

# Punitive Damages in México

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In an important judgment, the Supreme Court of Justice of the Nation introduced in Mexico the “punitive damages”, a concept which belongs to the common law tradition and therefore it is alien to the civil law culture to which the Mexican Legal System belongs. Although it is a precedent that is not consolidated with strong binding effects and therefore other judges are not forced to apply it, this decision raises the opportunity to discuss in depth the stiff legal regime of civil responsibility in Mexico to review its pertinence, and its conformity with the concept of “integral repair” of the international laws of human rights. In spite of the objections that, with or without reason, can be formulated against that decision of the Supreme Court, the introduction of the punitive damages in Mexico represents a great opportunity for the evolution of its legal system.

*Keywords:* punitive damages, exemplary damages, damages, responsibility, Mexico

## Introduction

The right of civil responsibility, that is to say, of repair of damages (damages and losses) could be only after the penal litigation, the most emblematic aspect of legal practice.

The North American cultural influence has impressed in the imaginary of the layperson, the idea that a judicial decision can always grant a stratospheric compensation to whom has suffered a damage who is not obliged to endure (Mankowski, 2009). This figure is a characteristic of the Anglo-Saxon legal tradition: punitive damages, which consist of a judgment pronounced in cases in which a person has unlawfully caused damage to another, and the amount of which does not tend to merely compensate for the damages caused, but to impose a sanction on the offender that serve as an admonition for him—and especially for the rest of society—that certain conduct is particularly reprehensible and that even outside the strictly criminal area shall be punished with greater or lesser severity.

Even in the United States, the reality is different from this monetary mirage that results from the expectation of offended persons to obtain, not only an amount of money that adequately compensates for the damages suffered by the defendant’s unlawful action, but also fantastic amounts of money that, in many occasions, seem disproportionate. With the exception of extremely dramatic cases (Land, 2018), there have been a significant effort of the courts and the legal community in general, to set the amount of such sentences in (more) reasonable limits.

But in Mexico, the blow suffered by the popular imaginary, when faced with the legal reality of the law of civil responsibility, is much more than disappointing. As it is the rule in legal systems belonging to the civil law tradition, the figure of punitive damages has been strictly banned in Mexico. Even traditionally, the damages

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related to injuries affecting the physical integrity of people have been limited—sometimes to ridiculous amounts for those who suffer an offense—for a legal assessment based on the Federal Labor Law.<sup>1</sup> This situation has had important effects on Mexican legal life, both in the practical and in academic fields.

However, some years ago, the Supreme Court of Justice of Mexico established a precedent of great importance, which opens the door for Mexico to recognize the figure of punitive damages. In later sentences, this criterion has been consolidated, although still it does not qualify as binding jurisprudence, or at least, the Supreme Court has not thus indicated it by means of the formal publication of the respective jurisprudence thesis in the weekly *Federal Judicial Journal*. But due to the influence of precedents of the Highest Court, even those that formally lack binding legal effects, it is necessary to know this new figure that could revolutionize the Mexican legal panorama.

### New Jurisprudential Line

On February 26, 2014, the First Chamber of the National Supreme Court of Justice ruled the direct Amparos 30/2013 and 31/2013 which dealt with civil liability.<sup>2</sup> Its decision introduced the “punitive damages” to the Mexican legal system, sometimes also called “exemplary damages”, which is a typical figure of the Anglo-American legal tradition that consists in an indemnification that punishes and discourages behaviors that cause grievance, and whose amount can exceed—and by far—the amount corresponding to the strict compensation (Glannon, 2015; Pearle, 2007).<sup>3</sup> This line continued in cases involving employment discrimination<sup>4</sup> and bullying<sup>5</sup> is then a jurisprudential development which, to say the least, deserves attention.

The introduction of this figure in the civil liability regime of our country is of great importance. It supposes a transcendental change in one of the most rancid matters of our system, in relation to a figure that always has been rejected by our Romanist tradition (Díez-Picazo, 2011; Yzquierdo Tolsada, 2015),<sup>6</sup> and which constitutes one of the aspects that most separate it from the common law (Merryman & Pérez-Perdomo, 2007). In addition, it is a legal development that can cause important social and economic transformations, and will set a very different course from the practice of all areas of law.

As to the first aspect, the possibility of being sentenced to the payment of a considerable sum of money makes that, in this country, we will be more attentive to prevent situations that may rise this situation, which undoubtedly will prevent many unfortunate events occurring to others. But on the other hand, this may have

<sup>1</sup> Article 1915, second paragraph, of the Federal Civil Code.

