal legality, as a reference only to single normative figures. In this perspective, the violation of inviolable rights protected by the constitution can justify - with the clarifications set out below - the award of non-compensatory damages[583] without the necessity of "normative support" to legislative intermediation[584].

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[580] Court of Cassation, 31 May 2003, no. 8827, cited above. Notes in G. PALERMO, *Contributo allo studio della responsabilità per danno non patrimoniale*, in *Contr. Impr*., 2018, 10 et seq.

[581] On this point, see, at length, P. PERLINGIERI, *Il principio di legalità nel diritto civile*, in *Rass. Dir. Civ*., 2010, 164 et seq.

[582] The methodological perspective based on the preceptive force of constitutional norms can already be found in P. PERLINGIERI, *Norme costituzionali e rapporti di diritto civile*, in *Rass. Dir. Civ*., 1980, 95 et seq., then widely developed in ID., *Salvatore Pugliatti e "il principio della massima attuazione della Costituzione"*, in *Rass. Dir. Civ*., 1996, 807 et seq., and in ID., *Giustizia secondo Costituzione ed ermeneutica. L'interpretazione c.d. adeguatrice*, in P. FEMIA (edited by), *Interpretazione a fini applicativi e legittimità costituzionale*, Napoli, 2006, 1 et seq. More generally, on the normativeness of the principles, P. FEMIA, *I principes directeurs del contratto: ricodificazione difensiva, costituzionalizzazione mancata*, in Contratti, 2011, online version, 11 et seq.

[583] F. QUARTA, *Risarcimento e sanzione nell'illecito civile*, cit., 383 and F. D. BUSNELLI, *Tanto tuonò, che...non piovve. Le Sezioni unite sigillano il ''sistema''*, in *Corriere Giur*., 2015, 1213.

[584] The expression is used by Cass., Sect. un., 5 July 2017, no. 16601, cit. In the same direction, A. MALOMO, *Responsabilità civile e funzione punitiva*, cit., 60. A not particularly different outcome is reached by A. di MAJO, *Principio di legalità e di proporzionalità nel risarcimento con funzione punitiva*, in *Giur. It*., 2017, 1794, who, though not referring to the constitutional regulations, specifies that "the normative anchorage does not so much need "a legislative intermediation", in compliance with article 23 of the constitution, as the reference to criteria and/or lines of reference, in order to establish a legal basis for the definition of compensation, as much as the reference to criteria and/or guidelines, which are present in the same armoury of civil responsibility and which allow the compensatory measure with punitive value to be oriented". Not so for C. C. VIAZZI, *L'ostracismo ai danni punitivi: ovvero come tenere la stalla chiusa quando i buoi sono scappati*, in *Riv. Dir. Civ*., 2018, spec. 342, in favour of "a special regulation that regulates the new type of damages that can be compensated under a number of essential profiles". On the meaning of the reservation of law enshrined in art. 2059 c.c. in relation to the opening to punitive damages, R. SIMONE, *La responsabilità*

The confirmation of what has been stated is to be found, moreover, in the case law applications, where the equitable assessment of the court and the need for personalization often hide compensation with a punitive function. The real issue concerns, therefore, not so much the admissibility/inadmissibility of the punitive function of article 2059 Civil Code, as rather the definition of the criteria that regulate the assessment of damages and that imprint it with a punitive function[585], given that "the reflection on the compensation functions for non-economic damages arises in conjunction with the attempt to quantify them"[586]. To this aim, without precluding, for the injured party, the reparation of the loss suffered and, therefore, compliance with the compensatory function of article 2059 of the civil code, the punitive and deterrent adjustment of the further amount, higher than the damage suffered, should be limited to specific hypotheses, aggravated by the conduct of the responsible party, in which the proof of the damage suffered by the injured party and the particular gravity of the offence, characterized by the malicious or seriously negligent nature of the harmful conduct, can be found[587].

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civile non è solo compensazione: punitive damages e deterrenza, cit, 2644 et seq.; in a different perspective A. MONTANARI, *La resistibile ascesa del risarcimento punitivo nell'ordinamento italiano (a proposito dell'ordinanza n. 9978/2016 della Corte di Cassazione)*, in www.dirittocivilecontemporaneo.com and M. SESTA, *Il danno nelle relazioni familiari tra risarcimento e finalità punitiva*, in *Fam. Dir*., 2017, 295, who, with reference to the punitive function in the intra-familiar tort, identifies in article 709 ter, paragraph 2, nos. 2 and 3, c.p.c. the provision that satisfies the reserve of law, since article 2059 c.c., according to the author, sanctions the need for a legislative provision "without, however, outlining its contours in terms of taxability, especially with reference to the pre-supposed and quantitative consequences of the punishment represented by punitive compensation". In a different direction, C. SCOGNAMIGLIO, *Le Sezioni Unite ed i danni punitivi: tra legge e giudizio*, cit., 1120, points out that it is "well known that article 2059 Civil Code does not provide for a quantitative determination of the sentence for compensation according to determined or determinable parameters, and therefore it is unsuitable for satisfying a need for legal reserve that should be understood as also referring to the "calculability" of compensation. However, it is equally well known that a not dissimilar preceptive structure can be found also in the context of other provisions, such as article 709 ter, paragraph 2, no. 2 and no. 3, Code of Civil Procedure, in which there is no hesitation - also by the same author - to recognize the basis of compensation with a sanctioning and deterrent purpose.

[585] On this point P. G. MONATERI, *Funzioni del risarcimento e quantificazione del danno non patrimoniale*, cited above, 1410, according to whom the sanctioning function is carried out by the exercise of the judge's equitable powers, as well as by the combined provisions of articles 1223, 1226 and 2056 of the Civil Code, as well as C. SALVI, *Le funzioni della responsabilità civile*, cited above, 2054 on.

[586] E. NAVARRETTA, *Funzioni del risarcimento e quantificazione dei danni non patrimoniali*, in *Resp. Civ. Prev*., 2008, 502.

[587] On the subject, with attention to the confirmations deriving from the studies of the economic analysis of law, P. G. MONATERI, *La delibabilità delle sentenze straniere comminatorie di danni punitivi finalmente al vaglio delle Sezioni Unite, commentary on Cass., 16 May 2016, no. 9978*, in *Danno e Resp*., 2016, 831 et seq; ID., *Le Sezioni Unite e le funzione della responsabilità civile*, *ivi*, 2017, 437 ff., where it is pointed out that the intentional or negligent nature of the illicit act is only relevant for the sanctioning function of civil responsibility but not also for that of deterrence, in the sphere of which, even for damages of modest importance, there can be exemplary compensation. On the need for a change of perspective, which focuses attention on the conduct and culpability of the agent, G. BONILINI, *Il danno non patrimoniale*, cit., 290 et seq.. Similarly, importance is given to the reprehensibility of the conduct by V. ZENO ZENCOVICH, *Il risarcimento esemplare per diffamazione nel diritto americano e la riparazione pecuniaria ex art. 12 della legge sulla stampa*, in *Resp. Civ*., 1983, 40 ff. In order to encourage the deterrent function of civil

In addition, the economic position of the injured party must also be taken into account when determining the quantum.

Many problems are still pending: for example, in cases where the offence goes beyond the sphere of violation of an individual's personal rights to cause serious social damage and affect diffuse or collective interests, the possibility of extending overcompensation to cases of strict liability[588]; the questions that are being raised regarding the opportunity to limit the judge's discretion by applying the criteria set out in the tables even for the quantification of damages other than biological damage[589]; the possible proliferation of claims for damages, on a punitive basis, from several persons who claim to have been damaged by the same wrongful act. In spite of the numerous tangles to be solved, the developments in the protection of tort law reveal significant opportunities, in the area of injury to inviolable rights, for overcompensation with dissuasive and punitive purposes. Against any potential distortion or judicial arbitrariness[590] a valid support is to be found in the judge's duty to justify his decision so that it is crystal-clear what led to the payment of the sum by way of punishment, the underlying reasons, the criteria for payment and their connection with the seriousness of the damage, the subjective circumstances (including the danger of reiteration of the offence) and the particular kind of inviolable right harmed. The residual - and much more - is entrusted to the interpreter's feeling of responsibility, who is subject to constitutional legality and not only to the (letter of the) law.

responsibility, according to P. SIRENA, *Il risarcimento dei c.d. punitivi e la restituzione dell'arricchimento senza causa*, cit., 537, a legislative modification would be appropriate on the basis of which, "without prejudice to the general indemnifiability of personal damage, subjective moral damage must be indemnified not only according to article 2059 Civil Code, as interpreted by the Constitutional Court, but also every time the illicit act has been carried out in bad faith". The distinction between malicious and culpable torts is only relevant for the different compensable consequences for A. NERVI, *Danni punitivi e controllo della circolazione della ricchezza*, in *Resp. Civ. Prev*., 2016, 323 et seq.). In case law, it does not consider relevant the conduct of the damaging party, Cass., 19 January 2007, no. 1183, available on dejure online.

[588] The subject is carefully analysed by G. AFFERNI, *La riparazione del danno non patrimoniale nella responsabilità oggettiva*, in *Resp. Civ. Prev*., 2004, 862 et seq.. In order not to discourage socially useful activities, C. SCOGNAMIGLIO, *Danno morale e funzione deterrente della responsabilità civile*, cited above, 2497, disagrees.

[589] On this point G. PONZANELLI, *Novità per i danni esemplari?*, cit., 1201 et seq.

[590] On judicial subjectivism in the area of non-asset damage, see the clarifications by C. SCOGNAMIGLIO, *Quale futuro per i danni punitivi? (aspettando la decisione delle Sezioni Unite)*, cit., par. 3.

Section II: A glimpse from elsewhere: the case of the French legal system

14. French case law approach

Considering the European legal framework, France has adopted a more receptive and tolerant approach towards U.S. punitive damages. The French Supreme Court (*Cour de Cassation*) has no objection to the concept itself. Instead of altogether rejecting punitive damages, the Court focuses on the amount of punitive damages awarded by the foreign court[591].

The famous decision in which the French Supreme Court dealt with the enforcement of a U.S. punitive damages award was *Schlenzka & Langhorne v. Fountaine Pajot S.A*[592].

In 1999**,** a couple from California purchased for almost $800,000 a Marquise's catamaran from Rod Gibbons' Cruising Cats USA**,** an authorized dealer and agent for the French manufacturer, Fountaine Pajot, S.A. According to the purchase agreement, Fountaine Pajot had to deliver the catamaran in Miami in «like-new» condition.

However, the vessel had been severely damaged in a storm that struck the port of La Rochelle, the place of its manufacturing. Fountaine Pajot concealed this information from the purchasers and performed only superficial repairs. Since the structural problems were not resolved, the California couple soon experienced issues with the catamaran and, thus, sued Fountaine Pajot in California.

In 2003, the California Superior Court ruled in favor of the plaintiffs and awarded them $1,391,650.12 in actual damages. Moreover, the Court, holding that

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[591] See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 250, according to which «this more receptive stance increases the likelihood that the plaintiff will be able to enforce an American judgment containing punitive damages in its entirety against a defendant's assets in [...] France».

[592] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A.*, no. 09-13303, *Recueil Dalloz*, 2011, p. 423.
In France, before *Fountaine Pajot*, there has been only one decision dealing with the enforcement of a U.S. judgement awarding punitive damages, in which the lower court refused to grant *exequatur* for two main reasons: (1) punitive damages are penal in nature and cannot be enforced in France, and (2) punitive damages violate the principle of full compensation (*principe de compensation intégrale*). Moreover, see B. WEST JANKE-F.X. LICARI, *Enforcing Punitive Damage Awards in France after Fountain Pajot*, *60 Am. J. Comp. L.*, 2012, p. 778, according to which «however, there were some faint hints in the jurisprudence that the *Cour de cassation* would recognize damages of a punitive nature. For example, French courts consistently enforce foreign sanctions based on contempt of court and penalty clauses (*clauses pénales*) in private contracts [...] By contrast, French doctrine was much more prolix in admitting, almost unanimously, the compatibility of foreign punitive damage awards with the French *ordre public* so long as the sum is not disproportionate or excessive».

Fountaine Pajot's behavior constituted fraud under California Law, stated that an amount of $1,460,000 in punitive damages[593] would have been suitable to punish and deter the French company. Furthermore, the California Superior Court applied a statutory exception[594] to the general American rule on attorneys' fees and, thus, awarded $402,084.33, bringing the total amount to $3,253,734.45.122. The American couple subsequently had to enforce the judgment in France, since Fountaine Pajot was located there.

Le Tribunal de Grande Instance refused to enforce the California judgment in France and this decision was, subsequently, confirmed by the Court of Appeal[595], which hold that the proper purpose of tort law is to return the victim to the *status quo* and, thus, the amount of damages should not be based on the wrongdoer's wealth nor his fault, but it should be determined solely by the extent of the plaintiff's damages. Consequently, the appellate court considered an award that punishes the tortfeasor to the benefit of a plaintiff as a windfall[596], which unjustly enriches him and, as such, in contrast with the French *ordre public international*[597].

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[593] The Court noted that the purpose of awarding punitive damages is not to bring financial ruin to the defendant, but, instead, to punish the defendant and deter it from engaging in such conduct in the future. Thus, it held that an award of $1,460,000.00, «which is approximately twenty percent of the net worth of the corporation», was appropriate.

[594] On the basis of the federal Magnudon-Moss Warranty Act, a prevailing consumer may recover reasonable legal costs.

[595] See *Cour d'Appel [CA] de Poitiers, 1re Chambre civile*, Feb. 26, 2009, *Schlenzka v. S.A. Fountaine Pajot*, no 07/02404, *137 JDI*, 2010, 1230.

[596] See J.A. BRESLO, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis, 86 Nw. U. L. Rev.*, 1992, p. 1130 f. On the contrary, see B. WEST JANKE-F.X. LICARI, *Enforcing Punitive Damage Awards in France after Fountain Pajot*, cit., p. 790, according to which « [...] in reality, there is not always a windfall or even full compensation for the plaintiff because there are many legal or factual obstacles to a veritable full compensation»; R. DEMOGUE, *Validity of the Theory of Compensatory Damages, 27 Yale L.J.*, 1918, pp. 585-593, which supports punitive damages and regards them as a means to fully implement the principle of full compensation. In fact, many scholars believe that the American rule, regarding attorneys' fees, is a significant impediment to principle of full compensation. Accordingly, since the plaintiff generally may not recover his attorney fees, paradoxically, punitive damages can sometimes operate to fill the gap and achieve full compensation.

[597] See B. WEST JANKE-F.X. LICARI, *Enforcing Punitive Damage Awards in France after Fountain Pajot*, cit., p. 791 f., according to which «we regard the appellate court's determination as incorrect and incongruent with how the *Cour de cassation* has interpreted principles of compensation in light of the *ordre public international*». According to the Authors, the *Cour de Cassation* has rejected many decisions of lower courts that granted awards higher or lower than the damage actually suffered, by referring to the concept of *ordre public interne*, which involves purely domestic considerations. However, cases involving the recognition of foreign judgments deal with the *ordre public international*, which refers to «a set of intangible and superior values, which combine the general (or public) interest, such as political, moral, and social rights. [It is a

Ultimately, the matter reached the French Supreme Court, which, for the first time, took a stance on punitive damages, ruling that «the principle of awarding punitive damages is not, in itself, contrary to public policy; although this is not the case when the amount awarded is disproportional to the loss suffered and to the contractual breach of the debtor[598]». Thus, according to the Court, this lack of the proportionality of the award was contrary to the *ordre public international* and, as a consequence, the *Cour de Cassation* rejected the entire judgement.

This judgement is particularly significant, since punitive damages are not *per se* incompatible with the French public policy, in so far as they are not disproportionate. Thus, the center of the public policy analysis moves from the incompatibility of punitive damages themselves to an examination of their amount[599].

However, the Supreme Court did not provide guidelines on how to determine whether a foreign punitive damages award is excessive. In fact, it just stated that punitive damages should not be disproportionate in relation to the injury suffered and the breach of the contractual obligations of the debtor. Though, the absence of determined criteria creates uncertainty, since the determination of the proportional nature of the award lies in the discretion of the lower courts.

In this respect, scholars have proposed two different solutions[600]. On one hand, a comparison between the amount of punitive damages and the amount of compensatory damages awarded may be required. In fact, the *Cour de Cassation* asserted that the award of punitive damages greatly exceeded the compensatory damages[601]. This may be interpreted as meaning that the Court

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doctrine] whereby the courts will reject foreign laws or judgments when they are considered contrary to fundamental national cultural values» (see M.L. NOBOYET-G.G. de LA PRADELLE, *Droit International Privé no 307*, 2009). As a consequence, a foreign law or a foreign judgment offending the *ordre public interne* is not sufficient to trigger the ordre public international exception.

[598] «Le principe d'une condemnation à des dommages interest punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur».

[599] See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 255, according to which «this revolutionary ruling makes it clear that objections against the enforcement of punitive damages based on the argument that they violate the divide between criminal and private law should be dismissed. This liberal, welcoming attitude on the part of France's Supreme Court appears [...] to be very progressive». Moreover, this corresponds also to the attitude of the Spanish Supreme Court in *MillerImport Corp. v. Alabastres Alfredo, S.L.*

[600] See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 255 f.

[601] The difference between them was $70,000.

suggests a 1:1 maximum ratio between punitive and compensatory damages[602]. On the other hand, scholars have considered the *Cour de Cassation*'s reference to the defendant's breach of the contract. Even if the dispute arose from a contract between the parties and, consequently, the French Supreme Court had to adapt the language of its judgment to the contractual origin of the litigation, it is possible to extrapolate the *Cour de cassation*'s statement to tort law as well. Thus, the term «contractual breach of the debtor» can be understood as referring to the seriousness of the debtor's wrongful behavior, the degree of culpability or blameworthiness of the fault[603]. As a consequence, according to this second approach, it is required to consider the conduct of the defendant when assessing the possible excessiveness of the foreign punitive damages award, together with the amount of compensatory damages given to the victim[604].

Whatever approach is applied, the application of the principle of proportionality shows that the *Cour de Cassation* has considered the evolution of the U.S. jurisprudence, which, starting from the BMW v. Gore case, has progressively introduced limits as regard to the determination of the amount of punitive damages[605]. Thus, the French Supreme Court, by referring to the principle of proportionality while enforcing a foreign judgement which awards punitive damages, has applied the same criterion used in the State where such damages are awarded[606].

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[602] See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 256, according to which «such a 1:1 ration stands in sharp contrast with the single digit rule (i.e. a maximum ratio of 9:1) established by the US Supreme Court when setting limits to punitive awards in the US». Moreover, according to the Author, «it could be argued that the amount awarded for attorneys' fees (*in casu* USD 402,084.33) should be added to the compensatory damages when calculating the ratio. Legal costs are in essence also a form of loss caused by the defendant. Of course, this scenario is quite exceptional because US litigants almost always bear their own costs, even if they win the case».

[603] See N. MEYER FABRE, *Recognition and Enforcement of U.S. Judgments in France: Recent Developments*, in *The International Dispute Resolution News 6*, 2012, p. 4.

[604] See C.I. NAGY, *Recognition, and enforcement of US judgments involving punitive damages in continental Europe*, in *1 Nederlands Internationaal Privaatrecht 4*, 2012, p. 9, according to which «generalizing this statement, it may be concluded that the punitive award's excessiveness is to be assessed about the amount of actual damages (in this case the punitive part exceeded the compensatory part) and it is to be taken into account how blameworthy the fault is».

[605] For the exhaustive analysis of the US Supreme Court Judicial review process, see *supra*, specifically from page 60 onwards of this work.

[606] See F. BENATTI, *La circolazione dei danni punitivi: due modelli a confronto*, in *Corriere giuridico*, 2, 2012, p. 266, according to which «si tratta pur sempre di un parametro soggettivo, con la conseguenza che in Francia potrebbero essere considerati eccessivi risarcimenti, valutati invece proporzionali nell'esperienza americana abituata a misure più elevate».

Moreover, the statement of the French Supreme Court, according to which punitive damages are not *per se* contrary to the French public policy, is not extremely surprising, since French scholars and lawyers generally agree that the purpose of tort law is not only to compensate damages[607]. In fact, they believe that deterrence and punishment are two other functions of civil liability and that French law provides for some mechanisms which do not principally aim to compensating the damage but are mostly intended to punish the wrongdoer.

15. The Proposals to reform the *Code Civìl*

Thus, French tort law seems to act as a form of "private penalty" (*peine privée*)[608]. An example of this *peine privée* function is the so-called *astreinte* which is a periodic penalty payment which can be imposed by a court, according to which a debtor has to pay to the creditor, in addition to his initial debt, a certain sum until he fulfils his duty. Thus, *astreinte* bears a close resemblance to punitive damages, since the money paid by the debtor exceeds the harm actually suffered by the creditor, who receives more than the amount of his loss[609].

