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Punitive Damages in Argentina and Mexico: Rethinking the Scope of the Public Policy Exception

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1. Introduction

In the modern continental tradition, discussions on the place of punishment in private law have been stirred in recent decades by intense debates over the (in)convenience of introducing punitive damages and their (in)compatibility with existing civil law legal systems.[1] Punitive damages, understood as extra-compensatory awards imposed by judges at the request of the plaintiff in order to punish the defendant and deter her (and perhaps third parties) from engaging in similarly reprehensible misbehaviour in the future, are certainly a controversial institution. By incorporating punishment into private law, punitive damages raise many varied questions, some conceptual, and others that involve their practical implementation.[2]

In general, scholars have resisted the punitive institution and, as the discussion has progressed, different types of arguments have been employed to justify its rejection. One of the main arguments against punitive damages argues that their eminently punitive nature is proper to the criminal law (public law) and that they are therefore alien to tort law (private law).[3] They are rejected because punitive damages depart from the traditional corrective function of tort law, which stipulates that the amount of compensation should not exceed the harm caused to the victim and that the judge should disregard the seriousness of the defendant's conduct when determining the proper amount of compensation.[4] Accordingly, the condoned practice of punitive damages in private law is understood to cause more dysfunction than good

[1] L. Meurkens & E. Nordin, *The Power of Punitive Damages. Is Europe Missing Out?*, Cambridge, Intersentia, 2012. In this compilation on punitive damages in Europe, it becomes clear that the (in)compatibility of punitive damages with existing civil liability systems is the most prominent dispute in the debates over its incorporation in modern continental tort law.

[2] For a comprehensive analysis of the theoretical and practical implications of the introduction of punitive damages in Argentina, *see* M. G. Martínez Alles, `¿Para Qué Sirven los Daños Punitivos? Modelos de Sanción Privada, Sanción Social y Disuasión Óptima´, *Revista de Responsabilidad Civil y Seguros*, Vol. XIV, No. 5, 2012, pp. 55-100. For an analysis of the retributive dimension of punitive damages, *see* M. G. Martínez Alles, `Moral Outrage and Betrayal Aversion: The Psychology of Punitive Damages´, *Journal of Tort Law*, Vol. 11, No. 2, 2018, pp. 245-303.

[3] J. Bustamante Alsina, `Los Llamados «Daños Punitivos» son Extraños a Nuestro Sistema de Responsabilidad Civil´, *La Ley*, Vol. B, 1994, p. 860. For common law scholars arguing that punitive damages should be abolished because they are in serious tension with tort law, *see* e.g. A. Beever, `The Structure of Aggravated and Exemplary Damages´, *Oxford Journal of Legal Studies*, Vol. 23, 2003, pp. 87-110.

[4] P.S. Coderch, `Punitive damages´, *InDret*, Vol. 1, 2000, pp. 1-17, p. 3; J. Mayo, `La Inconsistencia de los Daños Punitivos´, *La Ley*, Vol. B, 2009, pp. 1269-70.

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by "ridiculously mixing the civil with the criminal and the administrative law."[5] At the same time, disallowing punitive damages has led some to seek or even invent other more appropriate institutions to fulfil the functions of punitive damages.[6] This perspective understands punitive damages as a threat to the traditional distinction between "public law" and "private law".

Despite this attitude of generalised resistance, recent relevant movements in the opposite direction can also be observed. In Latin America, countries such as Argentina, Chile and Mexico have grown receptive to introducing punitive damages into their domestic legal systems. In 2008, Argentina became the first civil law jurisdiction to introduce punitive damages under the rubric of consumer law.[7] Chile joined in this trend by introducing the sanction in the framework of its Consumer Protection Law passed in 2018.[8] The case of Mexico presents certain particularities, starting with their unusual origin. The Mexican Supreme Court of Justice directly introduced punitive damages under the umbrella of non-pecuniary damages in 2014.[9] In continental Europe, similar signs can also be identified. Although perhaps more timid than the Latin American developments, they indicate an increasingly receptive attitude to the punitive institution.[10] In fact, the discussion has recently been revitalized by the recognition that the determination of the extent of damages that are legally recognized as compensable in each European jurisdiction ultimately belongs to their domestic spheres, meaning that no obstacle, at least in principle, precludes the incorporation of punitive damages in the different jurisdictions of the European Union.[11] This is the logic followed in France where, within the framework of the recent *Projet de Réforme de la Responsabilité Civile*, a

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[5] J. Mayo & L. D. Crovi, `Penas Civiles y Daños Punitivos´, *Revista de Derecho de Daños*, Vol. II, 2011, p. 19.

[6] A. J. Bueres & J. S. Picasso, `La Función de la Responsabilidad Civil y los Daños Punitivos´, *Revista de Derecho de Daños*, Vol. II, 2011, pp. 65-75, p. 73 (following this line of thinking, the authors share the conclusion of a report issued by the French Senate, which states "that the development of class actions is revealed as a much more appropriate instrument to achieve the goals that are theoretically associated with punitive damages.").

[7] Arts. 8bis y 52bis, Law Nº 24.240 (text according to Law Nº 26.361, B.O. 7/4/2008).

[8] Art. 53 (c), Law Nº 21.081, 13/09/2018 (although it should be noted that the law does not expressly refer to it as "punitive damages"). On this point, *see* S. Gamonal Contreras & A. Pino Emhart, `La Dignidad Humana en el Derecho Privado. Una Lectura desde el Concepto de Dignidad Como Estatus´, *Revista de Derecho Privado*, Vol. 43, 2022, pp. 45-72, p. 60 (arguing that the new regulation has elements that bear some resemblance to (English) aggravated damages rather than punitive damages).

[9] Amparo Directo 30/2013, Primera Sala, Suprema Corte de Justicia de la Nación, 26/02/2014, pp. 87-91.

[10] On this point, *see* R. C. Meurkens, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, Deventer, Wolters Kluwer, 2014, chapter 8 and 9.

[11] E. Büyüksagis, I. Ebert, D. Fairgrieve, R. C. Meurkens & F. Quarta, `Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism´, *European Business Law Review*, Vol. 1, 2016, pp. 137-57 (arguing, based upon scholarly work and case law from Germany, Italy, the Netherlands, France and Switzerland, that "extra-compensatory damages are frequently applied by national judges, albeit not always in an overt manner, and that such a phenomenon should not be deemed a priori in conflict with the principles of European law.").