<sup>2</sup> For simplicity I will refer only to the execution of the first of the cases indicated, which served as a model to the second one. I will use the public version of this resolution available at [www.scjn.gob.mx](http://www.scjn.gob.mx). From both Affairs derived the thesis with 2006805, 2006958 and 2006959 registration numbers, among others.

<sup>3</sup> Stratospheric claims and convictions that have occurred in the United States for this concept are proverbial. The paradigm is *Liebeck v. McDonald's*, also called the Stella case by the name of the plaintiff, the case of the hot coffee in which this company was sentenced to pay \$2.9 million; see Wikimedia Foundation, *Wikipedia. La enciclopedia libre*, San Francisco, Cal., s. v. “Liebeck v”. “McDonald's Restaurants”, <http://bit.ly/1hRf5wj> (October 5, 2018). Annually, these actions cost the country hundreds of billions of dollars and produce effects beyond the strictly economic.

<sup>4</sup> “DISCRIMINACIÓN EN EL ÁMBITO LABORAL. EL JUZGADOR PODRÁ IMPONER MEDIDAS REPARATORIAS DE CARÁCTER DISUASORIO PARA PREVENIR FUTURAS ACTUACIONES CONTRARIAS AL PRINCIPIO DE IGUALDAD DE TRATO”, First Chamber, *Semanario Judicial de la Federación*, 10a. epoch, lib. 14, January 2015, t. I, thesis 1a. IV/2015 (10a.), p. 756.

<sup>5</sup> In adherence to the route of direct Amparo 30/2013. For all see “BULLYING ESCOLAR. CRITERIOS PARA VALORAR EL GRADO DE RESPONSABILIDAD DEL CENTRO ESCOLAR” First Chamber, *idem*, 10a. epoch, book 24, November, 2015, t. I, thesis 1a. CCCXLIX/2015 (10a), p. 954.

<sup>6</sup> Luis Díez-Picazo says, “The figure of punitive damages is alien to the continental European Court systems”, p. 26, cited by Yzquierdo Tolsada, 2015 (noting also that Spanish caselaw has been very reluctant to adopt such figure).

negative consequences in so far as a conviction of this kind could result in a financial catastrophe for individuals and companies (Lewis, 1992),<sup>7</sup> and will have an impact on the cost of economic activity, to begin with its influence on the amount of the premiums of insurance and bonding.

Legal practice will also be affected by this jurisprudence line in all its fields. It is obvious that affecting the forms of litigation will require higher quality to the work of lawyers. But perhaps the corporatists and legal staff of companies and public entities should be the most attentive to this issue, given the preventive nature of their role. They are responsible for advising their clients and organizations to implement practices that reduce the possibility of a conviction of this nature and banish those practices that put them at risk of suffering them.

At the moment, apparently, the punitive damages have not been introduced by a strongly binding jurisprudence.<sup>8</sup> However, it is a caselaw development that the First Chamber has resolutely promoted and that has four precedents that support it; it is not a mere isolated holding, resulting from chance or accident. Although it does not have it in a strict sense, this jurisprudential line has a weakly binding character due to the high quality of the court from which it comes (Taruffo, 2003).<sup>9</sup> This is more than enough to have it, as the author pointed out, as a development that deserves attention.

### The Facts of the Case

A group of young people stayed during the national holidays of 2010 at a hotel in Acapulco. Two couples of them were using kayaks in the artificial lake of these facilities when one of them fell into the water. The pump submerged in the lake had a faulty seal and it electrified the water that the couple had fallen in; she could go out, but he could not. After several minutes, during which none of the hotel staff arrived at the site nor the electricity of the lake was cut off, the body of the young person was recovered. Hotel employees who attended the young man lacked preparation to face an event like this, and the young man received first aid from other guests that identified themselves as cardiologists. An ambulance, from outside the hotel, took about an hour to arrive, and by the time, the young man was carried on to the ambulance he had no vital signs. It was concluded that when he was moved from the site, he was already dead.

