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The Current Application and Optimization Suggestions of the Punitive Damages System in China

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Abstract: China has now established a system of punitive damages, with *the Civil Code* as the main body, supplemented by other separate laws. This paper posits that the punitive compensation system addresses the shortcomings of the current private law system. With the blurring boundaries between public and private law, the punitive compensation system is more conducive to preventing social risks and providing comprehensive and adequate relief to the rights and interests of the infringed. The purpose of this paper is to analyse the historical origin and function of the punitive damages system, to summarize the process of its localised application in China, and then to analyse the status and existing problems in the application, and to put forward the improvement methods for the existing problems. The research value of this paper mainly includes two aspects: theoretically, it helps identify defects and deficiencies in the application of the punitive damages system; practically, it aids in reducing the judiciary's subjective arbitrariness.

Keywords: punitive damages, current application and optimization, suggestions.

1. Introduction

The United Kingdom was the birthplace of the punitive damages scheme. With the continuous progress and development of the rule of law in China, based on the sanctions of malicious infringement and the purpose of better safeguarding the rights and interests of the infringed, China has gradually instituted a system of punitive damages with the nature of public law to play a disciplinary, deterrent and relief function. After the promulgation of the Civil Code, China established the punitive compensation system for the first time, and made specific provisions on the fields of product infringement, environmental infringement and intellectual property infringement. In product infringement, Article 1207 of *the Civil Code* makes specific provisions on the utilization of punitive damages. In environmental tort, with the increasingly serious environmental pollution in the world and the transformation of the values of ecological civilization, Article 1232 of *the Civil Code* makes a general provision for punitive damages. In intellectual property rights, *the Trademark Law* revised in 2013 introduced punitive damages into intellectual property rights for the first occasion, and then successively introduced punitive damages in *the Copyright Law* and *Patent Law*. However, due to the scattered and inconsistent application standards of punitive damages for rights to intellectual property in the single law, Article 1185 of *the Civil Code* once again makes general provisions on punitive damages for intellectual property rights.

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Nonetheless, in judicial practice, there are many dilemmas in the implementing the punitive damages system. Under the public law model of governance, there is often a possibility of failure on the part of the subject of public law regulation, while public law regulation focuses more on punishment than relief, which is not conducive to safeguarding the interest of aggrieved parties. Under the private law remedies model, private subjects often lack the will to request punitive damages due to the uncertainty of the effects of the remedies. At the same time, due to the existing legislation on punitive damages provisions being mostly general, in practice, the judgement standard is often difficult to unify, resulting in excessive space for the judge's discretion, and very likely to result in different judgements in similar cases. In view of this, this paper will be from the theoretical level in-depth discussion of the current situation of the domestic application of the deficiencies and shortcomings, and at the practical level to reduce the judicial subjective trespassing to improve the path.

This paper is structured into three main sections. The initial section examines the historical development and legislative status of the punitive damages system, clarifies its foreign origins and functions, and summarises its localisation process in China. The second part examines the challenges of applying the punitive damages system in China, focusing on defects in the public law system, ineffective private law remedies, and excessive judicial discretion. The third part proposes optimisation paths for these issues, suggesting improvements such as combining public and private law, increasing practical application, safeguarding government independence, and balancing penalties with remedies. Additionally, it recommends strengthening publicity, distinguishing between statutory and punitive damages, and drawing on international experience, as well as refining compensation criteria and establishing uniform judgement standards to reduce judicial discretion.

2. History and Legislative Status of The Punitive Damages System

2.1. Foreign Origins and Functions of Punitive Damages System

2.1.1. Origins and Initial Functions of The UK

The punitive damages system originated in England, dating back to the Wilkes v.wood case of 1763. This case recognised punitive damages aimed at punishing the defendant for malicious conduct and deterring future misconduct. Over time, punitive damages have grown in the English legal system, although they have also caused controversy due to the lack of harmonised rules.

In the 1964 case of Rookes v. Brand, punitive damages were defined as punitive and exemplary, distinct from aggravated damages. The case outlined three scenarios for applying punitive damages: oppressive, wanton or unconstitutional acts performed by a public official; situations where the defendant benefits beyond compensating the plaintiff's damages; and instances expressly provided for by law.

