Essays

Punitive Damages Under the Lens of Constitutionality: The Role of the Hierarchy of Values

Filippo Maisto*

Abstract

To award punitive damages in the absence of a specific statutory provision is incompatible with the provisions of Art 23 and Art 25, para 2, of the Italian Constitution. Nevertheless, the precept 'according to the hierarchy of values of the legal system' legitimates the use of this judicial technique to punish both torts and breaches of contract (thus also in cases concerning contractual liability) if the interest of the aggrieved party or debtor converges with the satisfaction of public policy goals.

I. Introduction

This paper addresses the issue of the compliance of punitive damages with the Italian Constitution.

In the next para, I will discuss the extra-compensation as a defining characteristic of punitive damages.

In para 3, I will turn to the potential conflict between the award of punitive damages and the provisions of Art 23 and Art 25, para 2, of the Italian Constitution.

In the following para, I will verify that the precept 'according to the hierarchy of values of the legal system' is able to legitimate directly (ie in the absence of any statutory provision) the use of extra-compensation to punish torts when the interest of the aggrieved party converges with the satisfaction of fundamental public policy goals.

In para 5, I will explain the reasons for applying these operational solutions to cases of contractual liability by distinguishing between contractual punitive damages and the penalty clause.

In the following para, I will specify the circumstances under which the principle of proportionality can justify a reduction in the amount of extra-compensatory damages.

In para 7, I will disprove the theory of the 'publicisation of private law'.

The paper will end with some remarks on the method used to legitimate rulings granting extra-compensatory benefits to the aggrieved party or debtor for the purpose of upholding a general interest.

* Full Professor of Private Law, University of Calabria.

II. The Structure of Punitive Damages: Extra-Compensation as a Defining Characteristic

The expression 'punitive damages' refers to enforceable pecuniary performance with the following characteristics: it is a burden on the tortfeasor, [1] it benefits the aggrieved party,[2] it exceeds the ontological maximum limit on compensation (ie extra-compensation), and it is determined in relation to the wrongful conduct of the tortfeasor.[3] More specifically, the core of the concept is the element of extra-compensation. [4] For this reason, performance plays a punitive role.

The element of extra-compensation distinguishes the punitive damages from the penalty clause (Art 1382 of the Civil Code),[5] invoked to trigger punitive performance in cases of contractual liability. From this perspective, the standard upholding the 'creditor's interest' (Art 1384 of the Civil Code) justifies the decision to extend the amount of the penalty – albeit only in relation to non-patrimonial damage – even beyond the limits established by the Italian Supreme Court (*Corte di Cassazione*):[6] this is also true of consequential damage under the provisions of Art 1223 of the Italian Civil Code. Thus, the amount payable as a penalty is greater than the amount (normally) awarded in recoverable damages,[7] but it is limited to the measure of loss actually suffered. For this reason, pecuniary performance fulfils a compensatory (and not a punitive) role.[8]

The above analysis confirms that the category of punitive damages is alien to Italian law. The reasons for this are not theoretical but historical. It should be recalled that a fundamental step in the evolution of civil society was the abolition of

[1] See C. De Menech, *Le prestazioni pecuniarie sanzionatorie. Studio per una teoria dei «danni punitivi»* (Padova: CEDAM, 2019), 65; Id, 'Il problema della riconoscibilità di sentenze comminatorie di punitive damages: alcuni spunti ricostruttivi' *Rivista di diritto civile*, 1662 (2016).

[2] L.E. Perriello, 'Polifunzionalità della responsabilità civile e atipicità dei danni punitivi' *Contratto e impresa/Europa*, 444 (2018), notes that in some American jurisdictions a percentage of punitive damages goes to the State (seventy-five per cent in Indiana, for example). This cannot be classified as a private law claim, being configurable rather as an administrative penalty (for a similar consideration, see G. Spoto, 'Risarcimento e sanzione' *Europa e diritto privato*, 515 (2018)).