The parents of the young man sued the hotel for civil liability, including the moral damage that resulted from the death of their only son. In the first instance, they were granted, by this last concept, the amount of eight million pesos. The decision was appealed and the High Court of Justice of the Federal District modified the sentence, reducing it to one million pesos. Both parties promoted two direct Amparos against this sentence, which came to the Supreme Court of Justice of the nation. The victims' attorney requested the Supreme Court to exercise its power of attraction, and the request was endorsed by Justice Alfredo Gutiérrez

<sup>7</sup> Due to the amount claimed, the *New York Times* would have closed if it had lose the trial initiated by a police officer who have sued for written defamation (libel) and not having resolved the Supreme Court in favor of the freedom of expression in the famous *New York Times Co. v. Sullivan* (376 U.S. 254 [1964]).

<sup>8</sup> We only have the four precedents mentioned above. There are debatable points on the formation of jurisprudence in this case, but it is unnecessary to address them here.

<sup>9</sup> "SENTENCIAS DE AMPARO, FUERZA OBLIGATORIA DE LAS, AUNQUE NO SIENTEN JURISPRUDENCIA", Third Chamber, *Semanario Judicial de la Federación*, 5th epoch, t. LXIX, p. 4087; only in relation to the indicated aspect, stating that the isolated theses of the Supreme Court "constitute *strong guidelines* for the judges [...], by virtue of which they are issued by the jurisdictional body to whom [...] it is incumbent to become the final interpreter", see "Tesis aisladas de la Suprema Corte de Justicia de la Nación. El principio de irretroactividad de la jurisprudencia, previsto en el artículo 217, último párrafo, de la Ley de Amparo, les es aplicable", *Semanario Judicial de la Federación*, 10a. epoch, March 11, 2016, thesis XVI.1o.A.24 K (italics added).

Ortiz Mena.<sup>10</sup>

The Supreme Court decided to protect the parents of the deceased young man and to deny protection to the hotel. As specific outcome of its decision, the Court modified the amount of compensation in favor of the plaintiffs, fixing it at more than 30 million Mexican pesos (a little more than 2.29 million dollars at the applicable exchange rate at the date of the sentence).

### Legal Basis for Punitive Damages

The central object of the decision of the Supreme Court was the fourth paragraph of Article 1916 of the Civil Code for the Federal District (CCDF) that governs moral damages.<sup>11</sup> Such rule establishes that:

The amount of the compensation shall be determined by the judge taking into account the rights that were violated, the degree of responsibility, the economic situation of the offender and the victim's, as well as the other circumstances of the case.

In its request for defense, the parents of the victim claimed that this provision was unconstitutional, because it did not provides a suitable compensation in regard to the damage caused, and it implies to assess the rights of a person according to their socio-economic level.<sup>12</sup> But in construing this provision, the Court guided it down to an unexpected path.

### Moral Damage and Reparation

After presenting the evolution of moral damage in our country, the Supreme Court concluded that the hotel was responsible and they morally affected the parents of the victim.<sup>13</sup> For the Court, the hotel was negligent when violating rules governing its service and for not adopting measures to prevent and deal with accidents, such as the one suffered by its young guest, to which it adds—something particularly perceived in the ruling—that “They did not offer a decent treatment to the relatives of the victim” (Glannon, 2015).<sup>14</sup>

<sup>10</sup> First Chamber, Faculty of attraction 80/2013, resolution of the 29th of May, 2013. It is significant that this constitutional judge pointed out the relevance of this matter. For having the master's degree awarded by Harvard University and having joined the State Bar of New York (see his profiles at <http://bit.ly/2xVVigF> and at <http://bit.ly/2gY58Ee>), it can be assumed that he has a clear understanding of the American regime of punitive damages.

<sup>11</sup> One of the interesting aspects of the case is the decision of the governing law of the case. The defendant company alleged that because in the State of Guerrero, particularly article 1768 of its Civil Code that provides for a “moral compensation” limited in its amount, and such rule was non-existent in the Federal District. If that had been the case, the question might have been in the sense of discussing the constitutionality of the quantitative limits imposed by that legislation and its substantive and procedural constitutional implications. In a way that can be seen in more detail, the Court decided on this issue in direct Amparo 31/2013 (pp. 39-46), indicating that the Civil Code of the Federal District was applicable, because it was a personal action and the defendant had its domicile in the said entity (pp. 42-43).