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form of punishment (*amende civile*) was introduced in order to combat lucrative forms of illicit behaviour.[12]

In parallel, the European approach to recognising and enforcing foreign punitive judgments has recently shifted from invoking the "public policy exception"[13] out of hand as a trump card that completely overrules such foreign judgments, towards a more nuanced reconstruction of that exception, one that considers a range of relevant questions previously ignored.[14] For instance, the Italian Court of Cassation radically modified its position in 2017 when it recognised that the execution of a punitive award ordered by a foreign court is not necessarily contrary to the *public order*, since the sanctioning function is no longer incompatible with Italian private law, which was the predominant argument only a few years ago.[15] Indeed, the Court of Cassation pointed out examples of Italian legal provisions that serve punitive aims, therefore concluding that the idea of punishment in private law can no longer be considered foreign. Notwithstanding, the Italian Court of Cassation did not wholly abandon the "public policy exception". It instead offered a reading which narrows the exception's scope down to, for the most part, questions concerning "proportionality" and "excessiveness". In this way, Italy joined the growing trend in continental Europe (that Spain and France had already joined) of acknowledging the compatibility of punitive damages with their legal systems and, by consequence, narrowing the scope of the classic "public policy exception" to cases where foreign punitive awards fail to satisfy several criteria before they can be enforced domestically, with particular emphasis on whether the punitive award is deemed excessive.[16]

From these developments, it can be inferred that the overall attitude and sentiment towards the proper place for punishment in private law is a dynamic, evolving feature of most civil law

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[12] Projet de Réforme de la Responsabilité Civile, Art. 1266-1 (2017). For analysis of the proposal, *see* S. Rowan, `Punishment and Private Law: Some Comparative Observations´, in E. Bant, W. Courtney, J. Goudkamp & J. M. Paterson (Eds.), *Punishment and Private Law*, Oxford, Hart Publishing, 2021, pp. 63-82.

[13] In this chapter, "public policy" refers to "international public policy" as policy with an exceptional character that must be construed narrowly and applied with circumspection compared with the "domestic public policy", which can in principle encompass a broad range of legal and moral prescriptions.

[14] For an overview of the current situation in Europe, *see* S. Bariatti, L. Fumagalli & Z. Crespi Reghizzi (Eds.), *Punitive Damages and Private International Law: State of the Art and Future Developments* (Vol. 83 Studi e Pubblicazioni della Rivista di Diritto Internazionale Privato e Processuale), Italy, Wolters Kluwer, 2019.

[15] Axo Sport S.P.A. v. Nosa Inc., Corte di Cassazione, 5 July 2017, no. 16601/2017.

[16] For an in-depth analysis of these cases, *see* C. Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union*, Antwerp-Cambridge-Portland, Intersentia, 2016, pp. 124-36; 139-44. For an analysis of the question of proportionality raised by the Spanish Supreme Court, *see* M. Requejo Isidro, `Punitive Damages: How Do They Look Like When Seen from Abroad?´, *in* L. Meurkens & E. Nordin (Eds.), *The Power of Punitive Damages: Is Europe Missing Out? Common Law and Civil Law Perspectives*, Intersentia, 2012, pp. 327-28.

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jurisdictions.[17] At the same time, acknowledging this observed phenomenon implies recognising that the "public policy exception" is also conceptually dynamic and fluid, generally informed and constructed on the basis of the domestic understandings on the proper place of punishment in private law. This interconnectedness calls for more refined and context-dependent scholarship on the recognition and enforcement of foreign punitive judgments. This scholarship should be capable of acknowledging the need for an understanding of the domestic debates over the punitive function of private law for the sake of more meaningfully addressing the particular scope that the "public policy exception" should take in different jurisdictions.[18] The changing landscape of the discussions on the proper place for punishment in private law taking place in each jurisdiction affects the scope of the "public policy exception", which means that outright rejection could eventually become an unreasonable (incoherent, unconvincing) response in jurisdictions that start to recognise that punishment, either overtly or covertly, does actually play a role in their law of torts. To clarify, I am not suggesting direct causation but rather correlation, as evidence shows that jurisdictions which become more receptive to the punitive function of private law within their own legal systems tend to shy away from invoking the complete "public policy exception" (i.e., "punitive damages oppose public policy").[19] Receptivity to punitive elements, it should be emphasised, does not necessarily require express introduction of punitive damages. Recognising punitive-like instruments within their private law has corresponded with a shift in approach from outright rejection of foreign punitive judgments to focusing instead on the factors behind the punitive award, mostly in terms of proportionality, and how they jibe with domestic criteria.[20]

Against the shifting European landscape, looking at Argentina and Mexico is worthwhile, since both have recently introduced punitive damages in their legal systems, posing a challenge to the classic response to requests for the enforcement of foreign punitive judgments simply

[17] Note that common law jurisdictions are not exempt. For instance, an ongoing discussion in English law questions the restrictiveness of the classic "categories test" originally introduced in *Rookes v. Barnard*, subsequently arguing for expansion in the scope of application of exemplary damages. For scholarly work along these lines, *see* J. Goudkamp & E. Katsampouka (2021), `Punitive damages: Ten Misconceptions´, *in* E. Bant, W. Courtney, J. Goudkamp & J. M. Paterson (Eds.), *Punishment and Private Law*, Oxford, Hart Publishing, 2021, pp. 187-223.

[18] On the connectivity function of private international law, *see* M. Pertegás Sender, `Connectivity in Private International Law´, Inaugural speech at Maastricht University, 2019, available at https://cris.maastrichtuniversity.nl/en/publications/connectivity-in-private-international-law.

[19] *See* supra notes 14-16.

[20] This general attitude can be observed in the following cases: Axo Sport S.P.A. v. Nosa Inc., Corte di Cassazione, 5 July 2017, no. 16601/2017 (Italy); Miller Import Corp. v. Alabastres Alfredo S.L., Tribunal Supremo, 13 November 2001, Exequatur no. 2039/1999, AEDIPR 2003, 914 (Spain); Schlenzka & Langhorne v. Fountaine Pajot S.A., Cour de Cassation 1re Civ. 1 December 2010, no. 09-13303, D 2011, 423 (France).

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because punitive damages are against the public order. Instead, much more complex and nuanced questioning is called for: under which circumstances would the enforcement of punitive damages compromise the "public order" of those particular jurisdictions? Since I was unable to identify representative cases dealing with the enforcement of foreign punitive judgments after punitive damages were introduced in the Mexican and Argentinean legal systems, I will concentrate on offering a thorough understanding of the contours of the punitive institution in those two jurisdictions from the internal perspective of tort law and its practice, largely assuming the above-mentioned interconnectedness between domestic tort law and private international law. It is my understanding that providing first-hand insights on the internal debates on punitive damages and its specific legal features in those countries will provide a helpful framework for private international law scholars who study requests for the enforcement of foreign punitive judgments in Argentina and Mexico (and perhaps other national jurisdictions as well) in the years to come.