Furthermore, there are fields where it is widely believed that French courts set damages not only on the basis of the harm suffered by the plaintiff, but also by considering the behavior of the tortfeasor, with the aim of punishing him when he appears to have been guilty of a deliberate contempt of the plaintiff's interest. An example is the competition field[610]. In fact, although there is no hard data[611], most

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[607] See J.S. BORGHETTI, *Punitive Damages in France*, in *Punitive Damages: Common Law and Civil Law perspectives*, H. KOZIOL – V. WILCOX (eds.), 2009, p. 68, according to which «the existence of punitive damages in some countries, especially the United States, has attracted much attention in France and has been a source of inspiration and discussion».

[608] See M. FABRE-MAGNAN, *Droit des obligations. 2- Responsabilité civile et quasi- contrats*, 2007, p. 13 f.; S. CARVAL, *La responsabilité civile dans sa fonction de peine privée*, foreword G. VINEY, 1995; B. MAZABRAUD, *La peine privée. Aspects de droit international*, thèse Paris 2, 2006.

[609] See J.S. BORGHETTI, *Punitive Damages in France*, cit., p. 58, according to which «there remain some differences, however, between astreinte and punitive damages, the first one being that the legislator has explicitly distinguishes astreinte from damages. Besides, astreinte is usually imposed when the debtor is in breach of a contractual dusty or of an explicit statutory duty. one hardly sees how astreinte could apply in matters of extra-contractual liability, except where a tortfeasor refuses to pay a victim damages which he has already been condemned to pay by a court or which he has agreed to pay under a settlement».

[610] See Cass. 1re civ., 31st May 2007, no. 05-19.978, *Revue des contrats (RDC)*, 2007.1118, with a commentary of Y.M. LAITHIER, according to which the existence of punitive damages was made even more obvious when the Cour de Cassation decided that the mere violation of a non-competition clause entitles the creditor to receive damages, without him having to demonstrate the existence of the damage.

[611] See Y. CHAPUT, *Clientèle et concurrence. Appoche juridique du marché*, 2000, p. 109, which analyses around 200 decisions relating to unfair competition and reaches the conclusion than damages are often awarded in order to punish the defendant. However, no estimate is given of the amount of punitive damages.

authors agree that in matters of unfair competition, when the courts set damages, they sometimes take into account not only the harm actually suffered by the plaintiff but also the profits which the defendant reaped from his culpable behavior[612].

Furthermore, many authors[613] have expressed the opinion that punitive damages should be introduced into French law. In their views, since criminal law is not always an adequate tool to fight against all such behaviors, punitive damages would be the best way.

In this respect, a group of French academics, led by Professor Pierre Catala, took the occasion of the 200th anniversary of the Civil Code to draft a project (*Avant-projet Catala*) which aims to update the part of the Civil Code dedicated to the law of obligations. As far as damages are concerned, the *Avant-projet* starts by affirming the principle of overall compensation, stating that «Subject to special regulation or agreement to the contrary, the aim of an award of damages is to put the victim as far as possible in the position in which he would have been if the harmful circumstances had not taken place. He must make neither gain nor loss from it»[614]. However, article 1371 of the *Avant-projet* immediately places an exception to this principle, by allowing for the payment of punitive damages in certain circumstances: «A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned, in addition to compensatory damages, to pay punitive damages, part of which the court may at its discretion allocate to the Public Treasury. A court's decision to order the payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance»[615].

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[612] See Cass. Com., 17th November 1998, *Revue de jurisprudence de droit des affaires (TJDA)* 3/99, no. 358, which upheld an appellate court's decision which took the defendant's fault into account in setting an award of damages.

[613] See M. CHAGNY, *Droit de la concurrence et droit commun des obligations*, foreword J. GHESTIN, 2004, p. 692 f.; G. MAÎTRE, *La responsabilité civile à l'épreuve de l'analyse économique du droit*, foreword H. MUIR-WATT, 2005, p. 303 f.

[614] Article 1370 of the *Avant-projet*: «Sous réserve de dispositions ou de conventions contraires, l'allocation de dommafes-intérêts droit avoir pour objet de replacer la victim autant qu'il est possible dans la situation où elle se serait trouvée si le fai dommageable n'avait pas eu lieu. Il ne doit en résulter pour elle ni perte ni profit».

[615] Article 1371 of the *Avant-projet*: «L'auteur d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommafes-intérêts punitifs

However, the *Avant-projet* has also attracted widespread criticism, some of which was directed at the very concept of punitive damages[616] and some at the way in which article 1371 regulates such damages. In fact, in a report on the *Avant-projet* drafted by the Paris Chamber of Commerce and Industry[617], punitive damages would give an excessively punishing flavor to civil liability and this would create confusion with criminal liability, whereas civil liability should abide with the principle of overall compensation. Moreover, the reporters are of the opinion that the courts can already efficiently sanction wrongdoers through a generous award of compensatory damages. Furthermore, the introduction of punitive damages had been criticized in a report drafted by a working group set up by the *Cour de Cassation*, chaired by Pierre Sargos, a former president of the *Chambre sociale de la Cour de Cassation*[618]. The group stated that the definition of the type of fault which would enable the courts to award punitive damages is too imprecise and the allocation of punitive damages to the Public Treasury alleviates the differences between *amende civile* and *astreinte*. Finally, the group expressed the opinion that French tort law should remain bound to the principle of overall compensation and that punishment of blameworthy behavior should be realized though the development of adequate criminal and administrative sanctions.

Despite criticism, the *Avant-projet* was presented to the French Minister of Justice in September 2005. Although the government declared it was very interested in

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dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du juge d'octroyer de tels dommages-intérêts doit être spécialment motivée et leur montant distingué de celui des autre dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables». Moreover, see J.S. BORGHETTI, *Punitive Damages in France*, cit., p. 70, according to which «this provision has probably been partly inspired by the position in Québec. The new Civil Code of Québec incorporates punitive damages and this has probably convinced many French lawyers, including the drafters of the Avant-projet, that this mechanism, though it originates from the common law, can be reconciled with the principles of the civil law tradition».

[616] See Y. LAMBERT-FAIVRE, *Les effets de la responsabilité*, in *RDC*, 2006, pp. 163- 164; M. BEHAR-TOUCHAIS, *Is civil penalty a satisfying substitute for the lack of punitive damages*, in *LPA*, 2002, n. 232, p. 36, according to which France's civil penalty is a sufficient alternative to punitive damages, especially because it prevents unjust enrichment of the victim and provides for adequate prevention and deterrence.

[617] D. KLING, *Pour une réforme du droit des contrats et de la prescription conforme aux besoins de la vie des affaires. Réactions de la CCIP à l'avant-projet "Catala" et propositions d'amendements* (2006) 119.

[618] Rapport du Groupe de travail de la Cour de Cassation sur l'Avant-projet de Réforme du Droit des Obligations et de la Prescription, 15th June 2007, no. 91.

the draft, the *Catala* Draft was replaced by a draft from the Department of Justice that did not even mention punitive damages. Even if hopes faded, the French legal system is constantly evolving, and it is likely that any future legislative change in the field of the law of obligations will be assessed in the light of the *Avant-projet*, or at least compared to it[619].

16. The discussions over the eligible beneficiaries of punitive damages

When it comes to the designation of the beneficiary of the award to be paid by the inflictor, the French legal community seems even more divided than regarding any other items.

Once more, Article 1371 Catala Draft stands out by its imprecision. Article 1386-25 Béteille Proposal echoes critical comments towards the latter but heads nevertheless for the same direction: the plurality of beneficiaries. This approach might appear quite peculiar to common law lawyers. The Terrè Tort Draft here again differentiates itself by pointing out the victim as the exclusive beneficiary of the punitive award.

Article 1371 Catala Draft states that the judge, when ordering the payment of punitive damages 'may direct *part of* such damages to the Treasury', thereby implicitly providing that the – another part of the – award is to be primarily

[619] In July 2010, the First Legislative Chamber registered a new proposal (*Béteille Proposal*), the purpose of which is to reform and codify present tort law. Its punitive damages provision is to be found in articles 1386-25, Béteille Proposal, which provides that: «In cases where the law expressly provides so when the damages result from deliberate wrongdoing or a deliberate breach of contract and have led to an enrichment of the wrongdoer resp. Promisor that the sole compensatory damages cannot eliminate, the judge can condemn, by a motivated decision, the inflictor of the damages to the payment, in addition to compensatory damages for the harm suffered by Article 1386-22, of punitive damages, the amount of which may not stand out twice the amount of the compensatory damages. According to shares decided by the judge, the punitive damages are respectively paid to the victim and to a fund which purpose is to compensate harm similar to the one suffered by the victim. When such a fund does not exist, the share of the punitive damages not attributed to the victim should be paid to the Treasury». Moreover, in 2010, a third reform draft was officially submitted by the so-called Terré drafting group to the Minister of Justice and published in March 2011 (*Terré Tort Draft*), whose article 69 reads as follow: «Subject to any specific provision, the form and amount of the reparation may have a symbolic reach. When an intentional fault causes the harm, the judge may condemn the wrongdoer, by an especially reasoned decision, to exemplary damages». While the Béteille Proposal originates from a legislative body, the Terré Tort Draft, like the Catala Draft, is both initiatives of university scholars. On the contrary, see J.S. BORGHETTI, *Punitive Damages in France*, cit., p. 72, according to which « [...] it seems unlikely that the legislator will officially introduce punitive damages into French law in the coming years. The reactions to the Avant-projet have shown that not only business circles but also many lawyers, judges, and academics are hostile to this institution».

allocated to the victim, as compensatory damages are[620].

This choice of beneficiaries, about which the drafter's comments remain silent, unleashed mainly negative reactions. Commentators oppose the allocation of an additional award to the victim and also contest the Treasury being an appropriate beneficiary. To Dreyer, the allotment of a punitive award to the victim potentially leads to his or her unjust enrichment[621]. The *Cour de Cassation* further signals its non-conformity with the compensatory purpose of civil liability where neutrality of the award for the victim is central[622]. Following a more pragmatic approach, Chagny positively views the allocation of punitive damages to victims as it constitutes an incentive for the same to intervene against lucrative, wrongful behavior.

Civil liability serves then as a private enforcement tool which directly benefits the victim but indirectly the community as well[623]. As to the allocation of the punitive award to the Treasury, the *Cour de Cassation* characterizes it as 'weird'. If implemented, it would create confusion between the concept of punitive damages as understood in common law and the device of civil fine with which French private law is familiar. The highest Court thus suggests that the punitive award be instead assigned to a compensation fund (*fond d'indemnisation*).

Article 1386-25 Béteille Proposal also foresees a plurality of beneficiaries: part of the punitive damages is to be directed to the victim and another part to a fund which purpose is to compensate losses as suffered by the victim. In the absence of such a fund, its share should benefit the Treasury. The Béteille-Anzani Report revealed that consultees were strongly divided on the punitive damages' beneficiaries' issue.

Despite the lack of consensus, the Béteille-Anzani Report recommends that the

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[620] J. MEADEL, *Faut-il introduire la faute lucrative ne droit francais?*, *LPA*, 2007, n. 77, p. 6 ss. The Author sees the Treasury as the sole beneficiary as Article 1371 does not explicitly mention the victim as beneficiary of the punitive award.

[621] E. DREYER, *La faute lucrative des médias, prétexte à une réflexion sur la peine privée*, *JCP*, 2008, n. 43, pp. 22-26; contra see P. PIERRE, *L'introduction des dommages et intérets punitifs en droit des contrats – Rapport Francais*, *RDC*, 2010, n. 3, p. 1117 ss.

[622] Rapport du Groupe de travail de la Cour de Cassation sur l'avant-projet de rèforme du droit des obligations et de la prescription, 15 juin 2007, available on the official website of the Cour de Cassation (www.courdecassation.fr).

[623] M. CHAGNY, *La notion de dommages et intérets punitifs et ses repercussions sur le droit de la concurrence. Lectures plurielles de l'article 1371 de l'avant-project de réforme du droit des obligations*, *JCP*, 2006, n. 25, pp. 1223-1227.

award be allocated in part to the victim. The reporters deem it to be of the essence of punitive damages that the victim is a beneficiary. Still, they partly side with the *Cour de Cassation* when proposing that part of the award be allocated to an indemnification fund, before the Treasury.

Also contested by the consultees is the choice, in Article 1371 Catala Draft, to charge the judge with the decision of whether or not to direct part of the award to another beneficiary than the victim[624]. Article 1386-25 Béteille Proposal slightly diverges from Article 1371 Catala on that point too: the plurality of beneficiaries is codified while the designation of the beneficiary's fund and the proportion of the award it is to receive is a matter of sovereign power of the lower judge. Again, the Béteille Proposal builds upon Article 1371 Catala Draft but attempts to avoid its shortcomings.

Neither the text of Article 69 Terré Tort Draft nor the drafters' comments, explicitly designate the beneficiary of the punitive damages. It clearly follows though from the system of Articles 68 and 69 Terré Tort Draft. According to Article 68, any person can obtain reparation of (non)-patrimonial harm caused by the infringement of his or her moral integrity. The originality of the Terré Tort Draft lies in the fact that the victim can be a private individual as well as a legal entity. Legal entities, Article 68 stipulates, may claim for reparation, provided, however, they are the victim of a serious fault. It then follows from Article 69 Terré Tort Draft that the (victim's) reparation right, based on Article 68, might either be a symbolic award or exemplary damages. Contrary to both the Catala Draft and Béteille Proposal, the victim, according to the Terré Group, is thus the sole beneficiary of the exemplary damages. This constitutes a far stronger incentive for the victim whose moral integrity has intentionally been damaged to take legal action; thereby increasing the deterrent impact of this provision.

The discussion that has developed in France about the specific issue of the beneficiaries of punitive damages, though in a spirit of a possible reform of civil liability, proves the vitality of the matter in order to guarantee a balance in the system.

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[624] A. ANZANI – L. BETEILLE, *Rapport d'information fait au nom de la commission des lois constitutionnelles par le groupe de travail relative à la responsabilité civile*, 2008-2009, 15 juillet 2009, available at www.senat.fr.

The proposals to establish funds, representing collective interests, equivalent to those harmed by the unlawful conduct, to which the over compensatory portion of the compensation is to be allocated, certainly deserve consideration and may represent a valid model also for the development of the debate in the Italian system.

In this manner, in effect, it is possible to assign a dissuasive and deterrent purpose to the compensation and, at the same time, to avoid that only the sole victim is unjustly benefited; in so doing, surmounting one of the main and traditional objections that have hindered the introduction of punitive damages in civil law systems.

Section III: The European perspective

17. The Growing European Attention for Punitive Damages

Notwithstanding the critics raised, supporters of punitive damages have found signals in the European legislation and case-law showing that the European Union does not totally reject this particular civil remedy[625]. Thus, it is worth analyzing in which way the Court of Justice of the European Union (CJEU) deals with this issue and how the European legislator reacts.

18. The position of the European Union legislator

The drafting process of the Rome II Regulation[626], even if it deals with private international law cases, clearly demonstrates the ambivalent attitude of the

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[625] See G. WAGNER, *Neue Perspektiven im Schadenersatzrecht – Kommerzialisierung, Strafschadenersatz, Kollektivschaden, Gutachten für den 66. Deutschen Juristentag*, in *Verhandlungen des 66. Deutschen Juristentages Stuttgart 2006*, C.H. Beck, 2006, Vol. I, Part A, p. 69, according to which the position of the European Union regarding punitive damages is not only ambivalent but also self-contradictory. Moreover, see H. KOZIOL, *Punitive Damages – A European Perspective*, in *La L Rev.*, 2008, p. 749, stating that: «on the other hand, an inclination towards punitive damages exists in some directives; for example, on consumer credit and in the area of anti-discrimination in the workplace, particularly about discrimination between men and women. Furthermore, the European Court of Justice demands the effectiveness of sanctions imposed by national laws for the violation of obligations arising from Community law».

[626] Regulation EC No. 864/2007 of the European Parliament and of the Council of 11th July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ* L 199, 31.7.2007, 40-49.

European Union towards punitive damages.

In the original draft[627], the Commission decided to combine a general rule on public policy (*ordre public*) with a more specific rule dealing with non-compensatory damages[628].

This was justified by an alleged widespread concern raised during the consultation phase by many contributors, predominately Germany, who argued that the absence of provisions limiting liability would be problematic. They found the general *ordre public* exception insufficient to avoid excessive damages such as punitive damages[629].

However, the Report on the proposal (also known as the Wallis report)[630] recommended that the proposal be softened by rephrasing it to a mere option of the forum to refuse the application of a foreign law allowing for punitive damages[631]. Subsequently, the Commission succumbed to this request and amended its

[627] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II), 22/07/2003, COM/2003/0427 final.

[628] The proposed article 24 reads as follows: «The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy».

[629] See Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM/2003/0427 final, p. 29, in which it can be noted that the idea of applying the law of a third country providing for damages not intended to compensate worried many contributors to the written consultation. On the contrary, see C. VANLEENHOVE, *Punitive Damages, and European Law: Quo Vademus?*, in L. MEURKENS-E. NORDIN (eds.), *The Power of Punitive Damages – Is Europe Missing Out?*, Intersentia, 2012, p. 335, according to which «the Commission, however, seemed to have forgotten how the legal systems of England and Ireland operate. The original draft would have had illogical consequences for those Member States since an English court for instance would have had to refuse the application of a foreign law granting punitive damages and replace it with its domestic law (*lex fori*) which awards such damages itself. [Moreover] Article 24 would also have caught other non-compensatory damages such as the account of profits which have an important function and are fundamentally different from punitive damages. This was caused by the lack of specificity as to the types of non-compensatory damages Article 24 aims to exclude».

[630] Draft Report on the proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), 2003/0168 (COD).

[631] See Draft Report on the proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), 2003/0168 (COD), pp. 31-33, in which rapporteur Diana Wallis, even if she felt sympathetic towards the proposed provision, thought it beyond the scope of the Regulation to introduce this new concept and to remove the possibility of awarding punitive damages as the Commission proposed in Article 24.

proposal[632] by deleting Article 24 and merging it with Article 23[633]. Thus, instead of automatically ruling out punitive damages as violating the public policy of the European Community, the new wording was meant to leave it purely optional for the national judge whether or not they deemed non-compensatory damages in violation of his own country's public policy[634].

However, this softened approach was subsequently smashed by the Council with its Common position[635], arguing that it was «difficult for the time-being to lay down common criteria and reference instruments to define public policy»[636].

As a consequence, in the final version of the Rome II Regulation only the first sentence of Article 23 of the proposal was retained in current Article 26, which deals with the public policy of the forum[637]. Nonetheless, a reminder of the discussion on punitive damages is recalled by the Regulation's preamble[638]. Thus, retaining at least an indication in the preamble of some Community general attitude

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[632] Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (Rome II), 21/02/2006, COD/2003/0168.

[633] In Article 23 it was stated that: «The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum».

[634] See F.X. LICARI, *Prendre les punitive damages au sérieux: propos critique sur un refus d'accorder l'exequatur à une decision californienne ayant alloué des dommages- intérêts punitifs*, in *JDI*, 2010, no. 17, according to which only excessive punitive damages are deemed to fall under the umbrella of the public policy exception.

[635] Common Position adopted by the Council on 25th September 2006 with a view to the adoption of a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) (EC) No. 22/2006, 25.9.2006, *OJ* C 289/3, 28/11/2006, p. 68.

[636] Statement of the Council's Reasons, 2003/0168 (COD), 25/09/2006, p. 11.

[637] Article 26 of the Rome II Regulation now states that: «The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum». See B.A. KOCH, *Punitive Damages in European Law*, in H. KOZIOL – V. WILCOX (eds.), *Punitive Damages: Common Law and Civil Law perspectives*, 2009, p. 199, stating that «this manœuvre did not change the interim version of the amended draft in substance, however, as each forum naturally retains the right to hold punitive damages in violation of its ordre public even without explicitly restating the obvious in the Regulation's text».

[638] Recital 32 of the preamble to the Rome II Regulation reads: «In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (ordre public) of the forum».

towards non-compensatory damages, despite its lack of legal force, is still a political signal[639].

Despite the Rome II Regulation, the European Union's attitude towards punitive damages is clear and inconsistent in other legal acts too.

On one hand, supporters of punitive damages see article 18 of Regulation No. 1768/1995[640] as proof of the existence of punitive damages within European law. In fact, under this provision, the right holder is awarded a multiple of the actual loss incurred and such overcompensation seems to be punitive in nature[641].