<sup>12</sup> For having only a tangential relationship with the subject of this work, I will not deal with this contestation. However, from what the Supreme Court concluded in its respect derived the following theses: “INDEMNIZACIÓN EXTRAPATRIMONIAL POR DAÑO MORAL. EL ARTÍCULO 1916, PÁRRAFO ÚLTIMO, DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL, EN LA PORCIÓN NORMATIVA QUE SEÑALA ‘LA SITUACIÓN ECONÓMICA DE LA VÍCTIMA’, ES INCONSTITUCIONAL SI SE APLICA PARA CUANTIFICAR AQUÉLLA”, *Gaceta del Semanario Judicial de la Federación*, 10a., lib. 8, July 2014, t. I, thesis 1a. CCLXXIV/2014 (10a), p. 146; and “PARÁMETROS DE CUANTIFICACIÓN DEL DAÑO MORAL. SE PUEDE VALORAR LA SITUACIÓN ECONÓMICA DE LA VÍCTIMA PARA DETERMINAR LAS CONSECUENCIAS PATRIMONIALES DERIVADAS DEL DAÑO MORAL (LEGISLACIÓN DEL DISTRITO FEDERAL)”, *idem*, thesis 1a. CCLXXV/2014 (10a), p. 160.

<sup>13</sup> From now on, I will refer generally to pp. 50 *et seq.*, of the execution of the direct Amparo 30/2013. If it were necessary to indicate the precise location of some information of this sentence, in the main text I will indicate in parentheses accordingly.

<sup>14</sup> Precisely in the case here analyzed, the Supreme Court considered “negligence” as the breach of a duty of care, as opposed to “the ordinary [...] diligence of an average man or a reasonable person”; opinion summarized in “NEGLIGENCIA. CONCEPTO Y CASOS EN QUE SE ACTUALIZA”, First Chamber, *idem*, 10a. epoch, lib. 8, July 2014, t. I, thesis 1a. CCLIII/2014 (10a), p. 154. This criterion recalls the Anglo-Saxon concept of “negligence”, which consists of *duty of reasonable care* or a “due care standard (*standard of due care*)”; it is remarkable, in particular, the allusion of our Supreme Court to the “reasonable person”, an idea that is not exempt from difficulties.

According to the opinion of the Supreme Court, if it were not for the aforementioned breaches, the victim would still be alive (Glannon, 2015).<sup>15</sup>

From this conclusion, the Court, continued the moral damages of the actors, are presumed from the fact that the death of a person inexorably affects the feelings of their close relatives (pp. 79-81). The following was to determine the criteria to establish the amount of compensation for the moral damage caused.

The Supreme Court rightly pointed out that “the conceptualization of the right to a fair compensation depends on the vision that our legal tradition adopts of civil liability, and in particular, the duty of mitigating the effects derived from the moral damage”.<sup>16</sup> This passage of its sentence announces a substantive modification in the conception of the indemnification in our legal system. Indeed, the solution that the Supreme Court established in this case seems to move away of its previous idea<sup>17</sup> on the “justice” of the compensation for the damage, but to conclude on the matter depends on establishing what compensates this repairing and if it is sufficient; and also, to consider that a sentence of this type cannot be limited merely to retribute or to compensate, but also to punish, is something not only strange to our legal tradition, but also rejected by this (Merryman & Pérez-Perdomo, 2007).

The First Chamber explicitly stated that the case we analyze is part of a “jurisprudential evolution” (p. 94). This development has led to the Mexican legal system to no longer understand civil liability in terms of the person to whom the action, that creates it, is attributed, but who is affected by the illicit act.<sup>18</sup>

### Fair Compensation

In reference to the right to a “fair compensation” that has developed since 2011,<sup>19</sup> the Court noted that compensation generally is used to “achieve fundamental objectives in terms of social retribution” and has a “deterrent effect” that prevents future illicit behavior. They pointed out that this “facet of the right of damages”, known as “punitive damages”, is inscribed in that fundamental right (pp. 88-89).

This facet of the reparation of moral damage, continued the Supreme Court, constitutes a “social expression of disapproval towards the illicit behavior” and something that is important to highlight, “reinforces the conviction, of the victims, that the legal system is fair and that their decision to act legally is useful”. It is about “exemplary sanctions [with which] a *culture of responsibility*” is sought (p. 89; italics added). The compensation for moral damages was thus the vehicle by which the punitive damages were introduced to Mexican civil liability.

The First Chamber founded the punitive nature of the reparation of moral damage in the literal and teleological interpretation of Article 1916 of the CCDF (pp. 90 *et seq.*), specifically in the provision made by its fourth paragraph of: (1) the violated rights; (2) the degree of responsibility; and (3) the economic situation of the

<sup>15</sup> The formula “*but for*” is the basic parameter in the common law to ascertain the causal nexus that is the source of liability. It has the disadvantage of being a “complex and speculative exercise”. Over time and in real problematic situations, the courts have established exceptions to this parameter and alternative solutions, such as the concept of the “substantial factor”—which is not categorical as such, but gradual—and the variation of the burden of the proof.