The structure of the chapter is as follows. Section 2 describes the current physiognomy of modern tort law in Latin America, identifying the current scholarly landscape of its punitive dimension. Section 3 explores the distinctive history and process by which punitive damages were introduced in Argentina and Mexico. It reveals that even though both jurisdictions were principally inspired by the American experience and literature on punitive damages, they have nonetheless diverged significantly from each other in several aspects. They followed different institutional procedures for the introduction of punitive damages and ended up with differences in the concrete legal criteria for domestic application. Moreover, the large degree of uncertainty around practical matters important for implementation (for instance, the precise scope within which punitive damages can be applied, the legal requirements for imposing them and the methods adopted to quantify them or caps or limits on its amounts) strongly suggests that punitive damages are a dynamic, constantly evolving institution. Section 4 considers the domestic legal features of punitive damages identified in Argentina and Mexico that pose new questions for further inquiry as regards future changes in the potential scope of the "public policy exception" in those jurisdictions and offers tentative thoughts on directions for further exploration before a brief conclusion will be provided in Section 5.

2. The Contours of Modern Tort Law in Latin America

Before engaging with the theoretical framework in which current discussions on the relationship between tort law and punishment take place and, in particular, on the space for punitive damages in Latin American legal systems, it is important to understand the landscape

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of modern tort law. In Latin America, the current theoretical debate on tort law basically revolves around two issues. The first is the discussion behind the growing acknowledgment that the dominant theoretical framework which exclusively understands tort law as a private compensatory mechanism can no longer be sustained. The second debate, related to the first, concerns the determination of the circumstances that call for deterrent (preventive) and punitive functions of tort law as well as the specific justification according to those circumstances. In other words, the current debate focuses, first, on the tension among the three primary functions of compensation, deterrence and punishment and, second, on the need to conceptually identify, relate, distinguish and demarcate them.[21]

It turns out that tort law is less oriented towards reparation than is usually claimed.[22] Similarly, the blameworthiness of defendants' conduct is considered to a much greater extent than is generally admitted.[23] The theorised compensatory orientation is further undermined by repeated analyses that demonstrate the general failure of the law of torts to genuinely compensate victims of serious harms. The vast majority of such harms are irreparable (whether prolonged pain and suffering, severe or irremediable physical injury, gross invasion of individual dignity or privacy, and so on), making accurate quantification in purely monetary terms virtually impossible. The objective of restoring the victim to the same (or close to the same) situation she was in before the harm occurred is therefore delusional in the vast majority of cases.[24] For example, in cases of harm to one's image or privacy arising from social network posts, the appropriate response, most will agree, will not exclusively involve monetary compensation. Rather, and overwhelmingly, plaintiffs demand a response that prevents the harm from persisting or being compounded (by, for instance, requesting the judge to order the removal of the offensive content). Similarly, apologies are also often more appropriate

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[21] M. G. Martínez Alles, `La Dimensión Retributiva del Derecho de Daños. La Perspectiva de la Víctima´, *in* J. A. Garcia Amado & D. M. Papayannis (Eds.), *Dañar, Incumplir y Reparar. Ensayos de Filosofía del Derecho Privado*, Lima, Palestra Editores, 2020, pp. 107-32; D. M. Papayannis, `Responsabilidad Civil (Funciones)´, *Eunomía: Revista en Cultura de la Legalidad*, Vol. 22, 2022, pp. 307-327; E. Barros Bourie, *Tratado de Responsabilidad Extracontractual*, Santiago, Editorial Jurídica de Chile, 2006.

[22] G. Keating, `Is the Role of Tort to Repair Wrongful Losses?´, *in* D. Nolan & A. Robertson (Eds.), *Rights and Private Law*, Oxford, Hart Publishing, 2012, pp. 367-405; A. Vargas Tinoco, `El Valor de No Dañar: De la Responsabilidad Civil a la Prevención´, in D. M. Papayannis & E. Pereira Fredes (eds.), *Filosofía del Derecho Privado*, Marcial Pons, 2018, pp. 327-58.

[23] E. Pereira Fredes, `Un Alegato a Favor de las Consideraciones Punitivas en el Derecho Privado", *Revista de Derecho Escuela de Postgrado*, Vol. 7, 2015, pp. 61-78 (arguing that the judicial practice of awarding damages in Chile often runs contrary to the principle of rectification).

[24] S. Hershovitz, `Tort as a Substitute for Revenge´, in J. Oberdiek (Ed.), *Philosophical Foundations of Tort Law*, Oxford, Oxford University Press, 2014, pp. 86-102, p. 93; A. Pino Emhart, `Restaurar para Corregir. La Dimensión Restaurativa de la Justicia Correctiva en la Responsabilidad Extracontractual´, in D. M. Papayannis & E. Pereira Fredes (Eds.), *Filosofía del Derecho Privado*, Marcial Pons, 2018, pp. 359-75.

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responses to certain types of harm than monetary awards.[25] The classic rectificatory monetary response, however sufficient and appropriate in many instances (for example, simple car or other accidents where the damage is solely pecuniary), is highly unsatisfactory in a significant number of tortious cases. This demonstrates, at the very least, a crucial shortcoming of the principle extolling rectification as the exclusive objective of tort law.

Returning to another point mentioned above, the blameworthiness of the defendant's conduct has been demonstrated to carry more weight in tort law decisions and with greater regularity than is assumed.[26] Judgments for compensatory awards, such as those often handed down in cases involving non-pecuniary damages, include extra-compensatory (punitive) elements meant to respond to the seriousness (or reprehensibility) of the defendant's conduct. Such judgments make clear the inadequacy of a purely rectificatory response to satisfy the demands of justice for victims of aggravated conducts. At the end of the day and no matter how they are framed, those so-called "compensatory" responses do "more than compensation". Indeed, scholars have identified an established practice of awarding "generous" compensatory damages when the judges seem to address the outrageous behaviour of the defendant – as illustrated by large awards for "pain and suffering," which according to theory should be strictly compensatory.[27]

All of the above reveals not only the crisis that the pretension to exclusivity of the rectificatory principle is going through, but also the covert presence of the ideas of punishment and deterrence already operating in the law of torts. The sharp division between "public law" and "private law" is much less clear in practice than it is theoretically vaunted.[28] The logic and operation of modern tort law in Latin America has, as we have seen in the examples discussed,

[25] A. Vargas Tinoco, `Reparar o Reconocer. Algunas Consideraciones sobre la Justificación de Medidas No Pecuniarias ante el Daño en el Derecho Privado´, in J. A. Garcia Amado & D. M. Papayannis (Eds.), *Dañar, Incumplir y Reparar. Ensayos de Filosofía del Derecho Privado*, Lima, Palestra Editores, 2020, pp. 57-106.

[26] M. G. Martínez Alles, `Tort Remedies as Meaningful Responses to Wrongdoing´, in P. Miller & J. Oberdiek (Eds.), *Civil Wrongs and Justice in Private Law*, Oxford, Oxford University Press, 2020, pp. 231-52.