On the other hand, the 26th Recital of the Preamble to the Intellectual Property Rights (IPR) Enforcement Directive explicitly excludes punitive damages[642].

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[639] See R. PLANDER-M. WILDERSPIN, *The European Private International Law of Obligations*, London, 2009, p. 752, according to which the inclusion of the Recital in the Regulation is meaningful because it enables the Court of Justice of the European Union to draw the line as to what amounts to an excessive non-compensatory award, thereby defining the boundaries of public policy.

[640] See article 18 of Commission Regulation (EC) No. 1768/95 of 24th July 1995 implementing rules on the agricultural exemption provided for in article 14, par. 3, of Council Regulation (EC) No. 2100/94 on Community plant variety rights, *OJ* L 173, 25/07/1995, pp. 14-21, stating that: «1. A person referred to in Article 17 may be sued by the holder to fulfill his obligations under Article 14(3) of the basic Regulation as specified in this Regulation. 2. If such person has repeatedly and intentionally not complied with his obligation under Article 14(3) 4th indent of the basic Regulation, in respect of one or more varieties of the same holder, the liability to compensate the holder for any further damage under Article 94(2) of the basic Regulation shall cover at least *a lump sum calculated based on the quadruple average amount charged for the licensed production* of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage».

[641] See B.A. KOCH, *Punitive Damages in European Law*, cit., pp. 208-209, according to which « [...] such provision [...] whose scope of application is admittedly not extremely extensive, and more may follow if, say, the Commission's plans materialize to boost private law enforcement of antitrust rules by way of non-compensatory damages».

[642] Directive 2004/48/EC of the European Parliament and of the Council of 29th April 2004 on the enforcement of intellectual property rights, *OJ* L 195, 2/06/2004, pp. 16- 25. Recital 26 reads as follows: «To compensate for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the right holder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the right holder. As an alternative, for example, where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research». However, see the recent decision of the CJEU (*Stowarzyszenie 'Oławska Telewizja Kablowa' w Oławie v. Stowarzyszenie Filmowców Polskich w*

Furthermore, article 340, Treaty on the Functioning of the European Union (TFEU), which deals with compensation claims against EU institutions, employs exclusively language aiming at compensation[643]. Thus, it appears that the European legislator considers punitive damages not available at all[644].

19. The Case-Law of the Court of Justice of the European Union

The Court of Justice of the European Union has played a central role in respect of the increased interest in punitive damages at the European Union level. Supporters of punitive damages have brought forward the Court's approach concerning the effectiveness of national sanctions that may be imposed for breaches of European Union law as proof of the uncertain and inconsistent position of the European Union.

The right to damages for breaches of European Union law is an established right that goes hand-in-hand with the principle that national remedies must secure the effectiveness of European Union law. The principle of effectiveness (*effet utile*) has

Warszawie), in which the Court clearly stated that the Directive does not prevent EU countries from providing for the award of punitive damages for IP infringement under their national laws.

[643] Article 340, TFEU, states that: «In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties». Moreover, see Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, which seems to discard punitive damages, too. In particular, article 3, par. 3, states that: «Full compensation under this Directive shall not lead to overcompensation, whether using punitive, multiple or other types of damages».

[644] Another document in which the Commission has shown its opinion concerning punitive damages is the Green Paper on liability for defective products from 1999. The Commission makes clear in this paper that European products liability law is better off without punitive damages [COM (1999), 396 final, p. 13]. This conforms with the Directive of 1985 on liability for defective products, which is focused on compensation without even mentioning punitive damages (Directive 85/374/EEC). The Green Paper on consumer collective redress published in 2008 also makes clear that punitive damages are a remedy that might «burden business» or «encourage a litigation culture» and should therefore be avoided [COM (2008) 794 final, pp. 48 f.]. Then, the European Commission has again rejected the use of punitive damages in this context in a recent communication of 11 June 2013 concerning the future of a European Horizontal Framework for Collective Redress [COM (2013) 401/2], according to which collective damages actions should aim to secure compensation of damage that is found to be caused by an infringement. The punitory and deterrent functions should be exercised by public enforcement. Thus, since there is no need for EU initiatives on collective redress to go beyond the goal of compensation, punitive damages should not be part of a European collective redress system.

been interpreted by the ECJ as a requirement for national courts to give adequate effect to directly applicable EU rights in cases arising before them[645].

In this respect, fundamental was the Greek Maize decision[646], in which the European Court of Justice declared that national sanctions which may be imposed for breaches of European Union law should be «effective, proportionate and dissuasive». This formula has been reiterated in subsequent ECJ decisions and EU legislative acts and it has been connected to the punitive damages remedy[647].

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[645] E.g. CJEU 10 April 1984, case 14/83, ECR 1891 (*Von Colson and Kamann v. Land Nordrhein-Westfalen*); CJEU 19 June 1990, case C-213/89, ECR I-2433 (*R. v. Secretary of State for Transport, ex parte: Factortame Ltd. and Others*) (*Factortame I*); CJEU 8 November 1990, case C-177/88, ECR I-3941 (*Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*); CJEU 13 March 1991, case C-377/89, ECR I-1155 (*Cotter and McDermott v. Minister for Social Welfare and Attorney General*); CJEU 25 July 1991, case C-208/90, ECR I-4269 (*Emmott v. Minister for Social Welfare and the Attorney General*); CJEU 2 August 1993, case C-271/91, ECR I-4367 (*Marshall v. Southampton and South West Hampshire Area Health Authority*); CJEU 8 March 2001, joined cases C-397/98 and C-410/98, ECR I-1727 (*Metallgesellschaft and Hoechst v. Commissioners of Inland Revenue*); CJEU 20 September 2001, case C-453/99, ECR I-6297 (*Courage Ltd. v. Crehan*).

[646] ECJ C-68/88, *Commission v. Hellenic Republic* [1989] ECR 2965. In this case, the Court relied upon art. 5 [now art. 10] ECT to delineate the measures the Member States have to take to respond to infringements of Community law. The Court declared that «whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive».

[647] Most reoccurrences of this formula in EU legislation explicitly address "penalties" as in the Greek Maize case. E.g. art. 13 Directive 2006/24/EC of the European Parliament and of the Council of 15th March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, *OJ L* 105, 13/04/2006, pp. 54-63; art. 46 Directive 2007/46/EC of the European Parliament and of the Council of 5th September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), *OJ L* 263, 9/10/2007, pp. 1-106; art. 30 Directive 2007/59/EC of the European Parliament and the Council of 23rd October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, *OJ L* 315, 03/12/2007, pp. 51-78; art. 16 Council Directive 91/477/EEC on control of the acquisition and possessions of weapons as amended by Directive 2008/51/EC of the European Parliament and of the Council of 21st May 2008, *OJ L* 179, 08/07/2008, pp. 5-11; art. 30 Directive 2008/50/EC of the European Parliament and the Council of 21st May 2008 on ambient air quality and cleaner air for Europe, *OJ L* 152, 11/06/2008, pp. 1-44. However, some provisions speak more broadly of "sanctions" without any further qualification. E.g. art. 16(a) of Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work, as amended by Directive 2003/18/EC of the European Parliament and the Council of 27th March 2003, *OJ L* 097, 15/04/2003, pp. 48-52; art. 14 of Council Directive 1999/13/EC of 11th March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations, *OJ L* 85, 29/03/1999, pp. 1-22; art. 20 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L* 178, 17/07/2000, pp. 1-16); art. 8 of Directive 2002/14/EC of the European Parliament and of the Council of 11th March 2002 establishing a general framework for informing and consulting employees in the European Community, *OJ L* 80, 23/03/2002, pp. 29-34; art. 11 of Council Directive 2002/65/EC of the European Parliament and of the Council of 23rd September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directive 97/7/EC and 98/27/EC, *OJ L* 271, 09/10/2002, pp. 16-24; art. 3 of Council Directive 2002/90/EC of 28th November 2002 defining the facilitation

Another important decision is *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* (*Von Colson*)[648], concerning the correct interpretation of the Equal Treatment Directive[649]. In this case, both women applied for two positions at the all-male Werl prison in North-Rhine Westphalia (Germany). Due to the problems and risks attached to female employees working in a prison populated by men, the recruiters decided to engage two men. The applicants felt they were unlawfully denied employment on grounds of their sex and asked for compensation in the German court. The latter referred several questions to the ECJ for a preliminary ruling, particularly as regard to article 6 of the Directive, which obliged the Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves offended by a failure to apply to them the principle of equal treatment to pursue their claims by judicial proceeding. In this respect, the ECJ found the German transformation of the Directive to be inadequate[650]. Even if the Member States are free to choose the appropriate measures in order to remedy violations of article 6 of the Directive, higher damages than the costs of postage and other expenses have to be awarded in order to require liability to go beyond mere symbolic payment[651].

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of unauthorized entry, transit, and residence, *OJ L* 328, 05/12/2002, pp. 17-18; art. 17 of Directive 2004/25/EC of the European Parliament and of the Council of 21st April 2004 on takeover bids, *OJ L* 142, 30/04/2004, pp. 12-23.

[648] ECJ 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein- Westfalen*, *ECR* 1984, p. 1891. There is also a corresponding case of the same day: ECJ 10 April 1984, *Dorit Harz v. Deutsche Tradax GmbH*, *ECR* 1984, p. 1921.

[649] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *L* 039, 14/02/1976, p. 40.

[650] ECJ 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein- Westfalen*, *ECR* 1984, p. 1891, par. 14, holding that: «The principle of the effective transposition of the directive requires that the sanctions must be of such nature as to constitute appropriate compensation for the candidate discriminated against and for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses incurred through reliance on an expectation is not sufficient to ensure compliance with that principle».

[651] ECJ 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein- Westfalen*, *ECR* 1984, p. 1891, par. 28, stating that: «If a Member State chooses to penalize breaches [...] by the award of compensation, then to ensure that it is effective and that it has a deterrent effect, that compensation must, in any event, be adequate about the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application». See N. JANSEN-L. RADEMACHER, *Punitive Damages in Germany*, cit., pp. 84-85, according to which these damages for discrimination cannot be explained within the traditional compensatory framework, but conversely fit into the concept of punitive damages.

Furthermore, of utmost importance is the principle established by the ECJ in the *Francovich* case[652] and further developed in the joined cases *Brasserie du pêcheur* and *Factortame III*[653] according to which a Member State may be held liable for damages under the principle of (Member State) liability for breach of European Union law. In particular, in the latter case, the Court referred to damages with a punitive function, by stating that «an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law»[654]. As a consequence, many scholars have interpreted the principle of equivalence as requiring the award of punitive damages if such damages could in similar circumstances be awarded according to national law[655]. Finally, it is worth to mention the recent decision of the ECJ regarding the Intellectual Property Rights (IPR) Enforcement Directive[656].

The case concerned the compatibility with article 13 of Directive 2004/48[657] of a provision of the Polish copyright law, according to which, in case of infringement,

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[652] CJEU 19 November 1991, joined cases C-6/90 and C-9/90, *ECR* I-5357 (*Francovich and Bonifaci v. Italy*).
[653] CJEU 5 March 1996, joined cases C-46/93 and C-48/93, *ECR* I-1029 [*Brasserie du pêcheur SA v. Germany* and *R. v. Secretary of State for Transport, ex parte*: *Factortame Ltd. and Others* (Factortame III)].
[654] Joined cases *Brasserie du pêcheur* and *Factortame III*, pp. 89-90, in which the ECJ stated that: «As regards, in particular, the award of exemplary damages, such damages are based under domestic law, as the Divisional Court explains, on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages under a claim or an action founded on Community law cannot be ruled out if such damages could be awarded according to a similar claim or action founded on domestic law. [...] Accordingly, the reply to the national courts must be that reparation by the Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favorable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to the damage done to certain, specifically protected individual interests, not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, under claims or actions founded on Community law, if such damages may be awarded under similar claims or actions founded on domestic law».

[655] See K. OLIPHANT, *Cultures of Tort Law in Europe*, p. 244. Moreover, in the Manfredi case, the ECJ went one step further, establishing that this requirement does not only apply to Member State liability but also to actions by private parties for breaches of EU competition rules (see *infra* §4.2).

[656] *Stowarzyszenie 'Oławska Telewizja Kablowa' w Oławie v. Stowarzyszenie Filmowców Polskich w Warszawie*, C-367/15, ECLI:EU:C:2017:36
[657] Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights reads as follow: «1. Member States shall ensure that the competent judicial authorities, on the application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity, to pay the right holder damages appropriate to the

the copyright holder may be awarded a sum of money consisting of two or three times the amount of the hypothetical royalty. In this respect, the ECJ did not rule out that businesses that infringe the intellectual property rights of others can be ordered to pay damages that value multiple what it would have cost them to license the use of that IP legitimately[658]. In fact, according to the Court, the Enforcement Directive «lays down a minimum standard concerning the enforcement of intellectual property rights and does not prevent the Member States from laying down measures that are more protective». As a consequence, the Directive does not prevent EU countries from providing for the award of punitive damages for IP rights infringements under their own national laws[659].

To conclude, it is clear that, despite the more restricted and negative approach of the European legislator, the CJEU seems to be more willing to welcome the punitive damages remedy into the European Union[660].

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actual prejudice suffered by him/her as a result of the infringement. When the judicial authorities set the damages:
a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum based on elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question.
2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established».

[658] The Court ruled that: «Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used».

[659] The Court stated that: « [...] that interpretation [is not] called into question by the fact that Directive 2004/48, as is apparent from recital 26, does not have the aim of introducing an obligation to provide for punitive damages. [...] the fact that Directive 2004/48 does not entail an obligation on the Member States to provide for 'punitive' damages cannot be interpreted as a prohibition on introducing such a measure». Moreover, it is important to highlight that this decision appears to be in flagrant contrast with the opinion of Advocate General Sharpston. In fact, whereas he stated that «it cannot be said that the notion of punitive damages must be regarded as being irreconcilable in all circumstances with the requirements of EU law», an award of punitive damages does not satisfy the proportionality test, which requires a relationship between the loss suffered and the amount claimed. Thus, in his view, the Directive does not authorize a Member State to provide a right holder whose intellectual property rights have been infringed with an entitlement to punitive damages.

[660] See B.A. KOCH, *Punitive Damages in European Law*, cit., p. 205, according to which «the bottom line of this jurisprudence is therefore *not* that the ECJ wants to promote punitive damages [...] ».

20. European Competition Law

An important cause of the growing European interest in punitive damages is the concept of private enforcement, which finds its origins in the field of competition law.

In complete contrast to the United States, where private antitrust lawsuits are most prevalent, private damages actions in the European Union (EU) are not very common and have never played a central enforcement role. However, thanks to the Court of Justice of the European Union, the debate on private enforcement of competition law in Europe was opened, particularly with the *Courage v. Crehan* judgement[661], in which the Court explicitly recognized a right to damages for breaches of EU competition law.

Supporters of punitive damages see this decision, as well as the following, as proof of a positive approach to and increased interest in punitive damages. Therefore, it is worth to analyze those judgements, which had also the effect of pushing the European Commission to express a position as regard to the adoption of punitive damages in case of competition law infringements.

20.1. The Courage Case

The European Court of Justice has played an essential role in the initial shaping of private antitrust enforcement in the European Union. Accordingly, fundamental was the *Courage v. Crehan* judgment[662], which led to the establishment of the right of any individual to claim damages before national courts for loss caused by anticompetitive behaviors.

[661] Judgement of the Court of Justice 20 September 2001, Case C-453/99, *Courage Ldt v. Bernard Crehan*, ECR 2001, I-6297.

[662] In this case, Mr. Crehan, a leaseholder in two Intrapreneur pubs, was contracted to purchase most of his beer from the brewer Courage. The latter sued Crehan in the English High Court for unpaid debt. In his defense, Crehan challenged the lawfulness of the agreement, by claiming that it violated article 101, TFEU. He also launched a counterclaim for damages, arguing that the illegal agreement caused the failure of his business. The case reached the Court of Appeal, which in turn referred it to the ECJ, asking, *inter alia*, whether a co-contractor has a right to damages.

First of all, the Court made it clear that if claiming damages, arisen from a conduct which restricts or distorts competition, were not open to any individual, the full effectiveness of the Treaty, and, in particular, the practical effect of the prohibition laid down in article 101, TFEU[663], would be at risk[664]. Moreover, the European Court of Justice acknowledged that the existence of such a right would have the effect of strengthening the role of EU competition provisions, as well as, of deterring the conclusion of agreements liable to restrict or distort competition[665].

In this respect, national courts play an important role in applying EU law provisions, since they should ensure that such rules take full effect and protect the rights they confer upon individuals[666]. Thus, if effective European procedural rules are lacking,

[663]Article 101, TFEU, provides that:
«1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) conclude contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited under this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question».

[664] See *Courage v. Crehan*, par. 25-26, which state that: «the full effectiveness of article 81 [now 101 TFEU] of the EC-Treaty and, in particular, the practical effect of the prohibition laid down in article 81(1) [now 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition».

[665] See *Courage v. Crehan*, par. 27, stating that: «the existence of such a right strengthens the working of the Community competition rules and discourages – frequently covert – agreements or practices, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community».

[666] *Ibid*. par. 29: « [...] In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favorable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)».

each Member State has to create an operative procedure enabling individuals to enforce competition law privately.

Furthermore, this decision is significant also because the claimant was not a victim of the anticompetitive behavior, but a party to the illegal cartel. In fact, there was a rule under English law according to which a party cannot obtain compensation from another party if they are both equally responsible for the damages. However, The Court's view was that the possibility of recovery of damages must in principle be open to any individual[667].

Therefore, with the *Courage v. Crehan* case, the right to damages for EU competition law infringements has, for the first time, been established.

20.2. The Manfredi Case

The *Courage v. Crehan* judgment was later confirmed and elaborated on by the European Court of Justice in the *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni* decision[668].

First of all, the Court restated that the full effectiveness of article 101(1) required that «any individual can claim compensation for the harm suffered where there is a casual relationship between that harm and an agreement or practice prohibited under article 81 EC [now 101 TFEU] »[669].

In addition, the European Court of Justice was asked whether article 101, TFEU, requires national courts to award punitive damages.
In this respect, the Court affirmed that punitive damages should be available if they

[667] *Ibid*. par. 28.
[668] Judgement of the Court of 13 July 2006, C-295 to 298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni* 2006 [*ECR*], I-6619. The case concerned a damages action in the Italian courts regarding a price-fixing cartel agreement in the car insurance sector. Manfredi and other applicants claimed they had suffered economic damages and brought actions against their respective insurers in order to obtain compensation. A number of questions were referred to the Court for a preliminary ruling, particularly regarding the award of punitive damages.
[669] *Manfredi*, par. 60-61.

are also available for similar domestic claims[670]. Thus, by saying so, the Court submitted that punitive damages are not contrary to the European public order[671].

Furthermore, it stated that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*), plus interest[672].
Therefore, the Manfredi judgment reiterates the need for effective compensation of the victims for competition law infringements. And the fact that the Court allowed the Member States to adopt multiple damages can be seen as an attempt to enhance private enforcement[673].

21. The Commission's Initiatives

On the basis of *Courage v. Crehan* and Manfredi's decisions, individuals now have a right to claim damages before national courts for the harm resulting from anticompetitive conduct. According to this, national courts must set criteria for determining an appropriate award of damages, which may include punitive damages if such remedy is available for competition law claims based on national law.

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[670] *Manfredi*, par. 93: «In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law [...] ».

[671] However, as pointed out in one of the working documents that accompany the Commission White Paper on damages actions for breach of the EC antitrust rules, this acceptance of punitive damages shows that the Court is not concerned about unjust enrichment or a windfall for the plaintiff in case such damages are awarded: «The fact that the Court accepts the existence of punitive damages, which by definition implies a transfer of assets to the claimant beyond the damage actually suffered, shows that there is no absolute principle of Community law that prevents victims of a competition law infringement from being economically better off after a successful damages claim than the situation they would be in but for the infringement. It can thus be assumed that enrichment would no longer be unjust if it results directly from the application of the relevant substantive and procedural rules, meaning that it would be "justified" by law. In the absence of such rules, the Court seems to accept domestic rules that aim at prohibiting enrichment without a just cause».

[672] *Manfredi*, par. 91-95.