<sup>16</sup> Amparo directo 30/2013, p. 95 (italics added)

<sup>17</sup> “DERECHO FUNDAMENTAL A UNA REPARACIÓN INTEGRAL O JUSTA INDEMNIZACIÓN. CONCEPTO Y ALCANCE”, First Chamber, *Semanario Judicial de la Federación y su Gaceta*, 10th epoch, book XII, September 2012, t. 1, thesis 1a. CXCIV/2012 (10a.), p. 502.

<sup>18</sup> “Reparación integral del daño o justa indemnización. Su determinación judicial en caso de vulneración al derecho a la salud, First Chamber”, *Semanario Judicial de la Federación y su Gaceta*, 10a. epoch, lib. XII, September 2012, t. 1, thesis 1a. CXCVI/2012 (10a.), p. 522.

<sup>19</sup> And even since 2009: “RESPONSABILIDAD PATRIMONIAL DEL ESTADO. EL ARTÍCULO 14, FRACCIÓN II, SEGUNDO PÁRRAFO, DE LA LEY FEDERAL RELATIVA, AL ESTABLECER UN TOPE MÁXIMO PARA LAS INDEMNIZACIONES POR DAÑO MORAL, VIOLA EL ARTÍCULO 113 SEGUNDO PÁRRAFO DE LA CONSTITUCIÓN GENERAL DE LA REPÚBLICA”, First Chamber, *Semanario Judicial de la Federación y su Gaceta*, 9a. epoch, t. XXX, September 2009, thesis 1a. CLIV/2009, p. 454.

person responsible, as determining factors in the amount of compensation. In their opinion, to be “fair”, the compensation for moral damage cannot be limited to what is strictly necessary to eliminate the negative consequences of the wrongful act and restore the previous situation to the victim, or in its case to satisfactorily compensate the victim (Borja Soriano, 2001; Gutiérrez y González, 2001; Pérez Fuentes & Cantoral Domínguez, 2015);<sup>20</sup> but “there are *aggravating factors* that should be weighted in the quantum of compensation” (italics added), to which these concepts refer. Thus, compensation for moral damages may not only be compensatory, but also have a punitive aspect that reproaches the unlawful conduct in the particular case (pp. 91-92).

Fulfilling the pedagogical function that corresponds to the courts of superior hierarchy, especially when they are in charge of the constitutional jurisdiction, the Court offered a methodology to assess the moral damage and to accommodate the punitive nature of their compensation. It is a formula that recalls that with which Robert Alexy directs the study of the concrete weight of fundamental rights to resolve their conflicts, based on a triadic scale (mild-medium-severe) of the intensity of the factors taken into account (Alexy, 2008). The considerations of the Supreme Court are important because they outline the concepts provided by Article 1916 of the CCDF in view of the punitive damages and their consideration to determine the amount of compensation for moral damages (pp. 95 *et seq.*)

It is not unusual for the Supreme Court to have considered the magnitude of the importance of the rights or immaterial interests that were harmed to increase the amount of compensation. At this point, we are even faced with a purely compensatory intention of this measure, whether from the qualitative or quantitative point of view, according to the Court, it is a situation in which a right of great importance is affected. It is done in a very intense way, or a plurality of interests can be damaged to a greater or lesser degree (pp. 96-98).

The authentic punitive nature of civil liability and the “fairness” of the corresponding compensation are then linked to the other two factors identified by the Supreme Court: the degree of responsibility and the economic situation of the person responsible. These are elements that do not correspond to the damage actually suffered by the victim, or rather, not one that was traditionally conceived in our system. The author will deal with them in the next section.

The purpose of considering the degree of responsibility, according to the Supreme Court (pp. 99-100), is “*to discourage* the type of behavior that causes moral damages and to comply with the other *social purposes* of the compensation” (italics added), that is, the social relevance that they had and that corresponds to the importance of discouraging them (Ferrajoli, 2009). For this purpose, it establishes a directly proportional relationship between the seriousness of these behaviors—integrally considered in themselves—and the amount of compensation, indicating the possibility of also estimating said quality through the aforementioned triadic scale (O’Donnell, 1988; Gifis, 2010).<sup>21</sup> From the traditional point of view, this position is clearly far from a strictly compensatory goal. Discouraging harmful behavior and promoting a “culture of responsibility”—a concept in which the Court

<sup>20</sup> Such scope was that in a traditional way—and also liberal at first, when the same possibility of repairing the moral damage was disputed—had had the compensation, and that it altered the case that is commented here. See Borja Soriano, Manuel (referring to the classic treatise of Henri and Léon Mazeaud).