[3] Regarding this standard, F. Benatti, *Correggere e punire. Dalla* Law of Torts *all'inadempimento del contratto* (Milano: Giuffrè, 2008), 121 and 350; L.E. Perriello, n 2 above, 434.

[4] In this sense, see F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 210; A. Montanari, 'Del "risarcimento punitivo" ovvero dell'ossimoro' *Europa e diritto privato*, 386 (2019); C. Castronovo, 'Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di *chance*, danni punitivi, danno c.d. esistenziale' *Europa e diritto privato*, 329 (2008). Taking a different approach, G. Spoto, n 2 above, 501, distinguishes between 'punitive damages' and 'extra-compensatory damages'.

[5] The same conclusion is found in G. Spoto, n 2 above, 496.

[6] The Court limits compensation for non-pecuniary damage to situations in which an 'inviolable right of the person' has been infringed (Corte di Cassazione-Sezioni unite 11 November 2008 no 26972, *Il Foro Italiano*, I, 120 (2009)). For an analysis, see G. Anzani, 'Danno non patrimoniale e responsabilità da inadempimento' *Studium Iuris*, 402 (2017)).

[7] The aggrieved party also has an advantage with regard to the burden of proof, which lies with the tortfeasor, who must prove the extent of the damage.

[8] For a similar view, see A. di Majo, 'Rileggendo Augusto Thon, in merito ai c.d. danni punitivi dei nostri giorni' *Europa e diritto privato*, 1313 (2018).

'prison for debts' (law 6 December 1877 no 4166). From the ideological point of view, a general condemnation regarding the use of punishment to discipline relationships between individuals is beginning to emerge.

Nevertheless, the 'living law' has often favoured a positive assessment of punitive damages. This trend has recently been confirmed in private international law, which would indicate that these judicial techniques are appropriate to the aims of public policy, which, in turn, converge with the implied individual interest. From an evolutionary perspective, it is necessary to ascertain whether punitive damages are not incompatible with the fundamental principles of the Italian legal system or not. Following the 'ethical positivism' approach,[9] the characterisation of damages as having a single social function (compensatory) or, alternatively, a multiplicity of social functions (compensatory, punitive, deterrent, etc) is a useful reconstruction for Scholars in creating categories rather than an argument apt to guide the decision making of Courts.[10]

III. The Conflict Between 'Atypical' Punitive Damages and the Constitutional Provisions that Guarantee the Principle of Protection of the Individual from Abuses by the Public Authorities

In 2017, the Joint Sections of the Italian Supreme Court (*Corte di Cassazione*) stated that the award of foreign punitive damages is not incompatible with 'public policy' (Arts 16, 64 para *g)*, and 65 of Law 31 May 1995 no 218).[11] This positive assessment is subject to the condition that

> 'the *a quo* Court's decision must bear an adequate legal basis, satisfying the requirements of subject-specificity (*tipicità*) and predictability (*prevedibilità*)'.[12]

These kinds of remedies therefore have characteristics that derive, in the context of Italian law, from statutory provisions structured as 'specific and detailed rules'.[13]

[9] On this methodological approach, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), passim, especially 122.

[10] The 'methodological issue' has been raised by P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 119 (2011). From a different scientific perspective, A. Montanari, n 4 above, 443, considers that the punitive nature of compensation conflicts with the dogmatic system of tort law. In particular, he excludes the application of extreme solutions to ensure legal certainty.

[11] Corte di Cassazione-Sezioni unite 5 July 2017 no 16601, *Danno e responsabilità*, 419 (2017).

[12] Translation by F. Quarta, 'Italian Corte di Cassazione 5 July 2017 no 16601' 2 *The Italian Law Journal*, 287 (2017).

[13] On the distinction between '(specific and detailed) rules' and 'principles': P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 9 above, 225; Id, 'Legal principles and values' 1 *The Italian Law Journal*, 135 (2017); Id, 'Il diritto civile tra regole di dettaglio e princìpi fondamentali. Dall'interpretazione esegetica all'interpretazione sistematica' *Il Foro napoletano*, 379 (2019).