[27] Examples of Latin American countries where this practice has been observed by scholars include among others: Argentina, *see* M. G. Martínez Alles, `¿Para Qué Sirven los Daños Punitivos? Modelos de Sanción Privada, Sanción Social y Disuasión Óptima´, *Revista de Responsabilidad Civil y Seguros*, Vol. XIV, No. 5, 2012, pp. 55-100 (identifying the use of non-pecuniary awards as a punitive mechanism employed by judges); Chile, *see* C. Domínguez Hidalgo, *El Daño Moral*, Santiago: Editorial Jurídica de Chile, 2000, p. 91 (noting how Chilean judges award damages for pain and suffering to punish the defendant) and Brazil, *see* A. G. Corrêa de Andrade, *Indenização Punitiva*, Roncarati, 2008 (discussing the use of emotional damages as a punitive tool by judges in Brazil).

[28] T. Honoré, `The Morality of Tort Law - Questions and Answers´, in D. G. Owen (Ed.), *Philosophical Foundations of Tort Law*, Oxford, Oxford University Press, 1997, pp. 73-85, p. 74 (arguing that both tort law and criminal law aim to eliminate or reduce undesirable behaviours, contemplate sanctions to be imposed on those whose behaviours are undesirable and raise complex questions about the conditions for imposing sanctions and the degree of responsibility of the perpetrators of unlawful acts).

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become much more complex. Compensation, deterrence and punishment often coexist (even if covertly), comprising an ongoing challenge for tort scholars to identify and define the conceptual aspects of each function and to elucidate their relative autonomy, overlap and coordination with the others. As will become evident, distinct legal systems in Latin America provide different spaces for these functions, both because of the specific arrangements in the given legal community and the policy orientation of the faction in power.[29]

3. Understanding Punitive Damages in Argentina and Mexico

Argentina and Mexico have both recently introduced punitive damages in their legal systems, as has been mentioned, and their introduction in each case was heavily influenced by the Anglo-American scholarship and relevant case law on the punitive institution.[30] Legal scholarship and the reasoning of the judges imposing punitive awards in both jurisdictions often directly refer to American sources and U.S. Supreme Court decisions.[31] Notwithstanding, Argentina and Mexico have followed fundamentally different institutional paths to introduce punitive damages in their own legal systems, as did the domestic debates on the place of punishment in private law. The specific legal features and practical implementation aspects of their punitive awards are distinctive too. A closer look at each facet follows.

A. Argentina: *The Consumer Protection Statute*

For the last three decades, Argentinean scholars have actively discussed the place of punishment in tort law.[32] The debates have focused on a variety of issues concerning the (dis)advantages of recognising punitive damages, the relative autonomy of punitive damages vis-à-vis compensatory damages, the desired legal requirements for their imposition, and

[29] For example, in Argentina, after the recent reform of the Civil Code (which entered into force in August 2015 and, for the first time, systematically regulates tort law requirements from Art. 1708 onwards) compensation and deterrence are autonomous functions that coexist simultaneously in any given tort litigation.

[30] For the influence of the United States experience and scholarship on punitive damages in the debates in civil law systems, *see* M. G. Martínez Alles, \`Punitive Damages: Reorienting the Debate in Civil Law Systems´, *Journal European Tort Law*, Vol. 10, No. 1, 2019, pp. 63-81.

[31] For examples of references to the U.S. jurisprudence in Mexico, *see* Amparo Directo 30/2013, p. 87, notes 125-26 (explicitly referring to Anglo-American scholarship on punitive damages in the judgment); concurrent opinion of Justice José Ramón Cossío Díaz, pp. 13-14, notes 5-7 (pointing out to the need to refer to the system of origin, the United States, to elucidate questions such as the scope of their availability, their method for quantification and their limits); Amparo Directo 50/2015, Primera Sala, Suprema Corte de Justicia de la Nación, pp. 55-63 (referring to punitive damages in the United States to exclude their availability against the state); p. 61 (referring to the U.S. precedent in Pacific Mutual Life Insurance Co. v. Haslip as guidance for quantification of the punitive award). For similar examples in Argentina, *see* M. G. Martínez Alles, \`¿Para Qué Sirven los Daños Punitivos? Modelos de Sanción Privada, Sanción Social y Disuasión Óptima´, *Revista de Responsabilidad Civil y Seguros*, Vol. XIV, No. 5, 2012, pp. 55-100.

[32] For the leading scholarly work that ignited the debate over punitive damages in Argentina, *see* D. Pizarro, \`Daños Punitivos´, in A. Kemelmajer de Carlucci & C. Parellada (Eds.), *Derecho de Daños: Libro Homenaje al Profesor Félix Trigo Represas*, Vol. II, Buenos Aires, La Rocca, 1993, p. 287.

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several practical aspects surrounding implementation (insurability, limits or caps, how to determine the level of reprehensibility of the defendant's conduct, whether to divide the award between the victim and the state, and so on). The scholarly work on the topic is vast and comprehensive – for instance, the few existent books on punitive damages in Latin America have mostly been written by Argentinean scholars.[33]

This long process of debate within scholarly and judicial circles paved the way for Argentina's Congress to introduce punitive damages in the Consumer Protection Statute.[34] A judicial decision in the context of consumer law in Argentina might therefore simultaneously contain compensatory, deterrent and punitive elements. For an idea of such a combination, I will explain a 2015 case tried in Argentina, a simple individual lawsuit against a cell phone company.[35] A single consumer sued a cell phone company seeking reimbursement for fees improperly charged under the rubric of "collection management activities." The lawsuit also requested the judge to order, by way of deterrence, the telephone company to cease this abusive practice and, finally, to award punitive damages due to the seriousness of the company's conduct.

The situation is different outside of the consumer law realm, for even though compensation and deterrence are autonomous functions that can coexist simultaneously in any given tort action, punitive damages are not available in general civil law litigation in Argentina.[36] The general sentiment seems to deem punitive damages acceptable in the circumscribed context of consumer disputes characterised by the asymmetric power dynamics between mass producers and individual consumers. Opening the door to punitive awards broadly available in more general private law disputes is much more controversial, not to mention cases involving civil liability of public and government officials. However reasoned or faulty this understanding is, it may explain the exclusion of punitive damages from the final version, although they were initially proposed by the drafting commission of the Argentinean Civil Code reformed in 2015.[37]

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[33] *See* e.g. E. López Herrera, *Los Daños Punitivos*, Buenos Aires, Abeledo Perrot, 2008; A. D. Chamatropulos, *Los Daños Punitivos en la Argentina*, Buenos Aires, Errepar, 2009.
[34] Arts. 8bis and 52bis, Law Nº 24.240 (text according to Law Nº 26.361, B.O. 7/4/2008).
[35] CcivCom. 6 Nom. (Córdoba), *Raspanti, Sebastián c. AMX Argentina S.A.* (26/Mar/2015).
[36] Art. 1708, Civil Code of Argentina (2015).
[37] Art. 1714 and 1715 of the Project of Reform of Argentinean Civil Code (2014).