<sup>21</sup> Three different degrees of responsibility can be pointed out in the behavior, which I indicate in descending order: 1) intentional, from which the probability of its harmful effects is known by the agent; 2) reckless, when the agent warns or should warn of the harmfulness of their actions or omissions; and 3) negligent in the strict sense, which consists in creating an irrational risk by virtue of incompetence or inadvertence. Following a reconsideration of the *punitive damages* in the United States, it has been suggested that this measure be adopted only for the first two grades, the highest, of responsibility.

classified the aforementioned “social goals”—seem to be independent objectives of the satisfaction of the grievances inflicted on the victim of an illicit act.

On the other hand, the economic situation of the responsible party plays a decisive role by relating to it the “degree of distress” that would result in being sentenced to punitive damages, and therefore the preventive effectiveness of this measure (p. 101) (Ferrajoli, 2009). In particular, the Supreme Court affirmed that the economic benefit that the person responsible may obtain from the aggravated acts should be considered. It is evident that explained the aforementioned: A small sentence would not deter someone who obtains a huge benefit with his/her illegal behavior, nor the one for whom it is costly to honor his/her duty. Therefore, the penalty needs to represent a very high cost for the culprit, so it becomes prevention enough to avoid an illicit conduct, especially when the threat is considered as a plain possibility when determining the responsibility (Yzquierdo Tolsada, 2015).<sup>22</sup> By virtue of their connection with the prevention of this kind of conduct, it cannot be attributed a strict compensatory nature to this factor.

Apart from the punitive nature exposed, the author does not see what application the degree of responsibility and the economic situation of the responsible party could have. Its inclusion in the text of Article 1916 of the CCDF causes that, inevitably, it functions as a legal basis for punitive damages. Both concepts cannot be taken as tending only to compensate the moral damage, to satisfy the aggrieved immaterial interests; it makes no sense to relate them exclusively to the damage caused, which has an autonomous existence, completely separate from them.

### Factor Weighting

On the factors addressed on the fourth paragraph of Article 1916 of the CCDF, the Supreme Court said that:

It should be noted that [these] elements of quantification [...], as well as its intensity qualifiers, are *merely indicative*. The judge, when considering each one of them, can observe *particular relevant circumstances*. Its enunciation simply aims at *guiding the actions of judges*, based on the function and purpose of the right to compensation for moral damage, without implying that these parameters constitute an objective or exhaustive basis in the determination of the compensatory quantum. (p. 101, original emphasis deleted, italics added)

The “weighting” referred to by the Supreme Court is not in the sense of balancing conflicting positions to determine the most important one and make it prevail. It is a more usual sense of the term: the careful consideration of one or more elements. What the Supreme Court indicated regarding the aforementioned “elements of quantification” is that they have to be assessed individually and jointly, to establish their dimensions and the manner in which they should affect the amount of the sum that must be paid as compensation.

The only inexorable rules imposed by the First Chamber in this exercise refer to the duty to motivate the conclusion on this amount to which the judge arrives, and the purposes to be met by compensation for moral damages (p. 101). With regard to the first one, the Court said that there should not be some quantification *ad libitum*, “reserved to the subjectivity of the judge”, but rather “it should specify how [the] application [of the indicated guidelines] leads, in the case, to the result arrived at, which must always be ‘reasonable’, the reparations

<sup>22</sup> This measure was clearly expressed by Lord Devlin in the ruling of the case *Rookes v. Barnard* (No 1) [1964] UKHL 1 (21 January 1964), <http://bit.ly/2Qu0Cwv>: “Where a Defendant with a *cynical disregard for a Plaintiff’s rights* has calculated that the money to be made out of his wrong-doing will probably exceed the damages at risk, *it is necessary for the law to show that it cannot be broken with impunity*. This category is not confined to moneymaking in the strict sense. It extends to cases in which the Defendant is seeking to gain at the expense of the Plaintiff some object—perhaps some property which he covets—which he could not obtain at all or not obtain except at a price greater than he wants to put down exemplary damages can properly be accepted whenever it is necessary to teach wrongdoer that *tort does not pay*” (emphasis added).

that are imposed must be ‘responsible, justified and duly motivated’”. And as for the latter, the said court indicated that the judicial quantification of this compensation should be led by the purpose of “*repairing* but also of *dissuading*”, thereby confirming the two-faced character of the satisfaction of moral damages.