[673] See A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, in L. MEURKENS-E. NORDIN (eds.), *The Power of Punitive Damages – Is Europe Missing Out?*, Intersentia, 2012, p. 438, according to which «This [possibility] should, however, not lead to the conclusion that the Court considers punitive damages to be appropriate in all competition cases, or that they should be available in all jurisdictions. The adoption of multiple damages gives rise to numerous issues and should, therefore, be assessed in the light of the concrete circumstances and context of the case»; L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, cit., p. 219, according to which «Contrary to the CJEU in *Manfredi* and the Commission in the White Paper working document, the legislator of the European Union did declare punitive damages as being contrary to public policy in recital 32 of the Preamble of Rome II. This is a clear example of the uncertain and self-contradictory position of the European Union with regard to punitive damages».

Thus, triggered by the case-law of the CJEU, the Commission focused on the enhancement of damages actions, in order to stimulate individuals who are harmed by anticompetitive behaviors to obtain justice, by asking for compliance of EU competition law before national courts.

21.1. The Ashurst Report

The first step was to identify the main obstacles hindering private enforcement and to find possible solutions.

With this aim, the Commission initiated a study, known as the Ashurst Report[674], which was published in August 2004.
However, the outcome was not very optimistic[675], since the report found that only three Member States[676] had a specific legal basis for bringing damages actions based on national competition law. Thus, in the absence of a legal basis, the other Member Stated referred to general provisions for the conditions of liability[677].

Moreover, according to this study, throughout the European Union around 60 antitrust claims were reported in 2004. However, only 28 have resulted in a damages award[678].
Finally, the report also paid attention to punitive damages as a possible mechanism of private enforcement in competition cases. In fact, among the possibilities to

[674] Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst Brussels, 2004).
[675] Ashurst Report 2004, p. 1: «The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment».
[676] Finland, Lithuania, Sweden.
[677] See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons, and Caveats for Continental Europe*, cit., pp. 221-222, according to which « [...] the absence of a specific legal basis in most Member States does not in itself create obstacles, although the existence of a legal basis may 'raise the profile' and thereby encourage private persons to initiate proceedings». Moreover, see M.F.J. HAAK-I.W. VERLOREN VAN THEMAAT, *De Mogelijkheden voor Civielrechtelijke Handhaving van de Mededingingsregels in Nederland - Een Inventarisatie in Opdracht van het Ministerie van Economische Zaken*, Amsterdam: Houthoff Buruma, 2005, pp. 1-9, which gave three explanations for the lack of private enforcement of competition law: (1) the financial and other risks are outweighed by the expected benefits of the procedure; (2) it is very difficult for an injured party to produce proof of a competition law infringement; and (3) it is also difficult to produce proof as regards the injured party's loss, whereas it is quite easy for the infringer to put up defenses in this regard.
[678] See A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., pp. 442-443, according to which «In contrast with the situation prior to the Courage case, the uncertainty of the existence of a right to damages no longer seemed to be the main impediment. Potential claimants have mostly been discouraged by unfavorable elements of this remedy, a lack of clarity as to its application, and a general reluctance to make use of it».

increase the level of damages and encourage plaintiffs to bring an action, the report mentioned the introduction of a form of punitive damages[679].

21.2. The Green Paper

On the basis of the Ashurst Study, the Commission published a Green Paper[680] and a Commission Staff Working Paper on antitrust damages actions in December 2005.
Their objective was to «identify the obstacles to a more efficient system for bringing such claims and propose options for solving these problems»[681].

From this paper, it appears that the Commission was extremely concerned about the small number of victims that brought actions for damages for competition law infringements.
Thus, according to the Commission, the most important aims and advantages of a more developed private enforcement of EU competition law are two. First of all, victims of such infringements should be compensated[682]. Secondly, private enforcement has an important deterrent function[683].

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[679] Ashurst Report 2004, p. 12: «The availability of punitive, exemplary or treble damages would clearly increase a potential plaintiff's possible award and constitute an incentive to bring an action in the first place [...] ».
[680] Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, par. 1.1, COM (2005) 672 final (19 December 2005). In the EU, green papers are documents published by the European Commission to stimulate discussion on given topics at the European level. They invite the relevant parties to participate in a consultation process and debate based on the proposals they put forward. The proposals included in green papers and their subsequent discussion may give rise to legislative developments that are then outlined in White Papers.
[681] Green Paper, par. 3. Moreover, see Commission's press release from 20 December 2005, according to which the measures proposed by the Green Paper would ensure that companies and consumers were compensated for their losses while avoiding claims instituted without sufficient grounds and serving only to annoy the defendant.
[682] Annex to Green Paper 2005, p. 6: «It is fundamental to the idea of private damages actions that the victim of a violation of the law is entitled to compensation for the loss suffered as a result of the violation in question. If competition law is to better reach consumers and undertakings and enhance their access to forms of legal action to protect their rights, victims of competition law violations should be able to recover damages for loss suffered. Damages can be claimed both in actions between co-contractors, as well as in actions brought by third parties against infringers of the law».
[683] Annex to Green Paper 2005, pp. 6-7: «Enhanced private enforcement will maximize the amount of enforcement as a means of enforcement additional to public enforcement. Increased levels of enforcement of the law will increase the incentives of companies to comply with the law, thus helping to ensure that markets remain open and competitive. Increased private enforcement will enlarge the range of infringements for which competition law will be enforced as well as the level of enforcement generally. This will arise in particular from litigation which is not brought on the back of decisions adopted by public authorities ("follow-on" actions). With follow-on actions, facilitating private enforcement will add more frequently than before to the fines imposed by public competition authorities the possibility for the victim of the anticompetitive behavior to recover his losses. Both damages award and the imposition of fines contribute the maintenance of effective competition and deter anticompetitive behavior». Moreover, see A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., p. 449, according to which «

Then, giving individuals a more active role in the enforcement of competition law will bring European citizens into closer and more direct contact with laws and policies made at European Union level[684].

As regard to punitive damages, The Commission considered as an option to induce persons harmed by anticompetitive conducts to bring actions and cartel members to cease their wrongful behavior the award of double damages for horizontal cartels[685]. Accordingly, when determining the way in which damages should be defined, the Green Paper expressly provides for the option of double damages[686].

However, this option has been the most controversial one. In fact, the reactions to the Green Paper clearly demonstrated that the great majority supported the compensatory principle for the recovery of damages, which was completely opposed to any other proposal departing from it[687].

[...] if deterrence is one of the Commission's objectives when encouraging damage claims, as it stated in the Green Paper, the concession of multiple damages will in effect contribute to achieving this objective and can be considered a logical, and eventually adequate, measure. Allowing individuals to recover multiple damages can compensate for low probabilities of detection of hard-core cartels, and at the same time act as a disincentive for firms that are considering taking part in such agreements. The approach taken by the Commission in the Green Paper reflects this point of view».

[684] Annex to Green Paper 2005, p. 7: «Bringing Community competition law closer to the citizen will encourage greater involvement in the enforcement of that law and thus a greater awareness of and engagement in competition law on the part of European citizens. It will help bring European citizens and undertakings into closer and more direct contact with laws and policies made at European Union level».

[685] Annex to Green Paper 2005, p. 43: «To create a clear incentive for claimants to bring antitrust damages cases, it could be envisaged to award double damages in case of the most serious antitrust infringements, i.e. horizontal cartels». See A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., p. 450, stating that: «In effect, the fact that victims can only claim a compensating amount of damages is not very encouraging to sue, particularly if we take into account the high costs that private litigation commonly involves and its unpredictable character. In this context, punitive damages can act as an (economic) incentive: plaintiffs will be more likely to bring damage claims when the potential awards are higher».

[686] Green Paper 2005, Option 16: «Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court». Moreover, see Annex to Green Paper 2005, p. 36, stating that «It should be borne in mind that most Member States exclude exemplary or punitive damages as contrary to their public policy. For that very reason, those Member States may refuse to recognize and enforce decisions providing for such damages. Despite this situation, one has to consider whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements. In doing so, one would create a clear incentive for claimants to file a damages claim. Such an incentive would be most apparent was the national court to automatically award more than single damages in case of the most serious antitrust infringements. One could, however, also make the award dependent on the existence or the absence of predefined conditions or leave it completely to the discretion of the national court».

[687] See the comment of the Competition Practice Group (CMS) to the Commission Green Paper 2005, p. 13: « [...] in rare cases there may be multiple jeopardies for the infringer through parallel antitrust damages claims of direct and indirect purchasers. Multiple jeopardies are, from our point of view, a very small risk which the infringer should have to bear. This is also an argument against double and other exemplary damages».

21.3. The White Paper

The next step was taken in April 2008, when the Commission adopted the White Paper[688] on private damages actions for breach of the EC Antitrust Rules[689], along with a Staff Working Paper[690] and an Impact Assessment[691].

In the light of the reactions to the Green Paper, the White Paper adopted many proposals, aiming to ensure that any victim of anticompetitive behavior can have access to appropriate enforcement mechanisms and be effectively compensated.

However, compared to the Green Paper, the Commission took a more reserved position[692] and deliberations on punitive damages did not continue. In fact, even if the Commission payed attention to the CJEU's ruling in *Manfredi*, according to which it should be possible to award punitive damages for competition law infringements if such damages may be awarded pursuant to similar actions based on national law, in the Impact Assessment the Commission made clear that in some Member States legal objections exists. Moreover, the *Manfredi judgment* must be interpreted as meaning that it does not suggest that punitive damages should be introduced[693].

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[688] A Commission White Paper is a document containing policy proposals for EU actions in a specific area. As it does in this case, it often follows a Green Paper published to launch a consultation process on the EU level. A White Paper does not have any binding effect, but it can lead to an action program for the EU in the area concerned if it is favorably received.

[689] White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final.

[690] Commission staff working paper accompanying the White Paper on damages actions for breaches of the EC antitrust rules, SEC (2008) 404 final.

[691] Commission staff working paper accompanying the White Paper on damages actions for breaches of the EC antitrust rules – Impact assessment, SEC (2008) 405 final. The White Paper should be read in conjunction with the aforementioned documents, the former offering a relevant overview of the existing *acquis communautaire*, and the latter analyzing the benefits and costs of the various policy options.

[692] A. EZRACHI, *From Courage v. Crehan to the White Paper – The changing landscape of European private enforcement and the possible implications for Article 82 litigation*, in M.O. MACKENRODT-B. CONDE GALLEGO-S. ENCHELMAIER (eds.), *Art. 82 EC: New Interpretation, New Enforcement Mechanisms?*, Dordrecht: Springer, 2008, p. 125, according to which the measures proposed in the White Paper were more conservative and disappointing.

[693] Annex to White Paper 2008: Impact Assessment, pp. 27-28: «Another possibility considered was to discard from the outset, for reasons of legal compatibility, the inclusion of multiple damages in any of the Policy Options. Multiple (punitive) damages (as opposed to purely compensatory damages) raise serious issues as regards their compatibility with the public policy and/or basic principles of tort law in many Member States. Under Community law, the existence of exemplary or punitive damages in the Member States may be acceptable as the Court clarified in its Manfredi judgment that "under the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, according to actions founded on the Community competition rules, if such damages may be awarded under similar actions founded on domestic law" (however, this does not imply that such particular damages should be introduced in every Member State). Therefore, to subject the full spectrum of possible (and sometimes supported) solutions to an impact

Consequently, the Commission focused on full compensations of victims of competition law infringements[694]. Measures should be effective, but damages to be awarded should not influence the level of fines (public enforcement) or the result of any private actions taken[695].

However, it should be kept in mind that, even if the Commission ultimately decided to avoid the use of a form of punitive damages in order to achieve the effective enforcement of competition law as to ensure full compensation of victims, it did not reject *a priori* any possible introduction of punitive damages. In fact, the Commission underlined that the appropriateness of the current definition of damages might be reconsidered, particularly if the situation in Europe does not change over the coming years[696].

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assessment, it was decided not to discard *a priori* double damages from the Policy Options, without ignoring that in some Member States there are legal objections to punitive damages. Particular attention was therefore paid to assessing the feasibility under national law and the impact of such measures [...] ».

[694] White Paper 2008, p. 3: «Full compensation is, therefore, the first and foremost guiding principle [...] The policy choices proposed in this White Paper, therefore, consist of balanced measures that are rooted in European legal culture and traditions».

[695] Annex to White Paper 2008: Impact Assessment, par. 61: «Since the primary objective pursued is full compensation of victims, the damages to be awarded should not influence the level of fines imposed by competition authorities in their public enforcement activities, nor under any future framework of enhanced private actions. Public fines and purely compensatory damages serve two distinct objectives that are complementary: the main objective of public fines (and of potential criminal sanctions) is to deter not only the undertakings concerned (specific deterrence) but also other undertakings (general deterrence) from engaging or persisting in behavior contrary to Articles 81 and 82. The main objective of private damages is to foster corrective justice by repairing the harm caused to individuals or businesses. Of course, as mentioned earlier, this by no means precludes that effective systems for the provision of damages also have positive side-effects on deterrence».

[696] Annex to White Paper 2008, par. 203-204: «The *acquis communautaire* on the definition of damages should be codified as a minimum standard. That being said, one also has to consider the fact that the risk/reward balance in antitrust damages litigation is skewed against bringing actions. The Commission considers it necessary to address this negative balance by ensuring that there are sufficient incentives for victims of competition law infringements to bring meritorious claims. One way of doing so would be to assure the claimant a priori that if he wins the case, he will be awarded damages that are higher than the loss suffered. However, as mentioned in paragraph 194, such a general approach would not appear necessary today. If it were to emerge, though, that the current situation in Europe of very limited repair of the harm caused by infringements of the competition rules does not structurally change over the coming years, it should be considered what further incentives are required to ensure that victims of competition law infringements bring their antitrust damages action. In that context, the appropriateness of the current definition of damages might have to be reconsidered». Moreover, see A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., pp. 448-450, according to which «the suitability of the adoption of punitive damages will also depend on the role it plays in achieving the Commission's goals. [Thus] If by facilitating private damages actions, the Commission only aims at assuring full compensation of loss, the introduction of multiple damages awards would inevitably be excessive. Punitive damages do certainly have compensatory benefits. The problem is that since this remedy affords by definition a higher award than the value of the loss suffered, the victims are *over*compensated. The additional award incorporated in the "punitive element" of the remedy, would at the same time result in a "not pursued" deterrent effect. Full compensation

22. Did the Commission Make the Right Choice?

This *iter* shows that the European Commission has openly discussed the possible introduction of punitive damages as a private enforcement instrument in order to fight breaches of EU competition law. Cartels have always been the main enforcement priority of the Commission and this is the reason why it proposed the introduction of punitive damages in the Green Paper, aiming not only to provide a remedy for victims, but also to combat them, by considerably increasing deterrence.

However, probably aware of the fact that the primary aim of damages actions should be compensation because this is significantly what distinguishes private from public enforcement, the Commission removed this option in the White Paper.

The decision of the European Commission was right because it demonstrated that its will was respectful for European legal traditions and, more specifically, for the individual legal systems.
Nonetheless, if the Commission had the opportunity to take such decision nowadays, the outcome would have probably been different, due to the recent development and changes of the punitive damages debate in certain European civil law countries. Therefore, the time was not right yet.

Part III - Punitive purpose, in a re-established relationship between (individual) freedom and (social) liability

23. The issue before the Italian Supreme Court

The decision at the core of this section[697] mainly addresses two issues, different but to a certain extent interrelated (although, it has to be observed, the grounds and consequences of these connections are various and not always overlapped,

can in all cases be effectively achieved by just awarding single damages, which are more adequate, as long as the final award for the victims is properly aligned with the size of the harm actually suffered».

[697] Cass., sez. un., 5 July 2017, no. 16601, which can be for instance read in *Giur. it.*, 2017, p. 1787 ss., with a note by A. DI MAJO, *Principio di legalità e di proporzionalità nel risarcimento con funzione punitiva* and in *Corr. giur.*, 2017, p. 1042 ss., with the comment of C. CONSOLO, *Riconoscimento di sentenze, specie USA e di giurie popolari, aggiudicanti risarcimenti compensativi o comunque sopracompensativi, se in regola con il nostro principio di legalità (che postula tipicità e financo prevedibilità e non coincide pertanto con il, di norma presente,* due process of law*)*.

going, to mention at least the most relevant ones, from legal transplant, to the usefulness and good use of comparison; from the relationship between axiology and law, to the function of jurisdiction and the role of the interpreter; from the dialogue between legal systems, and thus their flexibility, the product of reciprocal influence, to the search for stability, in order to safeguard above all legal certainty, in the form of predictability of the decision and its effects on the legal status of citizens): the first concerns the legal relevance, in the Italian legal system, of the Anglo-American institute of punitive damages[698]; the second regards the current functions of civil liability[699].

As this analysis will show, both the level of political philosophy (referring to the sense, the foundations and the evolution of 'living in society') and that of the policy reflect and affect the level of legal technique.

24. The content of the message conveyed by the Supreme Court: a statement of principle

Before examining in detail how the judgment has resolved the problems brought to it, it is important to quickly consider how these questions have been presented from the point of view of "judicial style". Therefore, according to the typical enquiry: how should the discourse that the Court makes on the subject of punitive damages be qualified (in the broad terms, moving then immediately to the contiguous field of the significance and function of liability for wrongful acts, and consequently of compensation for damages)? There are those who have already commented, or will say: certainly, the judgment is erudite and the motivation is wide-ranging, reaching the heart of tort law (the judgment, moreover - and this is perhaps to some extent arguable - discusses the "essence" of tort law[700]), but the

[698] I refer here exclusively to some recent contributions, where extensive bibliographic riff.: F. BENATTI, *I danni punitivi nel panorama attuale*, in *giustiziacivile*.com, 24.05.2017; C. SCOGNAMIGLIO, *Le Sezioni Unite e i danni punitivi: tra legge e giudizio*, in *Resp. civ. prev.*, 2017, p. 1109 ff.; M. TESCARO, *La riconoscibilità delle sentenze nordamericane di condanna a* punitive damages, in C. GRANELLI (ed.), *I nuovi orientamenti della Cassazione civile*, Milano, 2017, p. 535 ss. See also F. QUARTA, *Risarcimento e sanzione nell'illecito civile*, Napoli, 2013, Ch. 4, p. 243 ss. and P. PARDOLESI, *Contratto e nuove frontiere rimediali*. Disgorgement v. punitive damages, Bari, 2012, especially Chapter 1, p. 19 ss.

[699] On this aspect too, it is sufficient here to refer to: P. TRIMARCHI, *La responsabilità civile: atti illeciti, rischio, danno*, Milano, 2017, spec. Ch. 1, p. 3 ss; P.G. MONATERI, D. GIANTI e L. SILIQUINI CINELLI, *Danno e risarcimento*, in *Tratt. resp. civ.*, directed by P.G. Monateri, Torino, 2013, Ch. 1, p. 1 ff.; M. BARCELLONA, *Trattato della responsabilità civile*, cit., spec. 'Introduction', p. 1 ff.

[700] As it can be read, on p. 20 of the typescript: "This does not mean that civil liability has changed its essence [...]" (the quotations are always taken from the typescript, of a total of 26 pages).

Court's ruling (on the subject of the legal transplant of punitive damages through a foreign judgment, and a fortiori, of the multi-functionality of tort law) is undoubtedly, by the Court's own admission, an obiter dictum: in particular, as has been evocatively suggested, an obiter ex cathedra[701].

Some have already stated, or will say: what the Court has ruled, and in particular what is to be read in the extensive principle of law behind the reasoning, is undoubtedly ratio decidendi[702], if only because the judgment is expected, in the near future, to represent a milestone (and even a turning point) in the field of civil liability[703].

However, a third point of view could be considered. In fact, adopting an appropriate formula, it may be asserted that this is a "judgment of principle", which comes about when case law, and in particular the Supreme Court, establishes principles "that go well beyond the circumstances of the case to be

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[701] Reference is made in particular to the following observation by C. CONSOLO and S. BARONE, *Postilla minima di messa a giorno di inizio luglio 2017*, in *Giur. it.* , 2017, p. 1365 ff, here p. 1366: "And it is only at this point (and we are on p. 12 [and in fact on p. 12 of the grounds the analysis of the third ground of appeal begins, which the Court qualifies as 'inadmissible': "The inadmissibility of the last ground [precisely the third], however, gives the United Sections the power to rule on the issue discussed therein, being able to interpret article 363 co. Article 363 par. 3 of the Code of Civil Procedure can be interpreted as meaning that the enunciation of the principle of law is also allowed in relation to the inadmissibility of a single ground of appeal that concerns a question of particular importance, even if the appeal as a whole must be rejected": p. 16]. 16]) that opens the dances of a long *obiter*, but *ex* 363, collegially *ex cathedra* and not only of the rapporteur, on the real and full compatibility, of the (recognition of decisions of) punitive compensation with the state public order, as well as gradually, with the structure of civil responsibility, in dialogo with the innovative tendencies of the order of remittal no. 9978/16, which perhaps would have wanted to have the possibility to make a statement on the matter. 9978/16, which perhaps would have wanted to ferry the Joint Sections towards the far more radical outcome whereby everything that is not constitutionally prohibited (and in fact Art. 23 and 25 Const, recalled from a tax/criminal point of view, by the Unified Sections, may appear to be out of focus), must be considered in line with the Italian international public order".