There is some controversy about the function of the punitive damages system. According to scholar Owen, the functions of punitive damages can be categorized as punishing, deterring, compensating and enabling private assistance in law enforcement [1]. Dobbs further adds that punitive damages not only serve these functions, but also save the state treasury the cost of litigation and compensate the victim for his or her mental anguish [2]. These views provide different perspectives on the multiple roles and importance of punitive damages in the legal system.

2.1.2. Developments and Amendments in The United States

The United States developed the punitive damages system based on British law, forming a unique legal system. Initially, punitive damages were included in statutes such as section 7 of *the Sherman Act* of 1890 and section 4 of *the Clay Act*, which applied the system of punitive damages only to the

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punishment of bullying and humiliating behaviour. After the twentieth century, the United States gradually expanded the punitive damages system to apply to penalties for abuse of power, product liability and business torts, extendeding it to antitrust, labour law, intellectual property law, maritime law and other economic areas. In judicial practice, United States courts routinely award large punitive damages in order to punish and deter.

Professor Wang Zejian summarises four main factors associated with punitive damages in U.S. law: state court jurisdiction, inconsistent standards among states, reliance on jury opinions, the win-share system for attorneys' fees, and the hidden public law nature of U.S. tort law [3].

2.2. The Localisation Process of Punitive Damages in China

2.2.1. Early Introduction and Initial Application

China adopted characteristics of the civil law system, introducing punitive damages in 1993, through *the Law on the Protection of Consumers' Rights and Interests.* Subsequently, the punitive damages system was included in *the Contract Law* of 1999, *the Labour Contract Law* of 2007, *the Food Safety Law* of 2009 and *the Trademark Law* of 2013.

On 1 January 2021, *the Civil Code of the People's Republic of China* came into force, providing for the application of punitive damages in three areas, including product infringement, environmental infringement and intellectual property rights. In march of the same year, the Supreme People's Court issued the Judicial Interpretation on Punitive Damages for Intellectual Property Rights, and the Copyright Law and Patent Law, which were amended and implemented on 1 June, also introduced a punitive damages system. *The Interpretation on the Application of Punitive Damages in Hearing Cases of Ecological and Environmental Tort Disputes* passed in December of the same year further improved the applicable rules of punitive damages in the environmental field.

In recent years, China has issued a series of laws and regulations in different fields, which stipulate the punitive compensation system in different fields, marking that China has entered a new period of development from the introduction of punitive compensation system into judicial practice.

2.2.2. Specific Provisions in Existing Legislation

In product infringement, article 1207 of *the Civil Code* states that if a product is produced or sold knowing it is defective, resulting in death or serious health damage, the infringed person can claim punitive damages. However, there have been disputes over the interpretation of "corresponding" as stipulated in the provision, which has led to inconsistencies in the determination of the amount of punitive damages.

In environmental infringement, article 1232 of *the Civil Code* provides that if the infringer violates the law and deliberately contaminates the environment or destroys the ecology causing serious consequences, the party who was harmed by the infringement may seek equivalent punitive damages. The adoption of *the Interpretation on the Application of Punitive Damages in Hearing Cases of Ecological and Environmental Tort Disputes* further regulates the scope of the use of the punitive damages mechanism in environmental litigation, but the standard for calculating damages remains inconsistent.

In intellectual property, punitive damages are included in *the Trademark Law*, *the Copyright Law* and *the Patent Law*, while *the Civil Code* also provides for this in general, with article 1185 stipulating that intentional infringement under aggravating circumstances allows for punitive damages. However, the legal norms have not yet been fully adopted in judicial practice, and different understandings of "malice" and "corresponding" have led to difficulties and disputes in practice.

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3. Dilemmas in The Judicial Application of The Punitive Damages System

3.1. Deficiencies in The Public Law Regime

3.1.1. Imperfect Legislation

The punitive damages system originated in the common-law system, while China mostly draws on the civil-law system. Civil law countries generally have a more conservative attitude towards the punitive damages system. For example, Germany and Japan do not allow for a system of punitive damages in the existing laws. The German Civil Code does not recognize the punitive function of tort liability, let alone the existence of punitive damages. Therefore, the localisation of the punitive damages system in China faces the problem of institutional integration. In essence, China has not simply copied the structure of civil compensation of the civil-law system, nor transplanted the punitive compensation system of the common-law system; rather, it has developed a model of punitive compensation system with Chinese characteristics.