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The Consumer Protection Statute regulates punitive damages through two main norms: Article 52bis[38] stipulates the general rule and Article 8bis[39] identifies specific types of abusive conducts susceptible to the imposition of punitive damages. The overall regulation establishes three dimensions for punishment in consumer law: (i) legal requirements (the circumstances under which can punitive damages be imposed); (ii) factors relevant for the amount of the award (guidelines for its determination and maximum amounts); and (iii) implementation issues (two in particular that relate to legal standing and who receives the award). As regards (i), currently overwhelming consensus follows a holistic interpretation of the Consumer Protection Statute that qualifies the reprehensibility of the provider's conduct as the grounds for punitive damages.[40] Regarding the amount of the punitive award (ii), the seriousness of the conduct displayed by the defendant is the primary consideration, and it is capped at five million Argentinean pesos.[41] This legal cap has been heavily criticised for disregarding the pervasive and severe inflationary feature of the Argentinean currency. To overcome it, a draft proposal to update the legal cap to account for inflation without constant legislative intervention is currently under discussion.[42] The most well-known objection to legal caps is that they sometimes impede the award from performing the double function of punishment and deterrence. In those particular cases, legal systems could solve the dilemma by issuing guidelines on quantification that ensure the punitive award is proportionate to the reprehensibility of the defendant's conduct without imposing a predefined legal limit. Finally, as regards implementation issues (iii), the legal standing to sue for punitive damages is

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[38] The general basic rule is expressed in Article 52bis: "Punitive Damages. To the provider that does not comply with its legal or contractual obligations vis-à-vis the consumer, at the request of the injured party, the judge may apply a civil fine in favour of the consumer, which will be graduated according to the seriousness of the conduct and other circumstances of the case, regardless of other compensation that corresponds to the consumer."

[39] Art. 8bis states that providers' behaviour revealing undignified or inequitable treatment or that places consumers in embarrassing, humiliating or intimidating situations, may be subject to the imposition of punitive damages, without prejudice to the compensation that corresponds to the consumer.

[40] On the development of this discussion in Argentina, *see* F. G. Santarelli & A. D. Chamatropulos (Eds.), *Comentarios al Anteproyecto de Ley de Defensa del Consumidor: Homenaje a Rubén S. Stiglitz*, Buenos Aires, La Ley, 2019.

[41] Taking into account the exchange rate as of 1 August 2022, the Argentinean peso is equivalent to 0.0075 USD, so the limit of punitive damages under the Argentinean Consumer Protection Law is equivalent to USD 37.700. Note that the legal cap was recently reformed as follows: "The amount of the fine cannot be more than [2.100 basic baskets]" (Art. 119, Law Nº 27.701 B.O. 1/12/2022). This means that the limit of punitive damages as of 1 December 2022 is equivalent to USD 1.837.000.

[42] Project of Reform of the Consumer Protection Law (2018) Art. 118 and 157, inc. 2.: "The amount of the fine cannot be more than [5.000 minimum wages], or ten times the total amount of the profit obtained by the supplier as a result of the illicit act, if the latter is greater."

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exclusively given to affected consumers who are also the sole recipients of the punitive award.[43]

After almost a decade of punitive damages awards, the practice remains incipient in Argentina. The awards are in general modest. Only recently have we seen instances of higher amounts (although still far below the legal limit).[44] At the same time, a recent proposal that would instigate a comprehensive reform of the Consumer Protection Statute, including the modification of the current regulation of punitive damages, is under discussion.[45] If implemented, it would introduce innovations in the practice of the adjudication of punitive damages in Argentina that would certainly lead to new questions and further developments in the years to come.

B. Mexico: *The Mayan Palace Case*

Mexico has followed quite a different path. Punitive damages were directly introduced by the Supreme Court of Justice, not by the Mexican legislature.[46] This happened in 2014, when the Supreme Court of Mexico imposed punitive damages in its judgment on a wrongful death case (referred to as "The Mayan Palace Case"). As part of the compensation that may be awarded to victims of serious torts, the Court ordered the defendant to pay $30.000.000 Mexican pesos in punitive damages.[47] However, unlike Argentina where punitive damages have been discussed for some time, the Mexican scholarly debate over the (un)desirability of punitive damages and, more broadly, the place of punishment in private law, was mostly absent prior to 2014. Tort litigation itself, historically considered unattractive by Mexican jurists, is a very

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[43] Art. 52bis, Law Nº 26.361.

[44] *See*, for instance, Cámara Primera de Apelación en lo Civil y Comercial Departamental, Sala II, *Castelli, María Cecilia vs. Banco Galicia y Buenos Aires S.A.*

[45] For instance, the main aspect of the proposed reform that could impact the current practice of awarding punitive damages in Argentina is that it confers judges two main prerogatives: (i) to impose punitive damages ex officio (art. 118, inc. 1); and (ii) to decide in a reasoned judgment the recipient of the punitive award (art. 118, inc. 3).

[46] Amparo Directo 30/2013, Primera Sala, Suprema Corte de Justicia de la Nación, 26/02/2014 (Mexico). Briefly, the facts of the case were the following: the victim and his friends were kayaking in the Mayan Palace Resort's artificial lake, which was available for all hotel guests, when the victim's kayak turned over. Unfortunately, an underwater water pump that had not received maintenance for many years had caused the artificial lake to become electrified. Twenty minutes passed before Resort employees shut down the electricity to allow for the victim to be rescued from the pool. The victim had died by then. Regarding the analysis of the defendant's behaviour, the Court found that the conduct was highly reprehensible, not just towards the victim, but also in regard to the other guests staying at the Resort since it had also placed them at risk of serious injury. The Court also considered that the Resort did not have any sort of protocols in place to address emergency situations (such as the one in which a guest loses his life) as evidenced by the twenty minutes it took for the staff to shut the electricity down, and the need to request first-aid from other guests as no qualified hotel employees were on hand. The Court further noted that another twenty minutes passed after the victim had been removed from the artificial lake before he was taken to the Resort's infirmary.

[47] Amparo Directo 30/2013, p. 124. Taking into account the exchange rate as of 1 August 2022, the Mexican peso is equivalent to 0.049 USD, so the amount of the punitive award ordered by the Supreme Court of Mexico is equivalent to USD 1.475.000.