However, this doctrine does not necessarily mean that punitive damages comply with constitutional values. Private international law uses the following artifices to allow the enforcement of foreign judicial orders in conflict with Italian constitutional principles: the distinction between 'international public policy' and 'domestic public policy',[14] the distinction between 'main issues' and 'preliminary issues',[15] and the doctrine of the 'attenuated public policy effect'.[16] Against these theories – in addition to specific technical reasons[17] – is the argument that their opposition to the construct of the unity of the legal system is to be taken into consideration.[18] At this point, it may be concluded that the Supreme Court has indirectly established the doctrine of the compatibility – within the limits of case specificity – between punitive damages and constitutionality (supplemented by supranational principles, pursuant to Arts 11 and 117 of the Italian Constitution).

The aforementioned conclusions are correct only when supported by a detailed study to ensure that the technique of punitive damages is not in conflict with constitutional principles. In this regard, potential conflict with the provisions of Arts 23 and 25, para 2, of the Italian Constitution must be examined.[19]

[14] For arguments in favour of the distinction between 'international public policy' and 'domestic public policy', see G. Barile, *I principi fondamentali della comunità statale ed il coordinamento fra sistemi (l'ordine pubblico internazionale)* (Padova: CEDAM, 1969); Id, 'Ordine pubblico (diritto internazionale privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 1980), XXX, 110; N. Palaja, *L'ordine pubblico internazionale: problemi interpretativi sull'art. 31 delle disposizioni preliminari al codice civile* (Padova: CEDAM, 1974).

[15] Regarding the distinction between 'main issues' and 'preliminary issues': P. Lagarde, *Recherches sur l'ordre public en droit International privé* (Paris: Librairie générale de droit et de jurisprudence, 1959), 73; P. Picone, *Saggio sulla struttura formale del problema delle questioni preliminari nel diritto internazionale privato* (Napoli: Jovene, 1971). In Italian case law, see Corte di Cassazione, 2 May 1999 no 1739, *Il Foro Italiano*, I, 1458 (1999).

[16] On the application of the doctrine of the 'attenuated public policy effect': S. Tonolo, *Le unioni civili nel diritto internazionale privato* (Milano: Giuffrè, 2007), 174; G. Pastina, 'La nozione di famiglia nella giurisprudenza della Corte europea dei diritti dell'uomo e gli obblighi alimentari derivanti da unioni personali', in G. Carella ed, *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato* (Torino: Giappichelli, 2009), 171. This doctrine has its roots in the French category of '*ordre public de proximité*': P. Courbe, 'L'ordre public de proximité', in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, (Paris: Dalloz, 2005), 227; G. Carella, 'Diritto di famiglia islamico, conflitti di civilizzazione e Convenzione europea dei diritti dell'uomo', in G. Carella ed, *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato* (Torino: Giappichelli, 2009), 69.

[17] Cf F. Maisto, *Personalismo e solidarismo familiare nel diritto internazionale privato* (Napoli: Edizioni Scientifiche Italiane, 2011), 31.

[18] For a thorough discussion, G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 15.

[19] The conflict between the award of punitive damages and Arts 23 and 25, para 2, of the Constitution is raised by C. Castronovo, n 4 above, 331. This reasoning is accepted, but only when a specific statutory provision is lacking, in G. Ponzanelli, 'Novità per i danni esemplari' *Contratto e impresa*, 1023 (2015); only pursuant to Art 23 of the Constitution, C. De Menech, 'Il problema della riconoscibilità' n 1 above, 1669 and 1673, and (most recently) Id, *Le prestazioni pecuniarie sanzionatorie* n 1 above, 263; P.G. Monateri, 'I danni punitivi al vaglio delle sezioni unite' *Il Foro Italiano*, I, 2648 (2017); only if there is the 'need to protect Constitutional interests', A. Ciatti Càimi,