The provisions on the punitive damages system in China's current laws are mainly embodied in *the Civil Code*, which is dominated by general provisions and supplemented by specific provisions in other sectoral laws. However, there are fewer provisions on the punitive damages system in public law and fewer state interventions, leading to inconsistencies in the provisions and application of punitive damages in the various sectoral laws of the private law system [4].

3.1.2. Ambiguity in The Government's Role

In environmental violations, for example, there are deficiencies in the environmental legal responsibilities of governments, which can easily lead to a failure of governmental protection and a failure of environmental law [5]. The government tends to emphasise economic development to the relative neglect of environmental protection. Ecological benefits tend to be expressed as long-term benefits rather than processes that can be seen immediately, but economic benefits can be quickly apparent. Moreover, China's administrative appraisal system takes GDP as the main appraisal and evaluation criterion, leading to the government's differential treatment of different environmental offences and potentially sacrificing some environmental benefits for economic gains which hinders the reduction of environmental pollution and ecological damage.

In addition, China's current legal system mainly emphasises corporate responsibility and relatively neglects government responsibility. Laws on environmental protection focus on penalties for polluters and lack the government's preventive and remedial measures, as well as a system for monitoring the government's performance of its duties. Although the Ministry of Ecology and Environment promulgated *the Measures for Interviews by the Ministry of Ecology and Environment* in 2020, which provides for interviews and accountability of local governments that fail to fulfil their environmental protection duties in accordance with the law, they still face many practical dilemmas in practice [6], and penalties for the government are often limited to warnings rather than real solutions to the problem.

3.2. Ineffectiveness of Private Law Remedies

3.2.1. Limited Relief Effects

In intellectual property, *the Judicial Interpretation of Punitive Damages for Intellectual Property* makes specific provisions for the calculation of the base and determination of the multiplier of the amount of punitive damages. These are based on the amount of the plaintiff's actual losses, the amount of the defendant's unlawful proceeds, and the benefits gained from the infringement. If all of

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them are difficult to be calculated, they should be determined by the multiplier of the rights licensing royalties. However, in judicial practice, the standard of proof for the above three criteria is often too high, making it difficult for parties to provide sufficient evidence, resulting in courts relying on discretionary compensation. Furthermore, the provisions on the multiplier for punitive damages are vague, leading to inconsistent judgements and undermining the system's remedial function.

In environmental infringements, *the Civil Code* only provides for the application of the punitive damages regime in general terms and does not specify the criteria for the amount. *The Interpretation on the Application of Punitive Damages to the Trial of Disputes over Ecological and Environmental Infringements* only provides for the scope of damages but not the base amount of damages or the criteria for calculating the damages, making it difficult for the parties concerned to obtain reasonable remedies.

In product infringement, the Supreme People' Court considers the extent of the damage and the number of affected plaintiffs as factors for punitive damages [7]. The above two reference factors for determining the amount of compensation are relatively vague, which in judicial practice often makes it difficult for the courts to from a uniform standard for the amount of compensation in the course of a trial, resulting in the dilemma of "different judgements for the same case".

3.2.2. Low Public Willingness to Defend Rights

In intellectual property, the application standard of punitive damages is not uniform, making it difficult to form a consistent standard for the determination of the elements such as "malice" and "seriousness", and the base and multiplier of the damages. As a result, the effectiveness of the punitive damages system in protecting intellectual property rights against malicious infringement is not evident, leading to declining public expectations and a reduced willingness to request punitive damages in litigation.

In environmental infringements, China's *Environmental Protection Law* allows social organisations specialising in environmental protection to bring public interest litigation against environmental pollution and ecological damage. However, these organisations face high prosecution costs and bear the initial burden of proof, requiring them to demonstrate that the defendant's actions violated state regulations and caused or posed a significant risk of ecological harm. The high costs of environmental justice appraisals further burden plaintiffs, reducing their willingness to prosecute. Additionally, as public welfare organisations, they cannot make economic profits from litigation victories, and under the "homogeneous compensation" principle, they lack incentives to win cases. This diminishes their motivation to bring public interest litigation [8].