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recent phenomenon in Mexico and, as a consequence, the law of torts has only drawn significant scholarly attention in the last decade or two.[48]

It was in this context that the Mexican Supreme Court introduced punitive damages as the "punitive aspect (or facet)" for non-pecuniary awards, justifying them under the constitutional principle of "fair (or just) reparation".[49] A majority of the Ministers of the Mexican Supreme Court agreed that the principle of "fair (or just) reparation" requires compensation that satisfies the victim's requirement of justice, and on that basis introduced a punitive component into the traditionally compensatory non-pecuniary award in order to respond to the reprehensibility of the defendant's conduct.[50] This concept of "fair reparation" derives from a broad interpretation of Art. 63.1 of the American Convention on Human Rights, which states that, in cases involving the violation of a right or freedom protected by the Convention, the injured party must be restored to full enjoyment of the violated right or freedom. It also states that, if appropriate, "fair reparation" should be paid to the injured party.[51] This interpretation is reinforced by the constitutional rank that, according to articles 1 and 133 of the Mexican Constitution, the Constitution itself and international treaties concerning human rights enjoy. In other words, the legal authority and rank of the American Convention on Human Rights is on a par with the Mexican Constitution. Granted, the Mexican Supreme Court's interpretation that punishment in tort law is justified under the principle of "fair reparation" is contested.[52] One relevant question is whether courts in civil law legal systems can legitimately introduce punishment in private law without any prior legal provision establishing such punitive elements.[53]

In any case, the main point is that the judgment granted non-pecuniary awards of a mixed nature: compensatory and punitive. By contrast, the discussion in Argentina over mixed-natured (punitive and compensatory) non-pecuniary awards only came up at the very beginning

[48] *See* e.g. E. Muñoz & R. Vázquez Cabello, *El Renacimiento del Derecho de Daños en México: Un Análisis Comparativo*, México, Tirant lo Blanch, 2019; C. De la Rosa Xochitiotzi (Ed.), *Derecho de Daños: Ideas para Iniciar el diálogo*, México, Suprema Corte de Justicia de la Nación, 2022.
[49] Amparo Directo 30/2013, pp. 126-31.
[50] Amparo Directo 30/2013, pp. 121-22.
[51] Amparo Directo 30/2013, pp. 120-24.
[52] On the impact of decisions of constitutional courts on tort law (or what is usually referred in Latin America as "the constitutionalization of private law") in Chile and Mexico, *see* C. Pizarro Wilson, `Notas sobre la Intervención de los Tribunales Constitucionales en la Construcción del Derecho de Daños´, in C. De la Rosa Xochitiotzi (Ed.), *Derecho de Daños: Ideas para Iniciar el Diálogo*, México, Suprema Corte de Justicia de la Nación, 2022, pp. 98-126.
[53] Amparo Directo en Revision 5612/2017, pp. 24-25 (arguing that, due to the sanctioning nature of punitive damages, they require previous legislative recognition to be imposed as such: regulation determining the scope of their availability, the legal requirements for its application, the standards to prevent excessive punishment, etc.).

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of the debate on whether to introduce punitive damages, and was quickly dismissed by overwhelming consensus. The consensus held that non-pecuniary awards were compensatory in nature (and, as such, responsive to the impact of the wrongdoing on the individual plaintiff) while punitive damages were inherently punitive (and, as such, responsive to the level of reprehensibility of the defendant's conduct). As a consequence, both types of awards were to be treated as essentially distinct heads of damages.[54]

A tentative explanation for the particular path that Mexico followed would focus on the explicit and transparent acknowledgment of the Supreme Court regarding the global recourse in civil law systems to non-pecuniary awards as a covert means to punish reprehensible defendants.[55] The underlying dilemma for the Court was whether continuing to impose punishment covertly under the label of compensatory damages was to be preferred over the explicit recognition of the punitive motive and, by consequence, a separate treatment with corresponding substantive and procedural safeguards that any given legal system ought to require before imposing punishment.

Another possible reading would regard maintaining punishment parasitically within classic compensatory damages (such as non-pecuniary awards), rather than introducing them as an autonomous head of damages, as less disruptive of the underlying principles of Mexican tort law. Under this reading, the Supreme Court could justify (even if contested) interpreting punitive awards under the umbrella of the constitutional principle of "fair reparation". The Supreme Court might have been following this line of thinking when it proposed a teleological interpretation of the law (in particular, of Art. 1916 of the Civil Code of the Federal District of Mexico, which regulates non-pecuniary damages), concluding that reparation is not limited to compensation but also may call for sanctioning the wrongdoer.[56] Either way, one important aspect of the judgment is that it signals the significance of distinguishing and rendering transparent the part of the award that the defendant is ordered to pay to compensate for the harm caused to the victim and the part imposed as a sanction for reprehensible conduct towards the victim. Without the explicit distinction between the two, damages awards in cases of reprehensible behaviour could be treated merely as a "price" to be paid for reprehensible

[54] On this point, *see* D. Pizarro, `Daños Punitivos´, in A. Kemelmajer de Carlucci & C. Parellada (Eds.), *Derecho de Daños: Libro Homenaje al Profesor Félix Trigo Represas*, Vol. II, Buenos Aires, La Rocca, 1993, p. 287.
[55] For an overview of this phenomenon in civil law jurisdictions, *see* M. G. Martínez Alles, `Punitive Damages: Reorienting the Debate in Civil Law Systems´, *Journal of European Tort Law*, Vol. 10, No. 1, 2019, pp. 63-81.
[56] Amparo Directo 30/2013, p. 90.

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conduct, one which fails to convey the moral condemnation of the serious behaviour in particular.[57]

As no Mexican legal provision regulates punitive damages, the institution is mainly evolving through case law,[58] which, only recently, has been complemented by the work of tort law scholars.[59] It is thus difficult to predict the exact direction punitive damages will take in Mexico.[60] Up until now, for example, the Supreme Court has repeatedly insisted that punitive damages cannot be imposed on the state.[61] Yet uncertainty over many other aspects of practical implementation persists: (i) the relative autonomy of punitive awards from non-pecuniary awards and (ii) the lack of clear guidelines on the required level of reprehensibility of the defendant's conduct and on the relevant elements to take into account when determining the amount of the punitive award.

Regarding the distance that separates punitive awards from non-pecuniary awards (i), since punitive awards were introduced into the Mexican legal system as a subset or derivative of non-pecuniary damages this could make them dependent on compensatory awards (that is, they might only be available when non-pecuniary awards have been recognized and adjudicated). Moreover, two categories of non-pecuniary awards theoretically now coexist in Mexican tort law: pure compensatory non-pecuniary damages in cases of negligent behaviour, and mixed (compensatory and punitive) non-pecuniary damages in cases involving reprehensible behaviour.[62] One main objection to maintaining this coexistence could be that punitive damages would still be adjudicated under the rubric of non-pecuniary damages, so, even in cases where they are conceptually separated from compensatory facets of non-pecuniary awards and given differentiated treatment, they will only be available when grounds are found for non-pecuniary damages. In other words, punitive damages would not be available in

[57] I have offered reasons for distinguishing punishment from deterrence and punishment from compensation in M. G. Martínez Alles, `La Dimensión Sancionadora del Derecho de Daños: Los Daños Punitivos´, in D. M. Papayannis (Ed.), *Manual de Daños Extracontractuales*, México, Suprema Corte de Justicia de la Nación, 2022; and M. G. Martínez Alles, `Tort Remedies as Meaningful Responses to Wrongdoing´, in P. Miller & J. Oberdiek (Eds.), *Civil Wrongs and Justice in Private Law*, Oxford, Oxford University Press, 2020, pp. 231-52.