Art 23 of the Constitution states that 'No obligations of a personal or a financial nature may be imposed on any person except by law'.[20] Regarding the cooperative relationships between persons (ie of a more strictly civil law nature), this provision plays a key ideological role. In combination with Art 3 of the Constitution, it conveys the idea that the individual parties are holders of rights and duties because they have agreed on them ('retributive justice'). Only if there are goals related to social/economic policy (Art 3, para 2, of the Constitution) statute law can attribute to individuals or categories of individuals sacrifice or usefulness in relation to the Community (administrative law relationships) or other individuals (civil law relationships) irrespective of their will ('distributive justice'). Within this framework, Art 23 of the Constitution prescribes the choice to adopt 'retributive justice' as a basic model for the allocation of available resources. This legitimates the determination that in intersubjective cooperation certain conduct is binding under two circumstances: when the interested parties have expressed their agreement and if a law imposes it to fulfil the higher goals of civil society. In relation to afflictive (ie punitive) phenomena, Art 23 of the Constitution fulfils the additional ideological role of protecting the freedom and property of individuals from abuses by the public Authorities (ie an extension of *habeas corpus* established by Art 13 of the Constitution). In any case, the assessment is that penalties (in particular, punitive damages) can be enforced only if two alternative conditions are met: either the interested parties have previously expressed their agreement, or a provision imposes them to satisfy the higher goals of civil society.

Art 25, para 2, of the Constitution states that

> 'No one may be punished except on the basis of a law in force prior to the time when the offence was committed'.[21]

This provision makes positive assessment of sanctions contingent on the existence of a remedy expressly established in statute law that is structured as a 'specific and detailed rule'. In particular, a negative judgment will arise under two circumstances: when the interested parties have agreed on punitive damages in the absence of a statutory provision, or the said discipline can be deduced from a statutory provision laid down in the form of a 'general clause' (for example, Art 2043 of the Civil Code)[22] or a 'principle' (for example, Art 2 of the Constitution). The political reason for this is to strengthen, from two points of view, the

'I danni punitivi e quello che non vorremmo sentirci dire dalle corti di *common law*' *Contratto e impresa/Europa*, 9 (2017); G. Spoto, n 2 above, 497; A. Montanari, n 4 above, 390. The opposing view that punitive damages conflict with no article of the Italian Constitution is supported in A. di Majo, n 8 above, 1313; and, from a different methodological perspective, L.E. Perriello, n 2 above, 449.

[20] Translation by the Italian Ministry of the Interior.

[21] Translation by the Italian Ministry of the Interior.

[22] See P. Perlingieri, 'Legal principles and values' n 13 above, 141.

guarantee provided by *habeas corpus* pursuant to Art 13 of the Constitution: the extension of the subject-specificity requirement to all sanctions, including in relation to individual property; and the legitimacy of the argument concerning the non-retroactivity of punitive statute laws.

IV. The Role of the Hierarchy of Values: Judicial Solutions Balancing Opposing Interests. Examples of 'Atypical' Punitive Damages Approved in Judicial Practice

The above analysis demonstrates that the technique of punitive damages conflicts with certain constitutional provisions when no such a remedy is established by statute law. This reconstruction does not, however, automatically preclude their lawfulness. Nevertheless, an examination of interests from the point of view of the hierarchy of values may lead to a different conclusion when the interest of the aggrieved party converges with the satisfaction of fundamental public policy goals. From this perspective, it is not important to verify that certain remedies expressly established in statutory law have the specific characteristics of punitive damages.[23] As stated above, Arts 23 and 25, para 2, of the Constitution express a negative assessment only if the availability of punitive damages is not established by statute law.

Italian case law includes certain judicial decisions that shape punitive damages in the absence of a statutory provision, namely, in fields (strictly) pertinent to the person, compensation for loss of life (*jure hereditatis*),[24] cumulation of compensation and indemnity for loss of psychological and physical wellbeing, and, with regard also to property, punitive damages awarded by common law Courts.