[702] P.G. MONATERI, *Le Sezioni Unite e le funzioni della responsabilità* civile, in *Danno e resp.*, 2017, p. 437, who states that the decision in question "is of extreme systemological importance. Its most important point is of course the civil law principle from which it moves to reach its conclusion. This principle is literally the following: *in the current* legal system, civil liability is *not only* assigned the task of restoring the patrimonial sphere of the person who caused the injury, since the deterrence function and the sanctioning function of civil liability *are internal to the system. From* this it follows that the institution of US origin of punitive compensation *is not, therefore, ontologically* incompatible with the Italian system. As everyone can see, this is a real precedent of great importance consciously rendered by the United Sections on the basis of a reconstruction of our domestic civil law system. It cannot, therefore, in any case be treated as an *objective*, but as a true *ratio decidendi*, since the premise is essential to the concrete conclusion, and it completely changes the perspective with which to look at Italian civil responsibility from now on" (original italics). See also ID., *I danni punitivi al vaglio delle Sezioni unite*, in *Foro it.*, 2017, I, p. 2658:"Unlike much of our doctrine, by now sometimes oracular in its formulations, other times occasional in its positions, due to its undulating position on opposing sides due to the circumstance, in their decision the Joint Sections have, in a clear and precise manner, explicitly formulated the principle of law by reason of which, given that the positive system of civil responsibility admits the function of punishment and deterrence, a determined conclusion of private international law results".

[703] Cf. A. ZOPPINI, *Una tappa che refinisce i confini del danno*, in *Il Sole 24 Ore*, 6 July 2017: "If, to date, these principles have been expressly affirmed with regard to the domestic recognition of orders made by foreign judges, it seems that this last step can only stimulate, for legislators and interpreters, a renewed reflection on the trajectories that can be taken from now on by civil liability".

decided [...]. These are unusual cases, which the legal environment captures for what the judge intended them to be: declarations of principle achieved after serious and in-depth discussion, not infrequently stimulated and led by doctrine; equally when the matter to be decided involves such fundamental values that the solution adopted in the court of law, certainly after extensive discussion due to the importance of the question (not necessarily of the litigation), has a strength of tendential stability that no judge would be inclined to oppose just for the sake [...] of judicial solipsism [...][704]"; principle judgments "constitute adjustments or disruptions of the system, the effective dimension of which can only be perceived over time[705]".

These preliminary remarks will also be implicitly helpful when it comes to reflecting on the signal conveyed by the judgment with respect to the threefold and interconnected dimensions of political philosophy, legal policy and legal technique. This interrelation, now most always taken for granted, acquires an unusual relevance (precisely because it is a ruling-principle), since it is immediately used by the Court not to solve a concrete case, but to indicate a route of legal policy (with respect to which the assumption in terms of political philosophy remains hidden, on which, therefore, it is perhaps worth making a few, albeit minimal, observations), here also aimed at providing the legislator with indications in the perspective of an ius condendum, if considered necessary for the implementation of the principle[706], or rather of the principles that the judgment sets out as legally founding the system of tort law and also the Italian legal system tout court in its transnational dimension[707].

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[704] M. LUPOI, *L'interesse per la giurisprudenza: è tutto oro?*, in *Contr. impr.*, 1999, p. 234 ss., here pp. 247-248.

[705] *Ibid*, p. 248.

[706] G. PONZANELLI, *Dalle Sezioni unite solo uno spiraglio per il danno punitivo*, in *Il Sole 24 Ore*, 14 July 2017, observes in fact that the punitive and deterrent purposes referred to by the Court "always need, however, to be transposed into a rule".

[707] I deliberately use the adjective 'transnational' in place of the non-synonimic 'international'/'sovereigntyae' also on the basis of a recent suggestion by Giacomo Marramao ("Mario Ricciardi and Carlo Sini dialogue with Giacomo Marramao on 'Philosophy of new global worlds'", Milan, 'Casa della Cultura Via Borgogna 3', 5 June 2017: *youtube.com/watch? v=5MT3ocyGE1k&t=2805s*), who spoke of our age as that of an interregnum between the 'no longer' of the old international order and the 'not yet' of the new supranational order. While the reference to the extension of supranationality undoubtedly suggests that the latter will have to take on a top-down role in order to unify the various state 'nationalities' (in this sense, the current EU is an unfinished supranational order); On the other hand, the reference to the transnational dimension is intended to emphasise not the hierarchical primacy of the supranational order with respect to national orders (a perspective that could be criticised, precisely because the transnationality of the legal order assumes a propulsive but not hierarchical position), but the cooperative and competitive role that the transnational orderly dimension can foster in the

But this analysis should be reserved for a later date. It is now essential to briefly consider the central steps of the motivation (concerning the two aspects already mentioned: relevance of punitive damages in the Italian legal system and multi-functionality of civil liability), devoting some critical observations to each of them.

25. The most influential arguments of the decision

If it is worth considering the judgment as a ruling of principle, i.e. if it is to be understood in its conceptual implications, which, as such, certainly go beyond the concrete case, and in fact express a certain legal sensibility (also in methodological terms), it is necessary to dwell on that part of the motivation that tackles (and it will be seen exactly how) the two main problems (main, it should be stressed, from the point of view of the judgement of principle and, as such, in view of a " development" of the system): those of the legal relevance of punitive damages and the multi-functionality of tort law.

From here onwards, thus, the reader will come across that part of the motivation which intends, on the one hand, to clarify the situation on the issues that have been repeatedly evoked, and, on the other, to indicate, in a prescriptive key (and, probably, in a prospective one - especially with reference to the need for legal certainty which, today, cannot but have a pregnant sense, not with respect to a text, but with respect to the argumentative use that the interpreter 'wants' to perform[708]),

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work of building a juridicality that is the product of what we might call 'qualified contact' between orders. In this way, they give rise (in ways that are more spontaneous than imposed by a centralized power, and therefore more on the basis of a 'bottom up' procedure than a 'top down' one; and it is evident that within this procedure the role of the courts will be - as it already is in no small part - decisive) to rules that are genetically transnational, because they are born within that dialogical sphere and in dialogical ways that represent the peculiarity of a properly transnational law. See S. DOUGLAS-SCOTT, *Law after Modernity*, Oxford and Portland (Oregon), 2013.

[708] A hermeneutic 'will', therefore, that will be garrisoned (and will not be a weak garrison) by the argumentative results that are derived from that text (whatever the source, it goes without saying), and that represent a bulwark as such certainly not immobile (if this were so, we would fall back into that textualist fallacy I would say today almost completely behind us, at least in theory - and always assuming that the textualist approach has its own reality and is not just a, perhaps even seductive, mythology. But this is another matter), but, equally certainly, stable (I mean: rationally and reasonably stable. A stability that is in opposition to arbitrariness, and to authoritative decisionism, not to the more or less rapid change of interpretations). A guarantee of stability, understood, in an Ascarellian sense, as interpretative continuity (a continuity that is historically adequate and which, therefore, cannot a priori oppose dizziness, as long as it is historically grounded), that is, it alludes to a certainty of law that is such with respect to the dimension of historicity; therefore a certainty that is guarded solely by argumentation, to be seen as the thread, in a broad sense, of the 'political' dimension of facts. See then P.G. MONATERI, *La Costituzione ed il diritto privato: il caso dell'art. 32 Cost. e del danno biologico ("Staatsrecht vergeht, Privatrecht besteht")*, in *Foro it.*, 1986, I, c. 2976 ss., here c. 2985: "[It is] impossible to compare the hermeneutic result with the *interpretandum* itself. It is only

what (precisely) must be the trajectory along which the interpreter will proceed. From here to the next, historically necessary, if not revirement in the proper sense (which in this meaning is perhaps restrictive, because it is not just a question of intervening on an interpretation in order to overcome it, or in any case modify it, but above all it is a matter of rethinking a classic institution such as that of liability[709]) systemological adjustment[710].

It is therefore time to identify the crucial points of the motivation.

In line with the majority of legal doctrine and the most recent case law of the Supreme Court (in particular, the Court cites S.U. no. 9100/2015, on the subject of directors' liability), the Court holds that "the sanctioning function of the damages award is no longer 'incompatible with the general principles of our legal system, as was once believed, since in recent decades provisions have been introduced in various places aimed at giving a lato sensu punitive character to the award' [cit. of S.U. 9100/2015]".

It might be noted that the Court draws an apparently indispensable link between the sanctioning function and legislative intervention (different and additional, obviously, to the provisions in the civil code). As if, therefore, the crucial instrument was the legislative one; but it can then be observed that, from 1942 to today, the shape of civil liability has always been designed and redefined to a large extent by scholarship and the courts, even beyond and against the so-called "intention of the lawmakers"; and it can be added that, in itself, legislative

possible to compare various hermeneutic results with each other. Thus, since the meaning of the *interpretandum* is always achieved by such a process, it is also always true that, in this sense, the rules applied are a creation of the interpreter [and there, in note 68, he adds: 'What is meant here is that a rule is given a meaning by the interpreter who applies a given hermeneutical rule to it, choosing a given meaning from among several equally possible ones, without, moreover, the reasons for that choice always being explicit to the interpreter himself']. Otherwise we should have at our disposal a criterion of exactness that is inaccessible. In fact, whoever believes in the existence of an objective meaning, true or otherwise, of the norm, must take it upon himself to indicate a criterion to demonstrate the exactness or truth of the hermeneutic results. It is obvious that it makes no sense to speak of an exact or true interpretation without having a criterion to check this exactness or truth. Such a criterion, however, can only be a criterion of correspondence between the result and the *interpretandum*. And it is obvious that the meaning of the *interpretandum* can only be reached by application of hermeneutical criteria. Therefore, it goes without saying that such a criterion of exactness cannot exist. Hermeneutical criteria and their results cannot be controlled by an external and independent parameter. What can be checked is only their consistent application".

[709] Again P.G. MONATERI, *I danni punitivi al vaglio delle Sezioni unite*, cit., in praising, apart from the result reached by the Court, the manner, measure and balance shown, states that the sentence "marks a milestone in the analysis of all the multiple functions performed by the institution as per article 2043 ff. of the civil code".

[710] P.G. MONATERI himself, in a passage already quoted *above*, in note 147, has in fact underlined the "extreme systemological relevance" of our pronouncement.

intervention can be used as a criterion to validate a trend that is already underway; It is more difficult to assign it a constructive purpose, if only because what the legislator can do is only to produce legislative texts (which, at least today, is not much); therefore, the ongoing tendency in the sense of a 'rediscovery' of the sanctioning-punishing function of civil liability would be the same even in the absence of the long list of legislative interventions that the Court has mentioned.

It can also be added that, from a normative point of view, articles 2043 (which is an exhaustive criterion in itself) and 2059 of the Italian civil code (together with article 2056) are more than capable of " orienting" the discussion, as it has in fact already occurred[711].

But, on the other hand, the sense of the normative approach of the U.S. is also clear: to intervene on the level of the policies, but not doing so in an excessively emphasized way, as if it were simply recapitulating a state of things already existing from the legislative point of view, and not outlining a new doctrine.

Nevertheless, the Supreme Court itself no. 9100/2015 has "clarified that such a sanctioning nature is not admissible except in cases where 'some provision clearly contemplates it, excluding the principle deducible from Art. 25 Const. paragraph 2, as well as from Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'" (p. 17); remembering, as it should, in addition to art. 25, art. 23 of the Constitution, "it is comprehensible why, even in the same chronological context, denials of the sanctioning and deterrent function of civil liability return. Unless it is a question of a mere argumentative enrichment, they originate from the necessity to refute the appeals aimed at extending the range of compensation in cases lacking adequate statutory cover" (p. 17).

Again, the emphasis is given to the need for regulatory, or rather, constitutional safeguards. But even in this case, it can be observed that, from the policy point of

[711] P.G. MONATERI, *I danni punitivi al vaglio delle Sezioni unite*, cit. expressly recalls: "[I]n our system, independently of the admissibility in general terms of civil sanctions, and in the face of their introduction in particular hypotheses, it is in any case evident that their function *can*, or rather *must* be carried out by the combined provision of articles 1223, 1226 and 2056 Civil Code as a minimum prevision of the content of compensation, and use of the equitable powers of the judge in relation to the circumstances of the case; not only to the lesion suffered by the victim, but also to the anonymous conduct of the injured party.c. as a minimum prevision of the content of compensation, and use of the judge's equitable powers in relation to the circumstances of the case; not only to the injury suffered by the victim, but also to the legal conduct of the damaging party, to his degree of guilt, and certainly also in relation to the enrichment he has gained from the unjust fact".

view, it is one thing to reiterate the necessity of a rigid implementation of the principle of strict legality in the criminal sphere (and certainly, it can be noted, the 'criminal policy' - and once again: above all, when not exclusively, that performed by the courts - of our system does not represent a paradigm in this sense, due to factors, above all cultural, on which it is not possible to reflect now[712]). It is quite another matter to affirm that the functions of damages, in order to be realized, must find legislative recognition. From this point of view, the story of the so-called existential prejudice has also realized, once again in terms of policy, a function - more or less transparent - of sanctioning-punishment, especially when the compensation has been awarded in relation to the public administration, in the presence of conduct detrimental to the principle of art. 97 of the Italian Constitution (somewhat provocatively, therefore, it could be said that, quoad rationem, the Italian legal system has long known 'punitive damages').

It can be added, hence, that the delimitation of the quantum of extra-contractual damages, in accordance with the aim that the compensation is required to pursue, is already resolved at its roots once the dual parameter is established for which unjust damage must be compensated and for which non-pecuniary damage is recoverable in cases defined by law (completely in line with articles 23 and 25 of the Italian Constitution). If this were not the case, it would not be possible to comprehend the whole Italian debate on the subject of civil liability, and above all, it would not be clear how the institutes of civil liability should be interpreted in compliance with the European principles that unquestionably have at their fulcrum, today, the idea of the just remedy as an adequate legal response to what (referring again to a recent and successful expression of the Federal Supreme Court of the United States of America) can be qualified (by the interpreter, certainly not by the legislator) in terms of a "credible claim".

It is quite obvious, therefore, that at its heart the theme of text/interpretation recurs (a question to be analyzed above all in the light of the powers of the interpreter with respect to the lawmaker's powers), but it cannot be disregarded that the entire

[712] But see G. FIANDACA, *Populismo politico e populismo giudiziario,* in *Criminalia*, 2013, p. 95 ff.: ID., *Il diritto penale giurisprudenziale tra orientamenti e disorientamenti*, Napoli, 2008.

apparatus of law is nothing other than a product of legal culture[713], that is, of the way in which, first and foremost, those who professionally manage the law, but then of course also each citizen, whether conscious or not, implement the law as a mechanism of control and social order, and certainly not as a mere recipient of statutory provisions.

Accordingly, the dilemma is not that of the presence or absence of certain legislative guidelines, but that of the relationship between, so to say, social experience and the law. If the present time[714] is one of factual matters, there is no doubt that the measure of what is legally relevant and what is legally not, cannot find an answer (in particular in the realm of civil law, which is the territory of autonomy, freedom and the consequent responsibility as a legal reaction against the undue violation of the legal sphere of others) either in the theory of the case, or in the theory of subsumption, but only in the constant concretization, in the face of the specific requirements of the fact, of the general principles[715]: which today, of course, are no longer those of the 'national' legal system, but are the principles common to liberal democratic systems[716], i.e. those which recognize the primacy of the individual.

If this is true, then it should not be disputed that the lawfulness of the sanctioning-punitive role and of 'punitive damages' is a dependent factor of the general structure of civil liability, which is not such because it was established in a certain way by the legislator of former or present times, but because it meets a social need that, when it is identifiable, must be answered by the legal experience mentioned above, i.e. by a living law that is not limited to case law, but which is an expression of the historic nature of the experience regarded from a legal point of view (which has to be traced back to the much broader sphere of social science as a whole). It is therefore an answer that is always relevant in terms of the policy, which certainly

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[713] On this subject, the well-known book by L.M. FRIEDMAN, *Il sistema giuridico nella prospettiva delle scienze sociali*, (trad.it. a cura di G. Tarello), Bologna, 1978.

[714] Cf. again F. VIOLA, *Il futuro del diritto,* cit., and now - and among the many writings on the topic in the A.'s most recent production - the essays collected in P. GROSSI, *L'*invenzione *del diritto*, Roma-Bari, 2017.

[715] See now G. D'AMICO (ed.), *Principi e clausole generali nell'evoluzione dell'ordinamento giuridico*. Presentation by P. Grossi, Milano, 2017. And see also S. MAZZAMUTO and L. NIVARRA (eds.), *Giurisprudenza per principi e autonomia privata*, Torino, 2016.

[716] Cf. S. CASSESE, *L'eguaglianza sostanziale nella Costituzione: genesi di una norma rivoluzionaria*, in *Le Carte e la Storia*, 2017, p. 5 ff., where the remark that art. 3 Const. 'marks the passage from the rule of law to the welfare state, from liberalism to liberal democracy' (p. 5).

proceeds from the positive law, in order to provide the answer expected by citizens, but which, just as naturally, cannot be resolved within it.

Moreover, the Court observes, the trajectory "that the institution of civil liability has followed in these decades is undeniable and unbearable": "In short, it can be said that alongside the predominant and primary compensatory-restorative function of the institution (which inevitably touches on deterrence) a multifunctional nature has emerged [. ...], which is projected into several areas, among which the main ones are certainly the preventive (or deterrent or dissuasive) and the sanctioning-punishment" (p. 17).

This is a very important point, especially because it clearly shows the role that the Court attributes to itself as the apex body of jurisdiction: it is in a very real sense a mediator in that relationship between social experience and legal experience, which, as such, transcends the domain of 'the legislation' and occupies the territory of 'the law'.

The Court continues: "The legislative framework that has been developed is an unavoidable response to this picture. On the one hand it shows the urgency the legislator feels in bringing the arsenal of civil liability to respond to emerging needs, on the other hand it demonstrates, with its vitality, how unsatisfactory is a lesson that wants to expel from the system, confining them in an unspecified and rigid space, figures that cannot be reduced to the "category"". (p. 17).

Here too, with even more vigor, there is in fact that (entirely agreeable) an inversion of the relationship between legislation and, precisely, legal experience, with respect to which the role of the legislator is to be meant as the expression of a trend already in progress, in the face of those 'emerging needs' which, when they arise, have in themselves (and in this sense are self-legitimized) that impetus which does not necessarily indicate the obligation to achieve a result, but rather the need for a partial or general rethinking of the legal experience historically determined up to that point. It is precisely with reference to this aspect that the role of jurisdiction as 'social mediator' may be gathered.

At this stage the Court refers to many (but the Court itself notes that the list "is still considerable", with respect to the cases examined) of those "sanctioning provisions", advising that "it is not the case here to look at the single hypotheses in

order to resolve the contrast between those who want to remove them from any possible embrace with civil liability and those who draw from them, as the Joint Sections believe, the comprehensive indication of the variety of functions that distinguish the controversial institution", Moreover, in conformity with the perspective adopted by the Supreme Court, the latter state that "in the same constitutional case law there are connections worthy of consideration [and here the reference is to Constitutional Court, no. 303/2011]". (p. 20).

This brings the attention to the crucial point (and on which the Court's observations on punitive damages depend): even at a constitutional level (since the Constitutional Court has stated in terms of "a clear sanctioning function" of certain legislative provisions) there is an acknowledgement of "the existence in the legal system of a multi-functional approach to civil liability, which responds above all to a need for effectiveness [...] of protection that in many cases [...] would remain sacrificed in the monofunctional narrowness" (p. 20).

In this perspective, it is then possible to turn to the plan of punitive damages, and in particular the judgment observes how the same case law of the Italian Supreme Court (here the reference is to Cass., sez. un., no. 5072/2016) has "pointed out [...] the possibility for the national legislator to provide for 'punitive damages' as a measure to contrast the violation of EU law [...]". (p. 20). With a caveat, however: "This does not mean that the tort law institution has altered its essence and that this deterrent-sanctioning orientation allows the Italian judges who pronounce on the subject of extra-contractual damage, but also contractual one, to give subjective accentuations to the compensation awarded". This is because "any imposition of personal performance requires a "legislative intermediation", by virtue of the principle under Article 23 of the Italian Constitution (related to Articles 24 and 25 of the Constitution), which places a rule of law principle as regards new patrimonial obligations and precludes an uncontrolled judicial subjectivism" (pp. 20-21).