[58] For a compilation of the relevant case law, *see* C. De la Rosa Xochitiotzi & V. F. Márquez Rojas, *Derecho de Daños: Responsabilidad Extracontractual*, México, Suprema Corte de Justicia de la Nación, 2020.

[59] *See* e.g. E. Muñoz & R. Vázquez Cabello, `Elementos, Umbral y Quantum de los Daños Punitivos en el Derecho Mexicano´, in C. De la Rosa Xochitiotzi (Ed.), *Derecho de Daños: Ideas para Iniciar el Diálogo*, México, Suprema Corte de Justicia de la Nación, 2021, pp. 1-64.

[60] For instance, *see* Amparo en Revisión 1133/2019 (in which the Supreme Court – featuring a different composition – introduces uncertainty as to whether punitive damages are really justified under the constitutional principle of fair (or just) compensation).

[61] Amparo Directo 50/2015, Primera Sala, Suprema Corte de Justicia de la Nación; Amparo en Revision 1133/2019, pp. 1114-16.

[62] *See* generally Amparo Directo en Revisión 358/2022.

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tortious situations that involve particularly reprehensible conducts deserving of sanction but in which only pecuniary damages are manifested or where, for some reason, the claim for non-pecuniary damages is not granted. In short, linking the punitive claim to the compensatory claim for non-pecuniary damages not only dilutes the conceptual distinction between punishment and compensation, it also limits the scope of application of punitive damages, undercutting its primary sanctioning function.[63]

Furthermore, the lack of clear guidelines on the required level of reprehensibility of the defendant's conduct and on the relevant elements to be taken into consideration when setting the amount of the punitive award (ii) is problematic. The Mexican Supreme Court has broadly considered as relevant factors the wealth of the defendant, the severity of the injury and the reprehensibility of the defendant's behaviour. However, it has not yet offered more concrete guidelines on quantification, which leaves open the critical question of how much punishment would be proportionate.[64] As is easily observed, the current status of punitive damages in Mexico is fluid, dynamic and, to some extent, uncertain.

4. The Scope of the "Public Policy Exception": Open Questions

The classic "public policy exception" raised in many civil law systems to straightforwardly reject domestic enforcement of foreign punitive judgments has usually followed the line that domestic tort law provides for extra-contractual compensation but is not meant to punish the defendant, as state-sanctioned punishment clearly pertains to criminal rather than private law. However, as described above, the introduction in Argentina and Mexico of punitive damages in their domestic private law systems not only complicates the categorical use of the public policy exception, but also invites us to think about the potential scope of the exception in a much more sophisticated manner. Indeed, the longstanding attitude of outright rejection no longer appears reasonable in a context in which the place of punishment is explicitly recognised in domestic private law.[65] On the other hand, just because punitive damages have been domestically recognised does not necessarily mean that the enforcement of foreign punitive judgments should be straightforwardly executed.[66] For instance, in terms of substance,

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[63] *See* generally Amparo en Revisión 1133/2019 (pointing out the significance of the distinction between punishment and compensation).

[64] Amparo Directo 30/2013, pp. 118, 124.

[65] On this point, *see* C. Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union*, Antwerp-Cambridge-Portland, Intersentia, 2016, pp. 158-59 (arguing that punitive-like remedies in the private law of a given legal system makes it a legal hypocrisy to declare punitive damages directly and categorically unenforceable using the shield of the public policy exception).

[66] An illustrative example are those common law jurisdictions, such as the United States and the United Kingdom (except for Scotland), where punitive damages are firmly recognized as such since the very beginning but

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Argentina could object to the enforcement of foreign punitive judgments awarded in disputes that are unrelated to provider-consumer relationships. The attempt to introduce punitive damages more broadly in the recent Argentinean Civil Code was, after all, unsuccessful. Similarly, Mexico could object to the enforcement of foreign punitive judgments that are not predicated on the award of non-pecuniary damages (i.e. punitive awards imposed as an independent head of damages), assuming the current legal reasoning of the Supreme Court is eventually consolidated (which remains uncertain). Moreover, according to the Hague Choice of Court Convention (which is in force, inter alia, in Mexico and the European Union, and which the United States has signed but not yet ratified), Mexico is to enforce the "compensatory" aspect of foreign punitive awards (typically those parts of the punitive award that are meant to cover legal costs such as American contingency fees). Yet it may reject the recognition and enforcement of the "extra-compensatory" aspect (i.e., the punitive element) of the foreign punitive award.[67] As this provision was signed almost a decade before punitive damages were explicitly introduced in Mexico, it is unclear whether the recognition of punishment as one of the functions of tort law will affect the prerogative granted by the treaty to reject the enforcement of the "punishment aspect" of the foreign punitive award from now on.[68] Admittedly, these are speculations that concern substantive understandings that certainly depend on (or are influenced by) the particular trajectory that the practice of punitive damages follows in those countries in the years to come. Nonetheless, they are all relevant aspects to consider when thinking about the potential scope that the public policy exception could take in those jurisdictions.

The main focus of the potential content of the public policy exception will probably centre on the analysis of whether the amount of the foreign punitive award is considered proportionate

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nonetheless differ significantly in the substantive scope of their availability. *See* M. G. Martínez Alles, `La Dimensión Sancionadora del Derecho de Daños. Los Daños Punitivos´, *in* D. M. Papayannis (Ed.), *Manual de Derecho de Daños Extracontractuales*, Mexico, Suprema Corte de Justica de la Nación-Marcial Pons, 2022, pp. 633-35.

[67] Art. 11 of the Hague Choice of Court Convention (2005): "Damages: (1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings."

[68] Note that the 2019 Hague Judgments Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matter has a similar provision regarding punitive awards – perhaps the opportunity to reconsider this issue may provide guidance for the stance towards enforcement of foreign punitive awards to be taken in Mexico. *See* generally M. Pertegás Sender & P. Beaumont, `Institutional and Framework Issues - Hague Conference on Private International Law', in P. Beaumont & J. Holliday (Eds.), *A Guide to Global Private International Law*, Oxford, Hart Publishing, 2022, pp. 91-103.