Compensation for loss of life (*jure hereditatis*) calls upon tort law to enforce the payment of a sum of money for the death of another by the person responsible. In this case, there is a dichotomy between the aggrieved party and the recipient of the benefit. The deceased person is in no position to benefit from pecuniary performance. Thus, the relative/heir is the real recipient of the money. For this reason, payment for the harm suffered is unable to perform a compensatory

[23] However, A. Montanari, n 4 above, 404, analyses the following statute law provisions: the rules of libel in the press; the rules concerning insider trading and market manipulation; Art 709 *ter*, paras 2 and 3, of the Code of Civil Procedure introduced by legge 8 February 2006 no 54, for breach of the obligations related to child custody; Art 614-*bis* of the Code of Civil Procedure on *astreinte*; Art 96, para 3, of the Code of Civil Procedure concerning vexatious complaint; the rules on the exploitation of intellectual property covered by copyright. The same analysis has been conducted, with different results, by A. Malomo, *Responsabilità civile e funzione punitiva* (Napoli: Edizioni Scientifiche Italiane, 2017), 25.

[24] In Italian case law, see: Corte di Cassazione 23 January 2014 no 1361, *Il Foro Italiano*, I, 719 (2014), favourable to the rule of compensation for loss of life; taking an opposing view, Corte di Cassazione-Sezioni unite 22 July 2015 no 15350, *Il Foro Italiano*, I, 2690 (2015).

function.[25] In such cases, payment of a sum of money by the tortfeasor acts as a punishment. This conclusion is confirmed from the sociological and anthropological perspective. Depriving the tortfeasor of his patrimony to the benefit of the relatives of the deceased assumes a symbolic value in relation to the social requirement that killing should not go unpunished. In such cases, in fact, the technical impossibility of compensation for damage is contrary to the common perception that negligent conduct in relation to the lives of others is antisocial. Lastly, these solutions are not excessively onerous on the tortfeasor since the benefit is normally paid by the insurer, which means that the person responsible suffers nothing more than higher insurance premiums.

Considering that compensation for loss of life is a punishment, it is worth examining the standard of lawfulness used to bind judges to these operational solutions. Decisions refer to Art 2 of the Constitution in conjunction with Art 2043 of the Civil Code,[26] which are structured as a principle and a general clause. For this reason, a ruling to award punitive damages is incompatible with Arts 23 and 25, para 2, of the Constitution where they establish the requirements concerning the provision under statute law. Such a decision, however, is able to achieve greater social utility complying with 'the fundamental duties of social solidarity' (Art 2 of the Constitution). From this perspective, the hierarchy of values in the Italian legal system allows the principle of the protection of property from abuses of authority (Arts 23 and 25, para 2, of the Constitution) to be mitigated. This balance legitimates the Courts ordering the payment of compensation for loss of life (*jure hereditatis*).

A similar reconstruction is also possible in connection with the doctrine of the cumulation of compensation and indemnity for loss of physical and psychological wellbeing. In such cases, a decision to award damages can be grounded in the general clause on non-contractual liability (Art 2043 of the Civil Code) combined with the absence of the '*compensatio lucri cum damno*' criterion.[27] Payment for damages cannot serve as compensation when the aggrieved party also receives an indemnity (social security[28] or private insurance without right of subrogation).[29] Under these circumstances, the pecuniary performance of the tortfeasor has a

[25] See A. Viglianisi Ferraro, 'È risarcibile *iure hereditario* il danno da morte o il danno ('biologico irreversibile') da lesioni mortali?' *Rassegna di diritto civile*, 623 (2017).

[26] The reference to Art 2059 of the Civil Code, however, is superfluous (see P. Perlingieri, 'L'onnipresente art. 2059 c.c. e la «tipicità» del danno alla persona' *Rassegna di diritto civile*, 523 (2009)).

[27] The reasons for cumulation (under certain conditions) are amply analysed by A. Lasso, *Riparazione e punizione nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 2018), 190. Expression in opposing opinion, in favour of the rule of *compensatio lucri cum damno*, Corte di Cassazione 22 May 2018 nos 12564, 12565, 12566 and 12567, *Il Foro italiano*, I, 1900 (2018).

[28] U. Izzo, *La «giustizia» del beneficio. Fra responsabilità civile e welfare del danneggiato* (Napoli: Editoriale Scientifica, 2018), 137, considers different types of indemnities.