Here the reference, already highlighted above, to the immutable essence of civil liability, regardless of the functions (or the relationship between different

functions) ascribed to it, comes up[717]. It is clear that here too the Court is exercising a perhaps excessive caution, this time not referring to the legislator, but to the scholarship and in particular to the theory of civil liability, as if: given a juridical institution, there existed its own essence (objective and therefore unchangeable); and, this core, which is the result above all of a legal dogmatics that tends to be conservative, had to be maintained, as otherwise the institution itself would be corrupted (and in this case for the responsibility of the jurisdiction).
It is also manifest that this approach in terms of 'legal essentialism' is in itself not convincing, both because the assertion that there is an essential core of legal institutions is debatable (this can be said in a prescriptive sense and in particular by affirming the appropriateness of a certain configuration of them[718]; certainly not in descriptive terms), and, above all, because if this were the case, the general meaning of the legal policy operation which the Court (in a sufficiently transparent manner) intended to govern would not be understood.
It is then plausible that this recall to the spirit, and therefore to the trans-historical stability of the liability, is made (exactly as happened in those parts referred to above in which it was stated that the legislative intervention is determinant for the purposes of the configuration of legal institutions) only to mitigate the impact of the principle judgment that the Court itself has drawn up. This, if nothing else, is inconsistent (but this statement could only be considered as a sign of reasonable precaution at a time, such as the present, when the judiciary/legislative interface is at the center of an intense debate, and in more recent times even much more critical than in the past)[719].
In addition, the relevant statement discloses another Court's concern, associated with the aforementioned subject: the reference is evidently to the risk that the extension of multi-functionality, and in particular the revival of the deterrent as well as punitive function (but it is the punitive function that the Court is focusing

[717] It has already been noted that "it appears slightly reductive (almost irenistic) to reassure the reader that "this does not mean that the tort law institute has changed its essence" [...]": thus C. CONSOLO and S. BARONE, *Postilla minima,* cit., p. 1367 ss.
[718] But it is clear that the Court is not speaking here in pre-writing terms, in the sense of the text. And in fact the United Sections evoke the existence of liability to express the idea that multi-functionality does not affect this essence. Therefore, it is clear that the reasoning is merely descriptive: the discourse on the functions of civil liability is not such as to alter, so to speak, the constitutive reason for civil liability itself.
[719] See now, with particular incisiveness, M. LUCIANI, voce *Interpretazione conforme a costituzione*, in *Enc. dir.*, Annali IX, Milano, 2016, p. 391 ss.

on here and that has led it to this comprehensible, but still excessive caution), may facilitate the path towards a formally punitive but substantially arbitrary damages. From this point of view, in the Court's perspective, the safeguard against arbitrary decision-making should be derived from a balance between civil law dogmatics on the subject of civil liability, its essential core and the constitutional guarantee. In fact, the Court states: "Every imposition of personal performance requires a "legislative intermediation", by virtue of the principle of Article 23 of the Italian Constitution (related to Articles 24 and 25 of the Constitution), which puts a rule of law principle with regard to new pecuniary performances and precludes uncontrolled judicial subjectivism" (pp. 20-21).

Now, the following considerations might be expressed: leaving aside the still debated problem of the implementation/application of the constitution (with reference to the 'distribution of competences and powers' between jurisdiction and legislation), it does not seem feasible to agree that judicial subjectivism can be eliminated ope legis. Rather, it is a problem to be addressed with reference to the legal culture predominantly diffused within a system at a certain historical moment.

Furthermore, if we look at the legislative level, in relation to the evoked rule of law principle, articles 2043 and 2059, as well as article 2056 Civil Code, should help to resolve the question of the risk of possible arbitrary decision-making, with the effect, however (resuming what has been said above), that the meaning of these normative texts will be nothing other than the outcome of that argumentative competition (or conflict), which is typical of the law of post-modernity[720]. An argumentative competition, moreover, that has widely used the Constitution precisely to justify a radical reassessment of the Italian system of civil liability. In this sense, therefore, the Constitution has worked in an anti-dogmatic direction (with respect to pre-constitutional civil law dogmatics) and also in an anti-textual perspective (with respect to certain readings of articles 2043 and 2059 Civil Code). Therefore, and it should come as no surprise, if trust in the statutes and belief in the law are not the same thing, the 'legicentrism' (to recall the term often

[720] See S.M. FELDMAN, *American Legal Thought from Premodernism to Postmodernism. An Intellectual Voyage*, New York-Oxford, 2000.

stigmatized by Paolo Grossi) apparently professed by the Court here should be regarded for what it is: an attempt to elude the criticism, which will undoubtedly be formulated by some, that the Court has pushed 'too far', encroaching on lands (and above all powers - it is self-evident - hermeneutical ones) that institutionally do not pertain to it.

At this point, the Court's reflection is sufficiently advanced to enable it to address ex professo "the question of the compatibility with public policy of judgments awarding punitive damages" (p. 21).

And this, inevitably, leads to the theme of public policy (international and domestic, in its dual and reciprocal implications) and its functions: the first aspect that the Court stresses is that "the notion of 'public policy', which constitutes a limit to the application of foreign law, has undergone profound developments" (ibid.): the idea of an international public order (and as such founded on fundamental principles coming from a plurality of legal systems, and not only from the domestic one, which is only one component of the axiological-ordinamental polyphony that strongly connotes the contemporary liberal-democratic legal space) has meant that it has played "a function [. ...] in promoting the protected values, which aims to harmonize the respect of these values, essential for the life and growth of the Union".

With some mitigation, though: when the domestic law adopts and transposes the supra-national law (and here the reference is in particular to the Charter of Fundamental Rights of the EU), if it is true that the national law is somehow reinforced, because it includes the "system of protections provided at a higher level than the primary legislation [...]", it is however also true that there will not be a "diminution of the control against the foreign norms or judgments that can "undermine the internal coherence of the legal system" (ibid.), and therefore two parallel levels would coexist (and only partially and episodically intertwining): the level of European Union public policy and the level of domestic public policy[721]. Yet, even here it is possible to observe a sense of caution[722] on the part of the

[721] It may be added (but see also what it will be said say immediately below) that, in this key, internal public order cannot but have, in an axiological key, a greater attitude of rejection than of acceptance.

[722] See, in fact, the critical mention in C. CONSOLO and S. BARONE, *Postilla minima,* cit., p. 1368. From this point of view, the view from which the Court of Cassation, in the ordinance of remittal, had reflected on the public order was more open: if I am not mistaken, the most recent comment to the ordinance, which I also

Court: a prudence that to some extent may not be surprising, and indeed is comprehensible, and will certainly be appreciated by many; but, at a time when the Court itself deems it appropriate to define the guidelines of the 'new' civil liability, stepping into the field of legal policy and adopting the model of the principle judgment, the discourse could also have been a little more self-confident. Caution aside, a few considerations can be added.

The first. If it is taken into account that there are parallel planes, whereby the transnational public order (but here, in a more restricted sense, the Euro-unitary one) and the internal one are 'autonomous' and 'co-existent', it can perhaps be added that then, when they occur, the hypotheses of intersection between the two public orders (but to be clear, they are legal systems in the proper sense) are pathological cases; that is to say: the 'domestic' public order intervenes to protect something that can be ascribed to the so often evoked 'legal traditions', thus safeguarding the proprium of the national order, which reacts, in its own defense, against something that derives from the Euro-unitary public order; but then, a fortiori, the same consideration should be made when considering transnational public order sub specie of global rule of law, also (or above all) in the light of the notion of 'horizontally expanding' democracy. The concept is widely discussed today and expresses the idea that it is the same liberal-democratic orders that are subject to reciprocal control (thus creating a virtuous circle), with the aim, once again, of enhancing that promotional function of the subjective legal sphere already referred to by the Court. It is therefore apparent that this perspective would impose a profound re-evaluation of the public order category, which today must be reconsidered within a liberal, democratic, and anti-nationalist (and perhaps even a-nationalist)[723] context (hopefully always wider, also in expansionist terms)[724].

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recall for the ample bibliographical riff, is that of C. DE MENECH, *Verso la decisione delle Sezioni Unite sulla questione dei danni punitivi tra ostacoli apparenti e reali criticità*, in *Resp. civ. prev.* , 2017, p. 986 ss.

[723] The United States of Europe is in this sense a prospect to think about, at the moment when it is affirmed, as the Court expressly does, that the function of public order has changed (and at this point it would then be necessary to reflect in depth, but it cannot be done here *ex professo*, on the relations between national public orders and that transnational public order which should operate as an 'axiological thrust', in conformity with a constant of development aimed at the progressive strengthening of individual freedom. On these aspects, it will be made a few comments *below*, in par. 17).

[724] Cf. again C. PELANDA, *Nova Pax. La riorganizzazione globale del capitalismo democratico*, Franco Angeli, Milano, 2015.

The second observation is the following: at the moment in which, taking into account in particular the Euro-unitary perspective, the promotional function of public order is admitted (in the sense that the systems, all of the systems that are within that legal sphere - which the Court identifies as the legal space of the EU, but there is no doubt that these remarks should be extended to the entire liberal-democratic area, to which obviously the United States of America belongs: which also makes it easier to reflect specifically in terms of the domestic legal relevance of a North American institution -, are influenced from outside, or rather, are progressively enriched by the fact that they are all based on the common idea, which is an axiological principle, of the expansion of the sphere of subjectivity[725]), it is then difficult to affirm that, in any case, the 'national' legal systems play and must continue to fulfil a controlling role, to safeguard the very internal coherence of the system (which basically means the tendency to reject legal transplant - and in a broader sense of 'legal flows'[726] - whether proper or improper, direct or indirect, taking into account in particular the structure, function and effects of the 'foreign' institution that appears on the verge of the 'national' system): the concept of the 'internal coherence of the system' is a debatable one, if assumed to be an essential feature of the legal system[727]; but above all a notion which, if accepted, can only lead to an immobility of the system, which would lead the legal order in which this canon of coherence is really respected (and imagining that this could really happen) to isolation from the others, because a strict respect for coherence (a negatively dogmatic coherence, therefore immobilizing), i.e. the structure and function of the system (a structure and function that can only be understood in the most restrictive possible way), will prevent any chance of cross-contamination

[725] An attempt is being made to avoid a possible objection: this 'common idea' is not to be interpreted, at least ex ante, as a requirement to reach an identity of legal solutions, because, if nothing else, this would be contrary to that pluralism, both axiological and methodological, which a vision of this kind cannot but be disposed to acknowledge. Otherwise said, then, this 'common idea' may well be carried out, i.e. made concrete, in different ways within the various legal systems; but there is no doubt that the promotional function so characteristic of the transnational level may produce unexpected and even unforeseeable effects (as is usually the case) within the various 'national' peculiarities. It is at this point that domestic public order comes into play (a concept that can still be used, albeit with the obvious limitations that the expression itself suggests, pro tempore, i.e. while waiting for the transnational public order, with the already briefly outlined properties, to supplant national public orders) which will be able to act either as a barrier or as an acceleration vehicle.

[726] Cf. M. LUPOI, *Sistemi giuridici comparati. Traccia di un corso*, Napoli, 2001, spec. p. 60 ss.

[727] Cf. M. LUPOI, *La coerenza di un comparatista negli ordinamenti incoerenti*, in V. BERTORELLO (ed.), *Io comparo, tu compari, egli compara: che cosa, come, perché*, Milano, 2003, p. 171 ss., at p. 173: "Coherence is an aesthetic value, not a juridical one. Legal systems are not coherent, whatever the meaning of "coherence" that one accepts [...]".

with other systems, and therefore both being influenced by them and affecting them.

In fact, as it has been well pointed out[728], in the face of the impossible internal coherence of systems (an impossible coherence, to be intended, above all, as the impossibility of finding a straight-line trajectory of development of the system, and as the impossibility of regarding as preferable the systemic response that is most in line with tradition), it is possible to react in the sense of reconsidering this physiological incoherence and valuing it, once again in an argumentative vein, as a tool aimed at the continuous evolution of the system. Inconsistency, however, should not be understood as a pretext for claiming the principle of disorder, but rather a sufficient degree of flexibility, which is all the more indispensable in the context of an open and globalized society that, from a methodological point of view, can only proceed by trial and error, even in the axiological domain.

And therefore, in a broader sense, inconsistency is a concept that is well connected to the freedom and variety of people's lives, of which the legal system is obviously a mirror. But, just as clearly, the legal system cannot limit itself to performing this reflective function, given that the perspective from which it, and therefore the interpreter, looks at the existence of individuals is prescriptive in nature. A prescriptiveness, it should be pointed out at this stage, which cannot be assumed to be self-evident, and as such simply applicable to the concrete case - hence the unsatisfactory, as already noted above, reference to the theories of the case and of subsumption - but which, in short, is the result and synthesis of a continuous rethinking of the rule to be applied, a reconsideration which is the prelude to the construction of the rule according to the concrete case.

Furthermore, the argumentative process that leads to the creation of the rule of the case reveals that sectorial and partial point of view mentioned above as an intrinsic condition for the legal flow and which, with regard to both diachronic and

[728] Again from M. LUPOI, *La coerenza*, cit, p. 174, where we read that, faced with the fact that the incoherence of systems also depends on the coexistence, in each of them, of "different systems of values", it is necessary (or at least this is what the author hopes for) that the legal system, that is to say the system, should be understood "as a complex of real life data, arbitrarily delimited by the legal system". It is necessary (or at least this is what the author hopes for) that the legal system, i.e. the legal system, should be understood "as a complex of real- life data, arbitrarily delimited by the comparator [but one could say more extensively: by the jurist] according to the particular point of view that he subjectively elects as a criterion of disqualification" (ibid.).

synchronic aspects, is the most perceivable and reliable foundation of the systematic dimension (which certainly exists) of the legal system, which is to be taken as a constantly expanding set of axiological impulses subject as such to that argumentative filter that has the function of identifying and presiding over the threshold of juridicity.

The conflict, and in any case the divergence between partial points of view (both those of the observer within the system and those of the players within it, such as, first and foremost, the conflicting parties) thus becomes (or rather, it may become) the main instrument of evaluation (and therefore of the production of lawfulness) in a general deconstruction and reconstruction process of the legal system, on the basis of the specific social needs that appear at the threshold of the judicial system. And it is exactly the decision on whether and how to overcome the border that is the vehicle for rethinking the legal system. A legal system, therefore, which, on closer examination, can never exist as a unified whole, since it is, if anything, a single entity that is identified as an argumentative premise for the purposes of solving a specific problem, although it is clear that what is considered unified is only the result of the observer's need to examine only that part of the legal system that is reconstructed in function of the goal to be achieved, so as to be able to reach a solution presented as a logical consequence of the premise.

From this angle, accordingly, consistency and cohesion are, on the one hand, false depictions of reality (if understood as being endogenous features of the legal system), but, on the other hand, they are also the foundation of the argument by virtue of which the specific question can be resolved. Indeed, an argument that is incoherent and fragmentary with respect to the system on which it insists would be very tenuous: if that were the case, we would be confronted with an aspect that negatively affected the legal system. The fact is, however, that every argument is all the more solid the more it succeeds in elaborating a reconstruction of the system that is coherent and unitary only partially, i.e. with regard to the specific viewpoint under examination. The variety of these reconstructive arguments, in total or partial competition, in total or partial harmony between them, embodies the dynamism of the legal system.

This leads to the third consideration. The Court refers to international public

policy; picking up on a previous reference, it is held that today this adjective should, in no small degree, be replaced by the more eloquent 'transnational' - certainly (it has already been noted) with exclusive reference to those liberal-democratic systems that operate in the same direction, that of the reinforcement of fundamental rights: strengthening, which also means increasing them, both quantitatively and qualitatively; and this precisely within that promotional function of public policy that the Court has shown itself to support: a public policy which, viewed from the perspective of this specific policy of law (a policy of the law regarding individual freedoms), would even appear to be difficult to distinguish, starting from its 'national' or 'transnational' character. In fact, the distinction may even lose its significance[729] if it is admitted that the concept of a promotional public policy cannot but be transnational, and therefore global, in order to counteract any reluctance of national systems to fully develop (and expand) the spaces of freedom and autonomy[730].

Within this only partial reconsideration of the public policy, when the national legal system (and its axiological bastion expressed by the domestic public policy) is called upon to pronounce on the admissibility of an institution of 'foreign' law, it is obvious that the national legal system represents the axiological barrier that is indispensable in this context.

So much so that, to refer to the present case, the Court observes: "The foreign judgment applying an institution not regulated by the national system, even if not hindered by the European discipline, must be confronted with the content of the Constitution and of those statutes which, like sensitive nerves, fibres of the sensory apparatus and the vital parts of an organism, reveal the constitutional order "[731] (p. 22). Therefore, if "the harmonizing outcomes, through the supranational Charters, can often facilitate innovative effects, [...] Constitutions and legal traditions with their diversity constitute a limit that is still alive: deprived of egoistic veins, which

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[729] But see now the critical reflection of G. ZARRA, *L'ordine pubblico attraverso la lente del giudice di legittimità: in margine a Sezioni Unite 16601/17*, in *Dir. comm. int.*, 2017, p. 722 ss.

[730] In saying this, there is no critique of what the Court has said, if only because it would certainly be excessive to criticize the Supreme Court today for not having adopted a view that could also be considered, at least to some extent, radical, if not outright 'libertarian extremism'.

[731] And the Court adds: "If with regard to procedural public order, without prejudice to the safeguarding of the effectiveness of the fundamental rights of defense, the sieve has become wider in order to facilitate the circulation of international legal products, the same cannot be said with regard to substantive public order" (p. 22).

gave them "shortness of breath", but made more complex by the interaction with the international context in which the State is placed" (p. 22).

And approaching the question, if not of legal transplant tout court, of 'legal interference', the Court advances an observation of comparative methodology: it will not be possible to base the acceptance or rejection of the institution of 'foreign' law solely “on the complete correspondence between foreign and Italian institutions. It would not be helpful to ask whether the ratio of the deterrent function of civil liability in our system is exactly the same as that which brings about punitive damages” (ibid.). This remark is obviously aimed at not restricting too much (hence the reference to "full correspondence") the domestic system's receptiveness, so that, the Court observes, the foreign institution cannot be admitted only when the ratio of it is the same as that of the Italian legal institution to which it is related.

If the standard was then that of the perfect functional compatibility between the "foreign" institution and the class of Italian institutions to which it is referred, the requirement of identity of ratio would be satisfied when it could be affirmed that the Italian institution is (must be) the genus to which the "foreign" species can be referred (precisely on the basis of the identity of ratio); once the deterrent function has been identified as the ratio, at least the prevalent one, of punitive damages, in order to admit the introduction of the latter into the Italian legal system it would be necessary to demonstrate that the civil liability function is also the deterrent one: which, in fact, it is, and therefore, even if this principle was applied, which instead, in the Court's opinion, must be rejected because, in essence, it is too restrictive, punitive damages should not find any barrier to entry.

It can also be remarked that this criterion, which is centered on the function of the institutions, and therefore on their rationale, does not in the end necessarily seem as rigid as it would seem from the words of the Court; in the sense that this investigation of the different rationales underlying the institutions in play may in fact serve precisely in order to make the system more flexible, and not rigid. Where the rationale of the 'foreign' institution is not irreconcilable, because the national system also has the same or similar rationale, the admission could not be denied. In this respect, the criterion of judgement based on an analogous rationale

seems to be very fruitful. It is therefore clear that the difference lies between a criterion founded on the necessary identity, or on the analogy, between the ratio of the 'national' institution and that of the 'foreign' institution. As the Court itself points out.

At this point, in fact, almost at the end of a very ambitious reasoning, the Court poses with great clarity, and so to speak, 'political' sincerity, the following question: "[W]hether the institution knocking at the door is in complete contradiction with the mixture of values and norms which are relevant for the enforcement purpose" (p. 23).

The question, formulated in such terms, suggests, however, that the criterion in the light of which to admit or refuse the introduction of the 'foreign' institution is that of strict (or broad) compatibility (precisely on the basis, in the first instance, of an analysis of the rationale of the 'foreign' institution, by virtue of a potential - to be explored - similarity of rationale within the national system: a rationale which, of course, will necessarily be expressed by institutions different from the 'foreign' one or ones, but without affecting the fact that, within the 'national' legal system, such a rationale, in a more or less nuanced manner, must be found).

The mention of the 'not evident contradiction', i.e. the not manifest incompatibility (a prima facie incompatibility - 'prima facie not-repugnancy-test' - it could also be said), could be viewed in this sense, which, on the contrary, should be identified whenever, within the 'national' system, an identical or analogous rationale can be found with respect to the rationale expressly founding the 'foreign' institution being judged.