In product infringement, infringers are often unspecified consumers, making the number of infringers uncertain while the financial resources of the infringers are limited. Some scholars argue that the financial strength of the infringer is closely related to the enforcement of the judgement. If the amount of punitive damages is too high, enforcement may fail, preventing consumers from obtaining the awarded damages and creating an enforcement impasse [9]. As a result, consumers, as plaintiffs, tend to prefer statutory damages over punitive damages, as the latter's fulfillment is uncertain, reducing their willingness to seek punitive damages.

3.3. Excessive Discretion in Judicial Practice

3.3.1. Reasons for Excessive Discretion

At the legislative level, as the provisions in China's present legal framework of punitive damages are mostly general in nature, they do not make uniform provisions for their practical application. The legal provisions provide only a vague scope of application and some references, and there is a lack of consistent standards. This leaves a wide margin of discretion in judicial practice.

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In specific cases, different judges will make reference to a variety of factors in determining the base and multiplier of the damages, including the actual losses suffered by the plaintiff, the defendant's unlawful proceeds, and the gravity of the infringement, and so on. However, due to the inherently subjective and complex nature of these factors, there can be significant differences in how the same factor is interpreted and measured by different judges. In the absence of clear guiding standards, this variability can further magnify discretion and lead to wide disparities in discretionary outcomes. Owing to the complexity and diversity of individual cases, judges have too much room for discretion when dealing with similar cases, thus leading to the frequent occurrence of different judgements in the same case.

3.3.2. Negative Impact of Discretion

Excessive court discretion may make it difficult to apply punitive damages effectively. Differences in the identification of subjective elements and the ambiguity of reference factors result in judges having varied perceptions of the conditions for applying punitive damages, complicating their actual application in practice.

Excessive discretion can also blur the line between statutory and punitive damages. In intellectual property, statutory damages often cover punitive assessments for infringement, resulting in punitive damages not working effectively. Current law provides that statutory damages in intellectual property consider the circumstances or nature of the infringement, which often includes the infringer's subjective fault, the manner of infringement, the duration, and the extent of damage to the right holder [10]. At the same time, some Higher People's Courts have issued local guidance which recognises that the extent of subjective fault of the perpetrator should be taken into consideration, reflecting the punitive function of statutory compensation.

For example, Article 5 (4)of *the Opinions of the Shanghai Municipal Higher People's Court on Several Issues Concerning the Application of Statutory Compensation Methods to Determine the Amount of Compensation in Disputes over Intellectual Property Infringement*; Article 6(5) and (6) of *the Guiding Opinions of the Jiangsu Higher People's Court on Several Issues Concerning the Application of Fixed Compensation Methods to Damages from Intellectual Property Infringement*; Article 9(3) of *the Beijing Municipal Higher People's Court on Determining Liability for Damages for Copyright Infringement*; Article 19(5) of *the Guidelines of the Chongqing Municipal Higher People's Court on Several Issues Concerning the Determination of Damages for Intellectual Property Infringement*. The difficulty of distinguishing between the statutory and punitive damages systems in judicial practice has resulted in the widespread application of statutory damages, hollowing out the punitive damages system.

Excessive discretion may also lead to large punitive damages awards. The lack of clear criteria for calculating the base and multiplier for punitive damages means that judges can make their own judgements based on relevant factors, likely resulting in huge and varied awards. Large punitive damages can create economic and social issues. For respondent enterprises, a large amount of compensation may lead to a deterioration of its financial position or even bankruptcy, thus affecting the employment of employees and market stability. As for the plaintiffs, high compensation awards are often difficult to enforce, as defendants may be unable to pay or evade payment. In addition, frequent large awards can raise public doubts about judicial impartiality, creating perceptions of unfairness or arbitrariness, and reducing trust in the justice system.

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4. The Path of Development in The Application of Punitive Damages in China

4.1. Improvement of Deficiencies in The Public Law System

4.1.1. Implementation of “Pluralistic Governance” Combining Public and Private Law

The system of punitive damage is essentially a special compensation system based on private law, using private law means to carry out the punitive and disincentive roles played by public law. Through economic incentives, it encourages individuals who have suffered damages to file civil lawsuits, achieving the goal of defending interests though judicial power [11]. To address the shortcomings of the current public law system of punitive damages, the idea of multi-dimensional co-governance, combining public and private law, should be introduced. Pluralistic governance means “public-private partnership”, where the government, as the public administration, strengthens its cooperation with social groups and individuals. The governance approach originated in the 1990s and is now popularly used around the world as a core concept and measure for governments to achieve common goals and enhance service delivery. However, as China mainly draws on the civil law system’s pattern of public-private law separation, the division between public and private law is more obvious, introducing a governance model that combines public and private law will create some conflict with the traditional governance system and legal system.