[29] On the point that the right of subrogation established by Art 1916 of the Civil Code can be waived, see A. Donati and G. Volpe Putzolu, *Manuale di diritto delle assicurazioni* (Milano: Giuffrè, 2016), 161.

punitive function. For this reason, a ruling of compensation for damages conflicts with the requirement of legal subject-specificity laid down by Arts 23 and 25, para 2, of the Constitution. From this perspective, the '*compensatio lucri cum damno*' doctrine actually complies with the Constitution. A different way of reasoning emerges, however, if the interests at stake are analysed in the light of the hierarchy of values within the Italian legal system. Against this background too, the payment of a sum of money to the aggrieved party by the wrongdoer is required to prevent the spread of a sentiment in society that the two parties are in the same position before the law.[30]

With regard (also) to property, punitive damages awarded by common law Courts and enforced in Italy represent the main situation where Italian Courts have expressed a positive opinion concerning the compensation having a punitive aspect, but only in relation to private international law. The *BMW of North America* v *Gore* case highlights that these techniques are also applicable to offences against property.[31] In this case, the Court awarded punitive damages for fraudulent conduct by a car dealer who concealed the fact that an accident had occurred during the transportation of the vehicle. In view of the transnational nature of the decision, the principles of subject-specificity and predictability laid down by Arts 23 and 25, para 2, of the Italian Constitution were upheld by means of equivalent methods used in a foreign legal system. From an ideological point of view, the ruling does not appear to go against the principle of protection of property from abuses of authority.[32] Given that, in private international law, the of extra-compensatory pecuniary benefits requires the Courts to exercise creative power, events such as this do not apply to domestic law cases.

V. Punitive Damages in Cases of Contractual Liability. Practical Consequences Arising from the Distinction Between Contractual Punitive Damages and the Penalty Clause

In Italian case law, when seized with matters of non-contractual liability, the reasoning that Courts infer from principles, general clauses, or judicial precedents

[30] U. Izzo, n 28 above, 390, outlines the need to preserve the community's sense of justice.

[31] Supreme Court of the United States 20 May 1996, *BMW of North America* v *Gore* 517 US 559 (1996), *Il Foro Italiano*, IV, 421 (1996), annotated by G. Ponzanelli, 'L'incostituzionalità dei danni punitivi «*grossly excessive*»'. However, the case assessed by Corte di Cassazione-Sezioni unite n 11 above, is in the field of fundamental rights protection: the punitive damages have been awarded to a motorcyclist who had suffered personal injuries in an accident which occurred during a motocross race as a consequence of an alleged defect of the helmet manufactured by an Italian company.

[32] For the Constitutionalisation of this principle pursuant to the Eighth Amendment to the United States Constitution, see Supreme Court of the United States 7 April 2003, *Farm Mutual Automobile Insurance Co.* v *Inez Preece Campbell* 538 US 408 (2003), *Il Foro Italiano*, IV, 355 (2003), annotated by G. Ponzanelli, 'La «costituzionalizzazione» dei danni punitivi: tempi duri per gli avvocati nordamericani'.

(ie in the absence of any statutory provision) to rule in favour of punitive damages is applied only to exceptional cases. The conflict that arises with the scholarly tradition explains the difficulty of creating a theoretical framework. The reason associated with social alarm, however, remains latent. It must probably be understood that the award of punitive damages to sanction offences concerning property runs complementary to the idea of using extra-compensatory benefits to punish breach of contract.

The solution of enforcing punitive damages for contractual liability in the absence of a specific statutory provision raises some major objections.[33] It is necessary to distinguish between two circumstances, namely when the punitive damages are awarded directly by the Courts, and when they are previously agreed upon by the interested parties. In the first case, a decision to order punitive damages conflicts with the provisions of Arts 1223 to 1229 of the Civil Code, which limit the amount of money that can be awarded to the equivalent of the harm typically suffered by the injured party. If a prior agreement has been reached, however, the award of extra-compensatory benefits conflicts with Art 1384 of the Civil Code, which implicitly quantifies the amount of money awarded as the equivalent of the actual harm caused (ie also covering non-financial losses and indirect consequences). These problems add to the general argument concerning the lack of subject-specificity and predictability required by Arts 23 and 25, para 2, of the Constitution.[34] From the perspective of constitutionality, it must be considered that, unconsciously, techniques of this kind evoke associations with 'prison for debt'.