If this is the situation, the criterion based on the institution's rationale, which the Court has rejected on the basis of a slightly too restrictive reading of it, seems to be decisive (but in reality, it was only apparently dismissed, since it was then restored by the reference to the axiological "contradiction" mentioned by the Court in the aforementioned text).

In this light, it is therefore logical that punitive damages (even with the clarifications given by the Court) have a secure access to the Italian legal system, precisely because of the polyfunctionality of tort law: once it is established that among the rationales of civil liability there is also that of sanctioning the damaging

party's behavior (in various aspects and on the basis of criteria it will not addressed expressly here), it is clear that a foreign law institution with a sanctioning-punitive rationale, precisely on the basis of the non-incompatibility prima facie criterion, cannot fail to cross this (first) filter.

At this point the Court can further focus on the question, going beyond that 'prima facie test' mentioned above and specifying the compatibility conditions that must be met in order for the foreign institution that has already passed the first test of axiological compatibility to have full access to the Italian system. Therefore, the specific issue of the "recognition of judgments condemning to award punitive damages" (p. 23).

The Court writes: "Schematically, it can be said that, having overcome the obstacle connected to the nature of the compensation award, the analysis should be conducted on the requirements that this award must have in order to be implemented in our system without conflicting with the values that guide the matter, values that can be ascribed to articles 23 to 25 of the Constitution. Just as [...] it has been said that any patrimonial performance of a sanctioning or deterrent character cannot be imposed by the Italian judge without an express statutory provision, the same must be required for any foreign sentence" (ibid.).

This step can be examined.

The first part of it (i.e. the reference to the nature of the award of damages) is naturally linked to the question (of a predominantly axiological aspect, I would say), now solved by the ruling, of the polyfunctionality of civil liability, hence the removal of the merely apparent obstacle whereby the award of punitive damages, having a sanctioning-punitive nature, conflicts with the rationale that marks the Italian system of civil liability (a nature that, speaking of rationale, now no longer finds, and precisely on the basis of the above-mentioned criterion of no manifest incompatibility, any preventive, i.e. a priori, barrier to admission)[732].

[732] It will not be useless to observe, therefore, that the overcoming of this test does not take place by way of legislation, but by way of interpretation, i.e. by virtue of a specific reconstruction of the rationale by the interpreter. From this standpoint, that long and, as underlined by the same Supreme Court, incomplete list of 'sanctioning provisions' legislatively foreseen should be intended as the symptom of a progressive reorientation of the Italian system of civil liability, as the recognition of the resurgence of the sanctioning-punitive rationale of the latter, and not as the legitimizing factor for the alteration of the institution of extra-contractual damages. It is not a matter of principle, because there should be no doubts that, in a theory of formants, legislative prescriptiveness is not explicable in terms of the technical configuration of an institution, and a fortiori of a system. Consequently, stating (as is also possible for the outside observer) that it was the legislator who

The second segment of the statement, on the other hand, deals with the "conditions of access" (in a prevalently technical key) of the institution of foreign law, and thus, here, of punitive damages. Accordingly, the punitive damages verdict, in order to be effective in the Italian legal system, must be submitted to, and satisfy, a second more severe test, because the core of it does not lie in the rationale of the institute but in the concrete way in which it works, so that its introduction does not cause a vulnus, not so much with respect to the whole system (because, quoad rationem, the test has already been passed, and therefore no risk can be found from an axiological point of view), but rather with respect (and here the reference to articles 23 and 25 is undoubtedly clear, at least in its purpose) to the structure of the institution.

The twofold, conventional level of the function and structure of legal institutions thus emerges with clear evidence. If, in fact, the function answers the question: 'why?', the structure addresses the question: 'how?'. And it is therefore obvious that, given an institution of 'foreign' law, it may well tend towards a purpose perfectly specular to (or in any case not incompatible with) a similar objective assigned to an institution of Italian law, but it might happen that it is structurally lacking (with respect to the Italian system), precisely because, as a 'legal institution', it should have, in advance (i.e. in the original legal system), be designed in such a way that, in downstream (i.e. in the receiving legal system), it could and should produce effects, which can and should be considered legally relevant, insofar as they come from a source which, whatever it may be, has

introduced ex novo, or reintroduced, the sanctioning-punishment function, must bear the objection (which would seem insoluble) that, from 1942 onwards (fixing the Code's entry into force as the term of reference), firstly the system, and then the tort law subsystems are the outcome of a competition between formants (namely legislation, doctrine, jurisprudence, practice, comparison - and their development and branches) with respect to which it certainly cannot be asserted that the legislator has ever had any dominance. Nor, after all, is there any suggestion as to how it could have been, if it is conceded, as is inevitable - and nowadays not only is everyone aware of this, but it is considered as a leading intrinsic feature of the vitality of law as a historical-social phenomenon - that what is written in a legislative text, in order to be 'law' in the proper sense, always requires that process of cultural metabolization that culminates in the moment of its application.

It could be said that law is either an applied law or it is not. The legal system, after all, is the result of a collective (intellectual and practical) effort, today more than ever in the name of axiological polyphonism and methodological pluralism: which, furthermore (but the argument cannot be developed here), also raises the interesting question of a possible parallelism between the various functions of civil liability and the axiological polyphonism of the legal system (with respect to both the endo-ordinamental axiology and the trans-ordinamentality which, in terms of political philosophy and legal policy, is the obvious premise of the Court's entire reasoning).

shaped, quoad structuram, the case in question[733] in a way that is also suitable for the destination legal system. Here too, on closer inspection, the issue of the compatibility returns, but in this case, it is a question of structural compatibility.
When such compatibility does not subsist, it might perhaps be possible to refer to a lack of confidence, and therefore to a disregard of the principle of entrustment, which every legal system (it is self-evident that it is liberal-democratic, i.e. based on the rule of law) is entitled to foster with regard to 'foreign' legal institutions. It is evident that, when certain legal effects have been produced within the original legal system, but there is uncertainty as to 'how' they have been produced (a matter which, of course, must be attributed above all to the argumentative process that has led to that result and, in an even broader sense, to the legal culture prevailing in that system), such uncertainty (which has implications for the operativeness of the legal institutions, and therefore their application) may well be challenged, precisely in a structural key, thus barring the way to the 'foreign' institution. Therefore, the lack of argumentative transparency, becoming an applicative ambiguity, turns out to be an obstacle to the (synchronic) flow of legal institutions.
The Court, at this point, continues: "This means that in the foreign legal system (not necessarily in the Italian one, which only has to verify the compatibility of the judgment issued abroad) there must be a normative basis for a hypothesis of a punitive damages award. The rule of law implies that a foreign judgment on "punitive damages" must originate from a discernible source of law, i.e. that the court has ruled on the basis of adequate legal bases, which meet the principles of typicality and predictability. In short, there must be a statute, or similar source, which has governed the matter "in accordance with the principles and solutions" of that country, with effects which do not conflict with the Italian legal system" (p. 23).
This point requires detailed analysis.
It looks like the argumentation plan is twofold, and to a certain extent, it is possible to find here (which is a virtue) a retraction of what had, in fact, appeared previously (i.e. the Court's adherence to an excessive 'legicentrism', which, on

[733] And in fact, it can be anticipated here that the Court devotes a paragraph of its reasoning expressly to the question of the specificity of the case, in the interests of legal certainty.

closer inspection, and read in bonam partem, above all, allowed the need for a restricted argumentative outline to emerge, which instead is successfully achieved here).

Yet, on the one hand, there is the need for normative grounds, which cannot be omitted (if it were absent, we would fall back on that structural failure from which the violation of the trust in the real possibilities of a fruitful dialogue between legal systems within transnational legality to which recall can be made to complement the national legal system - legality meant as a reciprocal reliance between liberal-democratic systems, sub specie, legal certainty, from which legal solutions, and legal effects, are not accidental or uncontrollable, but rational[734]). Of course, and exactly for those structural causes on which enough attention has already been paid, this normative guarantee only concerns the foreign legal system.

On this aspect, however, the Court is less emphatic, not excluding, in fact, that such a 'normative basis' may also be found in the Italian legal system. This seems to be a questionable observation. If the structural criterion is employed, it is in fact evident that the 'foreign' institution has passed the first filter (the functional one); but then, in the event that the home jurisdiction expressly provides (whatever the source) for the institution in question, the second filter, that of a structural nature, should also be passed, and the 'Italian' effectiveness of the 'foreign' institution will be almost automatic.

On the other hand, there is the explicit mention of the rule of law principle, in relation to the principle of certainty. Rule of law and certainty are obviously to be interpreted in terms of what they should mean today within the liberal-democratic

[734] The following 'proportion' can then be put in place: rationality is to the structure as reasonableness is to the function of legal institutions. Where the coexistence of rationality and reasonableness expresses that constancy of juridical proportionality between institutions belonging to different legal systems, hence the complete legitimacy, on the basis of this assumption, of that trans-ordinamental dialogue which, taking place within a spatial and time-related juridical context aimed at the promotion of the subject of law, and as such aimed at the protection of the latter, will be all the more beneficial and legally prolific the greater the distance between the starting positions. A dialogue that is materialised and becomes law as a syntax of social experience when the individual legal systems (which, it should be noted, cannot be taken as dimensions of legality to be considered in a formalistic and objectivist key) find within themselves, above all thanks to the work of the interpreter, that inner strength (which is nothing other than a disposition to mutation, which is certainly hazardous) that looks to dialogue (dialogue, and therefore conflict, and not unproductive 'dialogism', which is certainly useless in its irenic nature) as the main, most fruitful instrument of mutual transformation. On the idea, see G. BOTTIROLI, *Bachtin: la ricchezza della teoria. Contro la povertà degli 'studi contestuali' (cultural studies, etc.)*, Report to the International Conference "Bakhtin: Through the Test of Great Time" '(The XIV Bakhtin Conference)' - Bertinoro, 4-8 July 2011, pp. 1-14: here p. 2. The text can be downloaded from the author's website: giovannibottiroli.it/en/personaggi-e-identita/bachtin-la-ricchezza-della-teoria.html].

legal space to which attention has often been drawn, and which therefore transcend the strictly legislative level (as the Court states).

Legality is mainly a matter of the effects of the concrete case complying with the model of the abstract case that exists as such in the 'original' legal system. A structural compliance that is transposable in terms of certainty (and in particular predictability) as to the concrete effects deriving from that structure. But what one might describe as the 'structural control of the effects' is other than what one might term the 'functional control of the effects': on the contrary, the Court, at the very end of this step, seems to lead the structure back to the function (but not vice versa): "With effects that do not conflict with the Italian legal system" (p. 23).

The two spheres should be - and this, moreover, in accordance with what the Court itself has previously stated - clearly distinguished: not just for internal symmetry of the system, or rather for argumentative linearity, but for the benefit of a functional as well as structural flexibility which, if well managed in terms of argumentation (which, as fleetingly observed above, is the only properly scientific tool available to the jurist)[735], is what allows the constant systemic fluidity that is the distinctive feature of law, both as a historical-social phenomenon (in a descriptive and diachronic key) and as an instrument of social progress (in a prescriptive and synchronic key).

In addition, the above-mentioned cooperation between legal systems should have the purpose of influencing each other for the better (in terms of "social needs")[736]: in this sense, the dialogue acts both in a competitive and cooperative manner.

It is thus possible to reach the last relevant part of this reasoning: "[T]here must be a precise delimitation of the case (typicity) and a precise indication of the

[735] And precisely for this reason, the problem of argumentation (and of all that is referable to it) is referable to the problem of legal technique. Knowing legal procedure means in fact, to a great extent, knowing the potentialities (and the limits) of argumentation as a technique, that is, the capacity to affect juridicity. In some extraordinarily incisive pages, L. LOMBARDI VALLAURI, *Corso di Filosofia del diritto*, cit., about the limits weighing on the activity, and in particular on the "politics that the jurist is called upon to carry out" (the words are again taken from the 'Introduction 1971'), in addition to positive law (but in this regard, it would be indispensable to make clarifications that cannot be made here), the "juridical as such" (p. 8; italics in original), is evoked. 8; italics in original), adding: '[T]he jurist will be able to realize, as a jurist, only that which is compatible with positive law and, before that, with the mode of operation proper to the law as such. There are ideals that are not judiciable [...]. The ontology of law identifies [...] the possibilities and limits of legal experience as such".

[736] On this subject see M. CAPPELLETTI, *Dimensioni della giustizia nelle società contemporanee. Studi di diritto giudiziario comparato*, Bologna, 1994, especially Chap. I ("Metodo e finalità degli studi comparativi"), p. 11 ss. and Chap. II ("Dimensioni costituzionale e transnazionale della giustizia"), p. 39 ss. (on p. 60 the reference to 'social needs' in the text).

quantitative limits of the quantum of the recoverable damages (predictability)". (p. 23).

What has just been reported is strictly related to the mentioned above passage and considerations: the reference to the typicity of the (foreign) case and the foreseeability of the quantum (i.e. the certainty of the applicable criteria in order to be able to predict, if only in a general way, i.e. with an acceptable degree of probability, the amount of the punitive damages) is in fact attributable, in the narrowest sense, to the structural level (i.e. of the case; and there is no doubt that the quantification criteria of the damage operate precisely on the structural level by determining the amount of the 'punitive damages'), and, in a broader sense, on the level of legal certainty, to be understood above all as the non-arbitrary application of the legal institutions, from which arises the (technically possible) predictability of the decision; the predictability is therefore the concrete opportunity, at least for the lawyer belonging to the legal system from which the institution originates, to ascertain ex ante, with sufficient accuracy, which solutions and which outcomes will have to be radically excluded and which is, instead, the range of acceptable solutions, i.e. in accordance with the living law of the system considered.

The concept of argumentation also recurs here, but it could not be otherwise. With the clarification, exactly in line with an approach to the law with a strong argumentative basis, that the ex-ante accessibility alluded to is to be intended not as the mechanical effect of the existence of a certain normative discipline, of a certain trend in the jurisprudence, or even of a well-established doctrinal opinion, but as the result of argumentation. Such a process, on the one hand, has to respect certain limits and constraints, on the other hand, however, is an instrument of constant adjustment of the law to the fact (and not vice versa), with the scope of elaborating a case regulation that is rational and reasonable, without prejudice to those legal, historical and contextual constraints which all, albeit to varying degrees, affect the same argumentation, but which the latter then has in itself the power (and above all the legitimacy in terms of legal policy) to transform when it reaches the solution of the case. It is, once again, the problem of the balance (which cannot be posed only as a potential objective, but must be achieved,

otherwise the 'ordinamental' response will be inadequate at the root) between interpretative continuity and discontinuity.

26. Concluding observations. The role of punitive damages in a redefined balance between freedom and responsibility

At this point we must, albeit quickly, consider the element so far only marginally and indirectly evoked: political philosophy.

It might be moved by saying that the analysis carried out up to this point derives mainly from the case in two acts (ordinance and judgement) now concluded. The apparently main subject of the case concerns the admissibility in the Italian system of punitive damages, and therefore the problem of their acceptance as an institute of foreign law, but, in reality, the Court of Cassation, has mainly dealt with public policy and the functions of extra-contractual liability.

And since the catalysts of social processes (which we could define as the enzymes of juridicity) are, as always, the pro tempore 'mainstream' ideas, which have the upper hand within that reflection on the meaning of things at the moment in which they are experienced (even indirectly), which constitutes the individual and social reason for being part of humanity, there is no doubt that, whenever a change is coming, or, there is no doubt that whenever change is imminent, or, in any case, traces of discontinuity with the past are discernible, the jurist, at least the theoretical one, should ask himself what has already changed or is changing at the level of political philosophy, understood here above all in terms of the general axiological framework of reference, which, as such, is that indispensable tertium comparationis from which to compare, even critically, the points of view of both the interpreter and the associated person.

Now, in terms of political philosophy, as schematically defined here, how can the Court's discourse be understood? That is, what are the reasons for a political philosophy that led to such a stance?

Starting from this angle, it seems that the focus should be placed on the question of the multifunctionality of civil liability, and in particular on the relevance of the sanctioning-punishment function. As always happens, the problem expressed in technical-juridical terms finds its premise in the dimension of political philosophy

and, consequently, becomes an instrument of legal policy, in the sense of a reorientation of the legal system.

It can therefore be said that putting the sanctioning function in the foreground (which is also correlated to the deterrent function) is a sign that shows how civil liability, today, must be rethought in relation to the indisputable expansion of the legal sphere of the subject, and in particular of the autonomy and freedom of the latter.

The point is in more than one respect delicate, because one could immediately object that, if on the one hand the spaces of individual freedom increase, and therefore the range of action of the subject increases, on the other hand one would expect a reduction, if not of the sphere of responsibility tout court, certainly of the idea that tort law, as a remedy, also incorporates a sanctioning function. On the other hand, for a long period of time, the sanctioning function has been almost canceled from the theoretical framework of tort law, as if it had to do exclusively with repairing the patrimonial or non-patrimonial damage caused to the damaged party.

If this is no longer the case today, it is necessary to look for some possible explanation. It is certainly true that the return of the sanctioning function cannot be identified with the return of the moralistic principle 'no responsibility without fault'[737], but it is equally true that, beyond the appeal to the economic efficiency of the rules of civil liability, an explanation situated outside the technical perimeter of liability rules must also exist.

From this point of view, then, to affirm that the function of sanctioning-punishing is the direct consequence of an economic analysis of law is only a partial explanation, precisely because it remains within the realm of legal technique, to take up one of the categories widely used here.

If, on the other hand, we try to leave this sphere and enter the sphere of political philosophy, we can perhaps affirm that the emphasis on sanctions is a direct consequence of a progressive expansion of individual liberty (which, but we will not go further into the question here, should also be put in relation to the discourse,

[737] P.G. MONATERI, *I danni punitivi al vaglio delle Sezioni unite*, cit. points this out with great clarity: "[T]he question of the sanctioning aspect of the civil liability insurance policy has nothing to do today with a recovery of moralistic theories of fault, but is inspired by the search for efficiency in the prevention of accidents".

which the Court expressly makes, on the promotional function of public order in its renewed conceptualization).

It exists, perhaps, an additional difficulty: at least in the Euro-unitary context, the principle of freedom has been and continues to be declined in that key, well known today, ordo-liberalism, which, on closer inspection, tends more towards order than towards freedom. In the sense that the figure of ordo-liberalism, said very briefly and also with some approximation[738], is the normatively stringent construction of a specific concept of freedom. This is to a certain extent paradoxical because the effect is that of bridling individual freedom, in its presuppositions and its outcomes.

From the civil liability point of view, it seems that this liberal paternalism has produced a progressive distancing, precisely in terms of political philosophy, from the idea (certainly not ordoliberal, but classic liberal) that there can be no freedom if there is no responsibility. Where the ordoliberal approach (perhaps even against the original intentions) has given rise to such a minute and often oppressive regulation (just think of consumer law; just consider of the rhetoric of 'informed consent' - from the medical field to the banking one), hence a somewhat deresponsibilizing effect. And this, it should be noted, on a double ground: that of responsibility, but also that of freedom itself, because a normatively directed freedom is a value that is less fruitful at root, in individual and social terms, than freedom subtracted from that ultra-detailed proceduralisation that (as always happens in these cases) sterilizes it out of a desire to protect it. It is precisely that same liberty that, instead, is claimed to be considered among the founding values of the market, of which it is the ineliminable theoretical presupposition[739].

This discourse must now be brought back to amongst much more circumscribed

[738] But it is then necessary to refer to the Italian author who has best studied the theme, and of whom I recall a recent and very felicitous contribution, which also deals with ordoliberalism (as always in a critical key, and, as always, from a radically anti-liberal point of view): A. SOMMA, *Stato del benessere o benessere dello Stato? Giustizia sociale, politiche demografiche e ordine economico nell'esperienza statunitense*, in *Quad. fior*., 2017(46) ('Giuristi e Stato sociale'), I, Milano, 2017, p. 417 ff., at p. 460: 'The ordoliberal one was [...] an economic police state, which on the one hand valued free individual initiative, but on the other hand coercive within organicist schemes [...]'.

[739] But here, too, the same considerations may apply, because the market that has been constructed by the EU is certainly not at all, or only minimally, traceable to the idea, which was brought to a remarkable level of intellectual refinement by Friedrich Hayek, of human ignorance, as the hinge, above all anthropological, of the market mechanism itself. See F.A. von HAYEK, *Competizione e conoscenza* (trad.it.), Preface by L. Infantino, Soveria Mannelli, 2017.

objectives. And so. It can be said that if the ordoliberal conception of freedom is currently under critical observation from many quarters, a particular aspect of ordo-liberalism concerns precisely the deresponsibilization (the predictable fruit of all paternalism) of the individual: if, in fact, freedom is exercisable only within that economic-legal order designed by a central authority and in view of the pursuit only of certain objectives, it is evident that such freedom becomes an instrument for the implementation of a program that certainly does not descend from that social conflict that is, or should be, the most authentic feature of liberalism. A liberalism that, insofar as it is not authoritarian - as the ordo-liberalism is authoritarian -, cannot but accept the risk of intellectual defeat, in the face of alternative visions of the individual and society that assert themselves through social conflict[740].