### Doctrinal Influence

The dual purpose—repairing and discouraging—of the compensation of moral damage is easily discerned by a careful reflection on the guidelines indicated in Article 1916, fourth paragraph, of the CCDF. One of the probable reasons why this text—and similar legislation—had not being attributed such meaning, even though apparently this was the intention of the legislator,<sup>23</sup> is the *very powerful influence of the traditional concept of moral damage* with its compensation, and dogmatic elaborations that resulted.

The text of said pre-existing provision that resulted from the reform published on December 31, 1982<sup>24</sup> incorporated a historical view of moral damage, generous at the time because it involved the triumph of the conditioned reparation of this offense against positions that denied it, absolutely (Borja Soriano, 2001).

Such perspective, first of all, made the moral damages dependent of the patrimonial damages caused by an illicit act; which was left out by the wording of the Article 1916 of the CCDF, as ruled by the Court in the case here discussed.<sup>25</sup> And secondly, it caused that the amount of the “moral repair” had a limit: the third part of the amount of the patrimonial damages, as it corresponded to the accessory character attributed to it, and which allowed that this class of offense was despised as opposed to the patrimonial one. The effect of this traditional conception is such that, as exemplified by the Civil Code of the State of Guerrero, it has persisted even after introducing formulas, such as the aforementioned CCDF numeral following the aforementioned reform.<sup>26</sup>

This would add a regrettable circumstance: the atrophy which, from the author’s particular point of view, without discarding ignorance on the subject, generally prevails in the Mexican Civil law. Broadly speaking, especially in the different States, it seems that there is nothing new under the sun in this legal branch and that its evolution reached the top with Rojina Villegas and his well-known *Compendios*; in the best of cases, we are already talking about an advanced level if we take Gutiérrez y González as authority, except for isolated and sporadic doctrinal and jurisprudential endeavors.

Unlike what happens in other countries, Spain for example, in Mexico, there are not many deep researches on the much varied civil topics, much less those that address these topics with a comparative perspective that encourages the expansion of legal knowledge and that strengthens its authentic scientific quality (Pegoraro & Rinella, 2006). This situation has allowed, from the author’s point of view, that the Mexican civil-law doctrines have not presented any significant progress for decades, because it is absorbed in a set of positions that only vary in its formal presentation, or at best, it lacks impact on the legal reality and the praxis of most of the legal operators.

<sup>23</sup> See direct Amparo /30/2013, pp. 91-92.

<sup>24</sup> Which was expressed in these terms: “Regardless of the damages, the judge can agree on behalf of the victim of a wrongful act, or his family, if the victim dies, a *fair compensation, by way of moral repair*, which the person responsible for the act will have to pay. This compensation *shall not exceed the third part* of the amount of the civil responsibility. The provisions in this article will not be applied to the Government in the case foreseen in article 1928” (italics added; cited by *ibidem*, p. 40, n. 28).

<sup>25</sup> “DAÑO MORAL. LA ACCIÓN PARA RECLAMAR SU REPARACIÓN ES AUTÓNOMA A LA DEMANDA DE RESPONSABILIDAD POR DAÑOS PATRIMONIALES (LEGISLACIÓN DEL DISTRITO FEDERAL)”, *Gaceta del Semanario Judicial de la Federación*, 10a. epoch, book. 7, June 2014, t. I, theses 1a. CCXXXIV/2014 (10a), p. 446.

<sup>26</sup> See First Chamber, direct Amparo 31/2013, pp. 45-46. This state legislation was invoked by the defendant in the matter discussed here to reduce the amount of moral damage claimed. The Court denied its applicability; but even if it had ruled in that the case, in my opinion, the exception should not have been considered, since the ceiling imposed is contrary to the fundamental right to fair compensation; *cf. supra*, note 16.



In the author's opinion, the prohibition of punitive damages in Mexico has caused a high degree of theoretical atrophy in the scope of the contractual and extra-contractual civil liability. Because there is no economic incentive for the people to go to court to demand their right to a repair, the judicature has not been motivated to deepen in the different aspects that the civil responsibility entails. Unlike the United States, to mention the example closest to us, in Mexico, we lack a precise and clear doctrine on the different aspects involved in the contractual (Blum, 2013) and the extra-contractual civil responsibility (Glannon, 2015).