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or excessive. In the case of Argentina, as mentioned above, the Consumer Protection Statute currently imposes a legal cap (a maximum amount of $5.000.000 Argentinean pesos), because punitive damages are understood as a penalty and, as such, they should be limited by the legislator.[69] The question is therefore whether a foreign punitive award exceeding this limited amount (which probably means most judgments, considering the devaluation of the Argentinean peso at current exchange rates) would be considered directly unenforceable in Argentina, or whether partial recognition of the foreign punitive award up to the legal limit would be allowed.[70] One possible development that could affect the excessiveness test is the recent proposal being discussed in Argentina, referred to earlier, to change the method of determining the legal maximum of punitive awards. Concretely, the projected reform proposes the introduction of two alternative mechanisms: (i) an amount equal to 5000 times the national minimum monthly salary;[71] or (ii) ten times the profit obtained by the supplier as a result of the wrongful act, whichever is greater.[72] It is not clear whether the proposal will be approved; however, if successful, it will certainly raise new questions about the proper proportional punishment since the legal limit itself says little about the content of the principle of "sanction proportionality" in any particular case.

In the case of Mexico, since there is no legislative limit and the Supreme Court has not yet offered concrete guidelines for quantification, discerning the proportionate level of punishment is even more challenging. To clarify, the Mexican Supreme Court found that the wealth of the defendant, together with the severity of the injury and the reprehensibility of the defendant's behaviour, are to be considered as relevant criteria to determine the proper amount of the punitive award, which is certainly a good starting point. However, these factors do not in themselves provide much guidance regarding the appropriate punitive award in particular

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[69] Evidence of such a rationale for introducing a cap on punitive awards is found in the legislative reports which served as basis for the introduction of punitive damages in the Consumer Protection Statute in 2008.

[70] Note that the question whether revising the amount of the punitive award through an excessiveness analysis is a "revision on the merits", that is in principle not permissible by private international law, is an important but altogether different question that exceeds the reach of this chapter. Besides, private international law scholars are divided on this particular issue. For an account of this discussion, *see* C. Vanleenhove, `A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional "¡No pasarán!"´, *Vermont Law Review*, Vol. 41, 2016, pp. 398-401 (arguing that a reduction of the punitive award of the kind described in the text – i.e. following a 1:1 ratio punitive-to-compensatory damages – would not amount to a review of the judgment as to its merits since the requested court would neither be "giving its opinion about the merits of the foreign case", nor "questioning whether the foreign decision was correct in fact and/or in law.").

[71] For an approximation, 5000 minimum wages in Argentina as of 1 August 2022 was equivalent to USD $1.715.000.

[72] Project of Reform of the Consumer Protection Law (2018), Art. 118.

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circumstances. Moreover, regarding the imposition of caps[73] or ratios, the Supreme Court of Mexico incidentally alluded to the 9:1 ratio (of punitive damages to compensatory damages) established by the United States Supreme Court in *State Farm Mutual Automobile Insurance v. Campbell*, qualifying it as hardly satisfying the due process standards in the United States. To clarify, the allusion is just an *obiter dictum* reference to the American case law without binding force in Mexico,[74] however the main function of sanctioning behaviour requires that the amount of the punitive award be proportional to the seriousness of the conduct displayed by the defendant. As a consequence, the amount of punitive damages should not necessarily be a function of the amount of compensatory damages. On the contrary, it should be understood that the appropriate amount of punitive damages will necessarily depend on the particular characteristics of the defendant's conduct (the level of indifference or disregard for the rights of others, intentionality, gross negligence, etc.). The greater the reprehensibility of the defendant's conduct, the greater the punitive award.

In addition to the reprehensibility of the defendant's conduct and the seriousness of the offense, another parameter that the judges considered in assessing the amount of the punitive award is the defendant's wealth (i.e. her ability to pay) to ensure that the award represents a genuine sanction and effectively deters her from similar behaviour in the future.[75]In this line of reasoning, a ratio in relation to compensatory damages (e.g., "the amount of punitive damages cannot be more than 10 times the compensatory award" or any other ratio that is proposed) would establish a pragmatic arbitrary line that not only dilutes the conceptual distinction between punishment and compensation but also comes up short in terms of the criteria for a genuinely proportionate sanction in any particular case. As the methodological procedure for the assessment of punitive awards slowly develops in Mexico, the excessiveness test for the domestic enforcement of foreign punitive awards could thus take many potential different forms as the practice of punitive damage awards evolves in the years to come.

Private international law scholars have suggested, mainly through references to European jurisdictions where punitive damages have not yet been explicitly recognised but are covertly present in legal institutions that either resemble punitive damages or pursue punitive aims, the

[73] It is important to note that over the past few years, the Mexican Supreme Court and the Federal Judiciary had been removing the caps on compensation for non-pecuniary awards, which in many Mexican states are still limited to one-third of pecuniary damages. The Federal Judiciary has consistently ruled that the cap is unconstitutional because it does not allow for "fair (or just) compensation".
[74] Amparo Directo 30/2013, pp. 13-14, notes 5-7 (concurrent opinion, Justice José Ramón Cossío Díaz).
[75] *See* generally Amparo Directo 30/2013.

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following guidelines: a 1:1 ratio of punitive to compensatory awards as a starting point for the European courts' proportionality test, and a 9:1 ratio of punitive to compensatory awards as the upper limit for the former (particularly in the case of punitive damage awards from United States courts), thus allowing some flexibility to account for the particular circumstances of the case at hand and the nature of the interests involved.[76] It is unclear, however, whether such guidelines would be endorsed in countries like Mexico and Argentina that have instituted their own domestic practice of awarding punitive damages and, consequently, the procedure for determining the appropriate punishment in their jurisdictions, which might well differ from the foreign country's idea of what comprises proportional sanctions. Furthermore, as already mentioned, the emphasis on the relative relationship between punitive and compensatory awards, even if pragmatic, is misguiding since the question of sanction proportionality of the punitive award is relative to the seriousness of the defendant's behaviour, not to the harm caused to the victim (i.e., compensatory damages). Ultimately, it will be up to each jurisdiction to offer their own understanding of the principle of sanction proportionality that will guide their treatment of the quest for enforcement.

5. Conclusion

The current status of punitive damages in Latin America, particularly in Argentina and Mexico, is tending towards acceptance and incorporation, yet remains highly fluid and dynamic. Because of the unresolved uncertainties regarding implementation and inherent tensions between the punitive institution and other established elements of those countries' legal systems, it could follow any of various directions and take different forms in the years to come. It seems likely, however, that the developments in Mexico and Argentina will ultimately influence the attitude towards recognition and enforcement of foreign punitive awards in Latin America more generally and, in particular, how the scope of the public policy exception will be refined.

[76] For more on this proposal, *see* C. Vanleenhove, `A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional "¡No pasarán!"´, *Vermont Law Review*, Vol. 41, 2016, pp. 377-401.

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