It can be said then that, today, the process of critical revision of which ordo-liberalism is the object, can produce a re-appropriation of freedom by the individual, with at least two socially advantageous effects.

The return of the idea of individual responsibility as the 'social companion' of individual freedom: freedom and responsibility can in fact be reciprocally the measure of each other only if both belong to the individual and not to regulatory apparatuses, which look at the members of the society as simple recipients of the regulation of which they are the source and not as co-operators in the elaboration of the regulatory framework. From this point of view, it seems evident, liberalism (or at least such a liberalism) is naturally progressive, because it accepts the risk that freedom and responsibility, considered as the main ingredients of social conflict and therefore of the non-authoritarian construction of the social order, lead to outcomes axiologically incompatible with the assumptions and hopes of liberal political philosophy.

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[740] A social conflict that, at least within the current liberal-democratic societies, shows above all its cultural side, which is precisely the main motor of the conflict. All this is very clear in Hayek, who in fact insists both on the centrality of the 'cultural battles' (from which the project of the 'Mont Pelerin Society' has been realized, but which I cannot say how much of its original vitalism has been preserved today), and on the weight of the 'general philosophy' diffused within society, on which the structures of the latter will necessarily depend (in a strongly anti-authoritarian perspective). More generally, cf. the very recent volume by A. MASALA, *Stato, società e libertà. Dal liberalismo al neoliberalismo*, Rubbettino, 2017.

It can be added that, if 'conservatism consists in preventing things from happening until they are free of danger', in the opposite sense liberalism (but, it could be observed, Hayekian liberalism above all, which, without a doubt, is its most convincing re-elaboration) is at root anti-conservative, being able to understand the famous and more often infamous 'laissez faire' also in the sense that, in order to be able to establish, according to the double but interconnected criterion of rationality and reasonableness, whether one is in the presence of a social advantage or disadvantage[741], it is necessary that the individual forces can be deployed as much as possible, in order to give rise to socially relevant consequences that only ex post can be judged as opportune or not adequate. In this sense liberalism is certainly a radical political theory and, by taking on board the social dangers potentially inherent in any individual action, is inherently emancipatory.

But liberal emancipation, therefore achieved in virtue of a 'struggle for freedom', certainly does not expel, and indeed strengthens in this sense, the horizon of individual responsibility, as a socially relevant limit because it is the product of that cooperative competition (or, if it fits well, competitive cooperation) which, in liberal terms, is the social struggle. In this sense, therefore, freedom and responsibility give rise to that constant social tension in terms of socially relevant individual opportunities, redefining and rethinking their reciprocal boundaries. This is why, in this perspective, freedom (in relation to responsibility, which is its counterpart) can only be a product of history and can only develop in history, that is, in the immanence of human action[742].

Hence, the return of the sanctioning function of civil responsibility. This is not to be understood at all, as has already been mentioned above, in the sense of a moralistic return of guilt, whereby the sanction is, so to speak, the juridical-social stigma of the 'moral error' of the partner author of the illicit act.

It might be sustainable that things are exactly the opposite, that is, that the anti-moralistic but radically ethical trait of the sanctioning function is very strong. In

[741] The fact that liberalism, and in particular liberal theory, is concerned with, and indeed cares about, the affairs of society should not surprise anyone, because liberal theory studies the conditions for achieving an optimal social outcome, and the individualistic approach is the chosen point of view in a cognitive (theory) and then prescriptive (doctrine) function.

[742] Here, the points of contact, and, of course, also the differences, between Croce and Hayek are evident, and would require a reflection in itself, which in the future we do not hope to be able to accomplish.

this sense: in the moment in which a non-paternalistic and therefore not anti-conflictual conception of freedom[743] prevails, it is precisely the increased possibility of the unfolding of individual freedom that causes a parallel development of social attention to responsibility. Juridical responsibility is certainly individualized with respect to the author of the illicit act, but there is no doubt that the conception of juridical responsibility, as such, assumes social significance; and therefore it can be added that the attention paid to the level of responsibility attests both to the growing expansion of freedom (from which an increase in risks and post eventum social effects that can be qualified as social disadvantages), and a necessary (precisely in terms of political philosophy and in particular liberal theory) expansion of what we could call 'a sense of responsibility', aimed not at repressing freedom at its roots but to make those consequences descend from the exercise of liberty, which are relevant from a civil law point of view (we are evidently alluding to the compensation of damage - in a broad sense, that is, beyond the strictly reparatory logic), which also have a sanctioning function, thus underlining (to take up an aspect already mentioned above) that individual liberty is the primary social motor, and the protection of it also from a sanctioning point of view is in the end the best proof of the social relevance of liberty itself.

A further consideration can be added. Individual freedom, considered as an excellent instrument of emancipation, undoubtedly produces new rights, as in fact has happened in these last few years (and it can be noted again that this expansive force can be traced more to the role of jurisdiction - national, euro-unitarian and supranational - as a response to certain individual claims made in court, than to the role of legislation).

This expansive force of freedom is flanked by the restrictive force of responsibility, which, however, operates in two directions: on the one hand, in fact, it operates as a tempering mechanism of freedom, in defense, evidently, of a certain social order already in place (after all, and this is evident, the expansion of

[743] Cf. again A. SOMMA, *Stato del benessere*, cit., p. 436, who says (but referring to another historical-political context, which has traits that can be traced back to ordoliberalism, and therefore comparable, as the author well shows) that "[a] system that requires the compression of emancipatory behaviour as anti-system conduct, unless it leads to the pacification of order and collaboration between its components".

existing rights and the identification of new rights produces repercussions on the social order; hence, and quite understandably, precisely within that cooperative/competitive approach, with a conflictual basis, the resistance against the expansion of individual rights via individual freedom, and therefore, above all, via the intervention of the jurisdiction, in a mediating function). However, on the other hand, this 'restrictive force' of responsibility operates as a mechanism of social retroaction, in the sense that, in the face of the 'new right', or at least of the expansion of the subjective sphere of the community, it becomes an instrument of defense of that same freedom which, before it had become concrete in terms of social benefit, it had opposed, and which now, instead, it protects, because the test of social advantageousness has been positively passed (it can be repeated that this test is often conducted by the judicial authority, in this sense 'institution of freedom').

The result, then, is that both freedom and responsibility have a reciprocal need for each other, at least within a framework of political philosophy, sensitive to the theoretical presuppositions of a liberalism, understood in a strong sense, that is, anti-paternalistic and radically conflictual.

Reference has been made to the role of jurisdiction.

On this point, it may be surprising that the Italian Supreme Court have not referred to that of 2008 on the subject of non-pecuniary damage[744]. Already in this last pronouncement, in fact, a series of elements can be found that go in the direction of the multi-functionality of civil liability and the union between freedom and responsibility.

In particular, two steps already brought to the reader's attention can be briefly recalled here: in the first one, it is stated that it is the task of the jurisdiction, via interpretation, to establish whether in a certain historical moment certain claims for compensation must be accepted because the underlying interest is not only legally relevant in a broad sense, but is specifically relevant in a constitutional perspective. There is no doubt that this discourse, centered on the 'creative' role of the court, cannot be limited to the creation of new fundamental rights of the person (otherwise it would be paradoxical), as it must be read also from a non-

[744] Cass. sez. un., Nov. 11, 2008, nos. 26972-26975, citt.

constitutional perspective, and therefore in the sense that such 'judicial creationism' (to use a formula which has now become customary) operates transversally within the system (a system which, also from this point of view, must also be looked at in its transnational dimension, which therefore returns). Moreover, the Court itself, expressly using the formula of 'social conscience' for different purposes, makes it clear that the hermeneutic work of jurisprudence, if read from certain theoretical assumptions (which could well be those of Hayek's liberalism), is not at all a risk for the democratic stability of society (of an open society, of course), because the judge, who is never alone in the moment of deciding, since he is in concrete dialogue, if nothing else, with the arguments of the parties, operates along a direction that can and must always be 'conformed' (reasonably and rationally) to the historical-social context. Here too, of course, the conflictual aspect returns, sub specie of argumentative conflict, because, within this general perspective, argumentative conflict is certainly the main instrument for the transformation of law: therefore, it will not be possible at all to speak of a (pseudo)-historicist determinism of juridicity, as if the latter were in substance determined by a 'history' that in this sense would however be nothing more than a mere description of events endowed almost mystically with an immanent deontology that would go to constitute the basis of argumentation (but one would then fall within the classic naturalistic fallacy) - an image, this, certainly to be rejected, if only because it depowers conflict and favors conformism, as much of ideas as of behavior.

The role of history and the historicist approach to law (which should be an acquired element of liberal theory, but, as is well known, this is not the case) should rather serve to make possible, in terms that are not only theoretical but concrete, and above all capable of affecting reality, that multi-voice dialogue which is undoubtedly the hallmark of open societies, and as such liberal-democratic; where this last adjective, in opposition to that old liberal-conservatism, centered on a rigid defense in class terms, and therefore on an undeniable class authoritarianism, expresses and records the relative, and in any case always increasing, beyond bizarre hopes in more or less happy decreases, improvement of one's economic condition (which is the prius of human existence),

achieved through the progressive strengthening of individual rights, and in particular thanks to the increased centrality of the individual dimension; economic condition, to be thought of above all as an instrument of social improvement, starting from what one is, that is, starting from what one can become thanks to the freedom the individual has at its own disposal.

In this sense, universalism of rights and universalism of the market[745] are the formidable instrument of individual emancipation of and in capitalistic society[746].

And so, we come to the second element, also very well known, contained in the motivation of the United Sections in 2008: the point goes to the observation that, for the purposes of compensation for non-patrimonial damage, the violation of a fundamental right of the person is not sufficient, and as such provided with constitutional coverage; the requirement, twofold, of the gravity of the infringement and the seriousness of the damage is also necessary.

Beyond the specific question of non-pecuniary damage, it seems that this importance can, at least today, assume a central relevance, and this precisely from a theoretical point of view, and in particular from that of political philosophy. In this sense: if the compensation of the damage is triggered in the presence of a sufficiently serious offence, and in the presence of a not insignificant damage, this means, without doubt, that the function which the civil liability rules perform are not only reparatory/satisfactory, but are also sanctioning-punitive, as well as deterrent. Because compensation is configured in this sense as a socially relevant response to damaging conduct.

If this is the case, at the moment in which it is admitted that fundamental rights (but in a broader sense it could perhaps also said: the legally relevant interests of the subjects of rights) are tending to expand, following the course of individual freedom (and its repercussions on society), the expected effect is that of a strengthening of the compensation remedy[747]. This, both in quantitative terms,

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[745] But see G. CAZZETTA, *Pagina introduttiva. Giuristi e Stato sociale: teorie e progetti, discorsi e pratiche*, in *Quad. fior*., 2017(46), p. 1 ff., at p. 1, where the reference to the "frontal clash opposing common market law and universalism of rights [...]".

[746] Moreover, the unsuspected F.A. von Hayek, in an interview published in the Corriere della Sera of November 7th 1970, p. 17, specified: "I advise you to avoid the word 'capitalism', which is at most suitable for a particular, very imperfect historical form of a competitive market economy [...]".

[747] See also D. POLETTI, *L'art. 2059 come ipotesi di sanzione civile punitiva?*, in F.D. Busnelli - G. Scalfi (eds.), *Le pene private*, Milano, 1985, p. 335 ff; and there see also the considerations of W. GRUNSKY, *Il*

precisely because the number of subjective interests that can be protected increases, and in qualitative terms, because, in the face of a concept of freedom that strengthens (and which strengthens following a non-paternalist or anti-paternalist path)[748], it is evident that the compensatory remedy will not serve only to repair the patrimonial loss suffered or to restore the non-patrimonial loss fixing, however, a monetary quantum, but (and leaving aside the deterrent function) also to emphasize the social gravity caused to such a precious value as individual liberty, obviously with specific regard to the specific lesion of the sphere of the subject who has suffered the illicit act.

From this perspective, then, the sanctioning function of civil liability performs a double task. This could precisely be asserted from the political philosophy angle: on the one hand, it frees the compensation from any quantification automatism. In addition, and from the reciprocal relationship viewpoint between freedom and responsibility, it looks at the harm of the individual subjective sphere as the result of conduct vulnerable to the freedom of the individual, and as such source of responsibility, only when, for its characteristics and effects, the conduct must be affected within that relationship, ascribable to a mechanism of endo-social control; which, if it were unbalanced on the side of freedom alone, would produce precisely the (unacceptable) effect of excessively reducing the role of responsibility in the function of social control of freedom.

The acceptance of social conflict as an instrument of development of liberal societies, therefore, in the perspective of tort law mechanism, leads not to 'compensate everything', but to 'compensate better', and this, precisely, as a direct effect of a permanent social conflict which, in this sense, has nothing pathological or institutionally destructive[749] about but is, on the contrary, the social presence of

concetto della pena privata nel diritto del risarcimento dei danni nell'ordinamento tedesco, p. 365 ff. A. DI MAJO, *Principio di legalità*, cit., p. 1793: "With regard to an evolutionary interpretation of the institute [i.e. civil responsibility] the path to take is undoubtedly the "main" one consisting in re-evaluating the profile of "unjust damage" (art. 2043) and this in the sense that the predicate of "injustice" is also imbued with "unlawfulness" and not only with the component (of the loss) of patrimonial values, such as to recall exclusively a reparatory measure according to a purely re-distributive logic between the damaging party and the damaged party".

[748] Where the paternalist path, in essence, sets the limits of that same individual freedom that one would like to promote, with the aim of attenuating as much as possible that social conflict that is the main product of a 'liberal freedom'.

[749] What is destructive, if anything, is that condition of perennial conflict, and not conflict, understood as a lack of acceptance, both theoretical and practical, of the close relationship between freedom and responsibility,

freedom, which as such must be taken seriously.
One conclusive consideration.

Recalling, above, the reasoning of the United Sections of 2017 in point of the predictability of the quantum of punitive damages, the link between foreseeability, on the one hand, and legal certainty and the rule of law, on the other, was stressed.

Now, the subject is obviously rather delicate, but some reflections are worth to carry out, albeit briefly, starting from what has been observed by an attentive scholar of the subject, who has affirmed: "If the punitive damages are by now distant from the seminal model, even if often emphasized in a sensationalistic way, which we are trying to correct safeguarding the merits and reducing the negative aspects, they are not yet, and perhaps they will never be completely, predictable damages"[750]. It could be added (but it would then be necessary to widen our gaze to the perspective of Law and Economics) that a not insignificant rate of unpredictability of the quantum, absolves, or at least can absolve, precisely that deterrent function, which, together with the punitive function, connotes our institution[751].

It seems rather easy to make a connection (which would require, however, for a meaningful development, precise sociological analyses) between the ex-ante unpredictability (in the absence of more or less strictly determined criteria) of the quantum and the fixing of the latter by a jury, on the basis of evident (let's say intuitive) reasons of an anthropological nature, which have a lot to do with the collective sense of just and unjust.

present in every sphere, from the strictly personal to the purely political, and which, it may be added, is so typical of Italian society.

[750] These are the words of F. BENATTI, *Benvenuti danni punitivi... o forse no!*, in *Banca, borsa, tit. cred.*, 2017, II, p. 575 ss., at p. 577. And in fact, the Author observes therein, at p. 579, that however "it remains difficult to ensure the pre-viewability of punitive damages when the determination of the amount is entrusted to juries, more subject to emotions and feelings. The progressive improvement of the instructions given to them does not seem a sufficient remedy. A doctrinal orientation supports the advisability of entrusting the fixation of the quantum to the judge. It does not seem, however, feasible at present because it would be a question of modifying a consolidated direction". And see also the precise analysis that F. QUARTA, *Risarcimento e sanzione nell'illecito civile*, cit., pp. 246-264.

[751] Moreover, it is F. Benatti herself who recalls, on p. 580, that "[t]he most attentive American doctrine has [...] highlighted how public damages reflect the complexity of civil liability and do not have only one function, but many".

Of course, it is the same Court to point out how the current trend is, instead, in the sense of subtracting the quantification of punitive damages "to unpredictable verdicts of juries (even though constituted, originally, to guarantee to the damaged party the judgement of his peers) [...]", and how "in the North American system [...] there [has] been a rapid evolution, which has now driven out the prospect of the so-called grossly excessive damages" (p. 23). But the fact remains, that at a time when the sanctioning-punishing function of civil liability is restored or, in any case, affirmed (not for moralistic reasons, of course), the ethical profile (which has nothing to do with moralism, of course) is ineliminable, alluding, with the reference to ethics, to the social relevance of individual behavior, both with respect to the individual and to society.

A social relevance that, no doubt, is historically determined, but which is the premise of the sense, the extension and the characteristics of responsibility (also legal), and therefore of tort law as a social remedy. In this direction, then, it might be asserted that there should be no doubts that, beyond the level of Law and Economics (certainly indispensable, for the purposes of the technical analysis of the institute), in a broader perspective, and in particular, precisely, of political philosophy, the punitive damages, as remedies characterized by a dual function, deterrent and punitive-sanctioning, express a social need for accountability of conduct, and as such should also be considered in the dimension of social responsibility.

In other words, punitive damages, both in its component of deterrence and in that one of sanction represent a response of the community (as expressed, pro tempore, and also casually, by virtue of the selection criteria, by the jury) to an illicit behavior of a fellow citizen.

In this sense, it could be perhaps possible to go so far as to say that the 'unpredictable' punitive damages are a positive socio-anthropological factor characterized by an intrinsic 'politicness', understood in the sense of criterion and measure of living in a society. And therefore, not only (or not prevalently: obviously this will depend on the historical context) mere revenge or retaliation of the

collectivity against the individual, but a social signal (from which, precisely, a series of patrimonial consequences) in the face of conduct which, in substance, has seriously betrayed the collective trust; it can also be said that punitive damages express a vision of juridicity (and in this sense they are in fact a juridically relevant response) filtered through the sphere of that 'sentiment of law'[752] (a concept evoked many times and in many different respects), which can be here synthetically expressed through the idea of a social conscience historically concretized in the function of a stable continuation of the social pact.

Therefore, social conscience comes to express a sentiment of law with respect to the dimension of a historically concerned sociality, and one can hear recall that relationship between social experience and juridical experience mentioned above. And this, above all in those contexts marked by an undoubted liberal trait (liberalism, to put it mildly, of the Hayekian rite), which look at law primarily as a spontaneous product of social living, beyond and even against the prescription of the State.

But then, and to take up the conclusion, happily Hayekian, of Monateri, if 'Staatsrecht vergeht, Privatrecht besteht'[753], we can also ask ourselves if the unpredictability of the quantum of punitive damages does not have, at least in part, that 'private' origin, which expresses the most tenacious link between society and law.

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[752] See the beautiful pages of G. ARCHI, *Il sentimento del diritto*, in *Studi in onore di Antonio Cicu*, Milano, 1951, vol. I, p. 18 ss. (the writing is now also available online at the site academia.edu, thanks to the project 'La Biblioteca Giuridica', created by Rocco Favale and Angelo Di Sapio: independent.academia.edu/LaBibliotecaGiuridica).

[753] The celebrated formula, which, above all in German-speaking doctrine, has seen notable variations as to the subject, can also be found cited, for example, in F.A. von HAYEK, *Legge, legislazione e libertà. Critica dell'economia pianificata* (transl. by P.G. Monateri), Milano, 2000 (1st. it. ed. 1986), pg. 169, note 22, who attributes it to Hans Huber -, it is recalled by P.G. Monateri at the end of his note, *I danni punitivi al vaglio delle Sezioni unite*: "From some quarters we now hear the need for legislative intervention. Such invocations, of course, immediately show themselves to be meta-positive, in that they call for a legislative intervention evidently necessitated by the current structure of the legal system. Moreover, one wonders how, in view of the constitutional references made by the Joint Sections, such an intervention can be considered, from the point of view of objectivity and reasonableness, in the field of legitimacy. Here it is only necessary to recall what we have repeated on other occasions, and which is widely shared and acknowledged by many experts of living law, and that is that private law constitutes a complex and decentralized order, which is ill-suited to the chase after legislation: "Staatsrecht vergeht; Privatrecht besteht"". (emphasis in original).

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