The development of these subjects in Mexico, at least as a subject of basic knowledge for any jurist, hardly explains its elementary aspects. A symptomatic example: an elementary search in the Mexican federal case law shows a short number of systematized precedents that, at the same time, mention "the contractual" and "extra-contractual" responsibility—that it would suggest some kind of parameter of distinction between both concepts<sup>27</sup>, only nine systematized holdings between 1917 and October of 2018.

Another conclusion that stem from these data is striking: of these nine precedents, the first two were respectively established in 1941 and in 1966, and the subsequent seven were issued in 2006 and subsequent years; i.e., there was a span of forty years (!) in which the Mexican courts did not deemed important to develop the most basic definitions of civil liability, nor at least to share their opinions on the matter through systematized official publications. But likewise, broadly speaking, it also suggests that in the last ten years the federal courts have dealt much more with the subject—almost four times more—than in all the previous ninety years, and that the judicial authorities are gradually developing a doctrine that it is more focused on civil responsibility.<sup>28</sup> From this new conception, an important part is the discussion on the pertinence of establishing—even though praetorially—the punitive damages in our country, regardless of whether or not this figure succeeds in taking root in Mexico.

### Conclusions

The introduction of punitive damages in Mexico is already a turning point in the legal culture of this country. It has made rethink the most basic considerations on the law of civil liability in the Mexican legal system, and made the jurists, at least by obligation, to discuss this legal regime with arguments based on a modern understanding, and not only of the civil law, but also of the legal system in general.

Also, as indicated by the Supreme Court of Justice of the Nation, to enact his controversial decision could lead to a real cultural revolution in Mexico. In fact, that was one of the intentions of the First Chamber of the Mexican Supreme Court in issuing the important sentence of direct Amparo 30/2013; explicitly, the Supreme Court indicated that its intention was to promote a "culture of responsibility" in the Mexican society. It is possible that the warning of a sentence to a punitive liability encouraged to dissuade the reckless disrespect towards others, which in Mexico is more frequent than many would like to.

However, there are many questions to be answered on punitive damages, for its full—and fair—use in Mexico.

The first question is about its possible unconstitutionality, mainly in the light of the concept of "exploitation" prohibited by Article 21(3) of the American Convention on Human Rights.<sup>29</sup> Are punitive

<sup>27</sup> Supreme Court of Justice of the Nation, *Semanario Judicial de la Federación (Jurisprudencia, Resultados)*, México, <http://bit.ly/2BYGG0A> (October 5, 2018)

<sup>28</sup> As a very recent example, see "Ilícitos atípicos en el ámbito civil. Sus elementos", Third Collegiate Court in Civil Matters of the First Circuit, *Semanario Judicial de la Federación*, 10th epoch, reg. 2018066, October 5, 2018.

<sup>29</sup> See, e.g., "Explotación del hombre por el hombre. Concepto", First Chamber (SCJN), *Gaceta del Semanario Judicial de la Federación y su Gaceta*, 10a. epoch, book 19, June 2015, vol. I, thesis 1a. CXCHII/2015 (10a.), p. 586.

damages a deprivation against the defendant, done by the State for unlawful enrichment of the claimant? Could there be constitutional considerations which justify this figure or force to reject it? When dictating the sentence in which it tried to insert the punitive damages as part of the moral damage, and with it, of the civil responsibility in the Mexican law, the Supreme Court did not answered thoroughly the previous concerns.

In the same sentence, the Supreme Court did not laid down clear parameters to avert the danger of abuse in the determination of the amount of punitive sentences. Indeed, yet it provided reasons, which attempted to justify its decision, to set the amount of damages whose repair granted, the support given to a resolution which almost quadrupled the sentence originally handed down by the civil jurisdiction of the Federal District seems weak.

When introducing the punitive damages in Mexico, some questions, like the previous ones, were left unanswered. Such answers are necessary to consolidate this figure in a legal system to which it is alien—like the Mexican system. And mainly to establish limits to prevent the abuse, on the part of the litigants, and unreasonable decisions by the judges. Nevertheless, the Supreme Court of Justice of the Nation has established the basis for a profound criticism around the regime of the civil responsibility in Mexico, and the possible consequences of its evolution.

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