Therefore, there is a need to adjust and improve the legal framework and to clarify the status and role of the governance model combining public and private law in the legislation pertaining to punitive damages. Supportive provisions for the public-private partnership model should be added as an important component of the punitive damages regime in the current legal system.

4.1.2. Integrated Implementation of Government Authority

Although the government, as the main body of the public law system, is affected by a variety of social factors, the government should maintain its independence, act as a neutral party in the distribution of benefits, and reduce the consideration of its own interests. It is necessary to take into account the interests of all the people and economic development, fully implement the powers of the government, and gradually transform it from a “management-oriented” government to a “service-oriented” government.

In intellectual property, General Secretary Xi Jinping emphasized the necessity of introducing a system of punitive damages to significantly increase the cost of violations in his keynote speech at the first China International Import Expo in 2018. The government, as the representative of public will, protects intellectual property rights as well as innovations, and it should protect and guide innovations through government power as well as public law.

In environmental infringements, the government should emphasise governmental environmental responsibilities and strengthen the fulfilment of governmental environmental obligations, improving the monitoring mechanism for governmental performance. While exercising its authority over the targets of environmental management and penalties, the government should also strengthen its monitoring system for the exercise of public power in the public interest in accordance with the law. Moreover, the government should harmonize economic interests with environmental protection, adopting policies that promote resource conservation, environmental improvement, and human-nature harmony, ensuring coordinated economic and social development with environmental protection.

In product infringement, the government and the relevant departments should strengthen their supervision, increasing personnel and equipment for effective quality control. By establishing a product quality traceability system, it can ensure supervision throughout the production, circulation, and sales processes, promptly addressing infringements and preventing serious consequences.

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Additionally, enterprises should be encouraged to improve their quality management systems, enhancing self-supervision and correction to reduce product infringements.

4.1.3. Achieving Both Penalties and Remedies

Public law liability tends to emphasise the "punitive" function, but administrative liability's punitive function is not sufficiently remedial when public interest requires separate remedies. The emphasis on the disciplinary function should be accompanied by adequate relief for the damaged rights and interests, not only as compensation for the infringed, but also as a response to social expectations.

In intellectual property infringement, in addition to punishing the infringing behaviour, attention should also be paid to adequately compensating the infringed for their economic losses and moral damages, so as to ensure that their legitimate rights and interests are fully protected. In environmental infringement, the specificity of environmental problems determines that it not only needs the disciplinary and deterrent function of administrative punishment, but also needs to be combined with the principle of risk prevention, increased risk prevention and ecological restoration function [12]. With regard to product infringement, the government not only punishes infringement, but also establishes a sound product liability insurance system to provide relief to victims through the insurance compensation mechanism and reduce their financial burden.

4.2. Improving The Effects of Private Law

4.2.1. Increasing The Willingness of Violated Persons to Defend Their Rights

In judicial practice, the usage of the punitive damages system should be increased, the distinction between punitive damages and statutory damages should be clarified, and punitive damages should be correctly implemented. At the same time, it is necessary to lessen the challenge of proof for plaintiffs of punitive damages, lower the standard of proof for punitive damages, and improve the application of the system of impediments to proof, so as to increase the plaintiffs' willingness to request. For example, legislation can be enacted to clarify the circumstances in which the burden of proof is reversed, so as to reduce the difficulty for the plaintiff in proving the subjective malice of the defendant and the gravity of the circumstances. In addition, incentive mechanisms, such as through the provision of legal aid and the establishment of special funds, can be set up to encourage plaintiffs to file claims for punitive damages.

4.2.2. Clarify That Statutory Damages Are Not a Substitute For Punitive Damages

The system of statutory damages was initially intended as a substitute for actual damages and originated in the United States with the system of fines imposed on tortfeasors in *the Anna Act* [13]. China's statutory compensation system was formally proposed in *the 1998 Summary of the Supreme People's Court Symposium on Intellectual Property Trial Work in Selected Courts of the Country*, which clearly states that the purpose of the statutory compensation system is to fulfil the role of compensation when the loss cannot be determined.

The functions of the punitive damages system, which are now generally recognised in China by Professor Wang Liming, include the compensatory function, the sanctioning function, and the deterrent function. It is clear that statutory damages are unable to achieve the above functions of the punitive damages system. Therefore, it is necessary to clarify the criteria for the application of the punitive damages system in legislation and judicial interpretations, and to refine the criteria for the determination of subjective elements and the definition of "aggravating circumstances".

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4.2.3. Improvement of Laws and Regulations by Drawing On Extra-Territorial Experience

China's base for punitive damages can be based on statutory damages in the academic community has a big controversy, but the United States and Taiwan of China will be in the judicial practice of statutory damages as the base for the calculation of punitive damages. Taiwan of China has a high degree of similarity with the mainland, and its practical experience shows that the application of punitive damages does not necessarily conflict with the system of civil law, and the mainland can learn from the idea.

At the same time, China's provisions on the application of statutory compensation are vague, and the range of compensation amounts is too large. Canada has more detailed and clear provisions on both statutory and punitive damages, and by drawing on its legislative experience, it can improve China's relevant laws and regulations to ensure that the amount of compensation is reasonable and fair.

4.3. Reducing Judge's Discretion

4.3.1. Refinement of Compensation Criteria

Firstly, it is necessary to clarify the quantification of the base amount of punitive damages, taking into account the actual losses suffered by the infringer, and determining different standards in different jurisdictions, and to determine the base amount of the calculation by taking into account the actual situation in the field. For example, in intellectual property infringement, the market loss caused by the infringement and the defendant's illegal income can be used as the basis for calculation; in environmental infringement, the amount of compensation can be determined on the basis of the cost of environmental remediation and the degree of ecological damage; and in product infringement, the number of consumers who have been victimised and the loss of each victim can be used as the basis for calculation. The choice of multiplier should be based on the seriousness of the infringement, the subjective malice of the defendant, the duration of the infringement and so on, to ensure that the amount of damages can serve as a punishment and deterrent without making it unaffordable for the defendant. In addition, a ceiling on the amount of punitive damages should be established in order to avoid situations in which excessive damages affect the survival of enterprises and social stability.

4.3.2. Development of Harmonised Determination Criteria

For the reference factors of punitive damages, there are different views in the academic community, and there is no uniform reference standard in practice. Differences among academics on the reference factors of punitive damages ultimately stem from different understandings of the functions of the punitive damages system, including "dualism", "triadism", "quadrism" and so on, of which the function of "deterrence" is basically universally recognised. Therefore, in determining the reference factor for the infringer, the "penalty" function is tested. At the same time, the reference factors for infringers should take into account the number of infringers and the damages suffered. The common viewpoints of academics should be refined and combined with judicial practice so as to form a uniform standard of determination.

The criteria for determining punitive damages can be discussed and revised on a regular basis through the establishment of a committee of experts, consisting of legal scholars, practitioners and industry experts, to ensure that they are scientific and reasonable. In addition, judge training should be strengthened to ensure they fully understand and adhere to the criteria for determining punitive damages and the conditions for their application. This will help reduce the impact of individual subjective factors on the outcomes of judgements and ensure consistent application in practice.

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5. Conclusion

The system of punitive damages serves to a certain extent to punish and prevent serious torts with subjective malice and to compensate for the insufficient remedy of damages under the principle of homogeneous compensation. However, in judicial practice, there are still deficiencies such as insufficient public law regulation, ineffective private law remedies and too much room for judges' discretion. To address these shortcomings, the application of the punitive damages system ought to be improved by combining public and private law, drawing on overseas experience and further refining the criteria for determining punitive damages.

By optimising the punitive damages system, the rights and interests of aggrieved persons can be better safeguarded and social risks can be better controlled, thus better responding to the needs of social governance. However, the proposal to reduce judges' discretion may still be insufficient due to the influence of various factors in practice, and the overemphasis on uniform standards and the reduction of room for discretion may result in the rigidity of trials. Therefore, while improving the system, a certain degree of flexibility should be maintained to ensure a balance between judicial fairness and efficiency.

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