It must be pointed out that when a prior agreement has been reached between the interested parties, 'atypical' (ie not established by statute law) punitive damages only conflict with Art 25, para 2, of the Constitution but not also with Art 23, which allows for 'unimposed' performance agreed upon by the interested parties. For this reason, the question at hand is the enforceability of rulings granting extra-compensatory benefits when a prior agreement has been reached.

From this standpoint, a solution allowing punitive damages cannot be deemed lawful on the basis that it aims to reinforce the position of the creditor. In reality, an adequate balance with the need to safeguard the patrimony of the debtor is reached by means of the technique invoking the penalty clause: Art 1384 of the Civil Code allows for benefit greater than the normal damage (known as '*danno risarcibile*'), but within the limit of the interest of the creditor (known as '*danno effettivo*').[35]

In certain cases, the award of punitive damages is able to fulfil important

[33] Differently, C. De Menech, *Le prestazioni pecuniarie sanzionatorie* n 1 above, 98, considers that there is no systemic reason to exclude statutory provisions of punitive damages for breaches of contract (ie 'atypical' punitive damages, instead, are excluded *a priori*).

[34] From law and economics perspective, however, the main argument against the enforceability of punitive damages for breaches of contract is the doctrine of 'efficient breach'. For more details, see C. De Menech, *Le prestazioni pecuniarie sanzionatorie* n 1 above, 80.

[35] See notes 5 and 8 (for bibliography) and the next section.

public policy goals, as the wrongdoing of the debtor goes against the principles of civil society as well as the creditor's interest. A good example is default due to discrimination,[36] or incompatible with the need to protect human health or political freedom. Adapting a famous case:[37] a cake designer agrees to provide a cake to celebrate a same-sex marriage, a Jewish or Muslim festival, or the birthday of a person belonging to an ethnic minority; however, he breaks his pledge for discriminatory reasons, actually preferring to suffer a loss incurred by paying compensation (anyway reduced if adequate notice has been given). In a second case, an employer promises to adopt extraordinary measures to protect his workers' health, but when he receives the estimate of costs, he deems it more profitable to break the promise. Lastly: a publisher makes an agreement with a political organisation to publish anti-government papers; he later changes his mind and prefers not to go against the opinion of the government majority. In circumstances like this, the threat of an extra-compensatory benefits to the creditor is a useful way of preventing prejudice to general interests.

Essentially, when a default by a debtor affects a general interest and not only the interest of a creditor, the relaxation of the principle of the lawfulness of penalties (Art 25, para 2 of the Constitution) is justified. Thus, a ruling that extra-compensatory benefits are binding can be enforced if agreed upon by the interested parties.

Considerations of this kind have precise operational consequences. In view of the difference in nature *vis-à-vis* the 'penalty clause', the 'conventional punitive damages' doctrine is able to justify the exclusion of a reduction of the amount payable based on the 'interest of the creditor' under Art 1384 of the Civil Code. A reduction may in fact be sought, albeit on the basis of other constitutional provisions (see the next section).

The need to protect a general interest also justifies the possibility of Courts acting *ex officio*. Thus, Courts may award punitive damages even in the absence of any claim brought by the injured party.

VI. The Limit Posed by Proportionality (the Risk of Overdeterrence)

Certain restrictions on ordering punitive damages in relation to both torts and breaches of contract can be adduced from scholarly arguments. In this respect, when the extra-compensation is excessive, a reduction in the amount of damages is justified by reference to the principle of proportionality (Art 49, para

[36] For the opportunity to use punitive damages to prevent discriminatory conduct, see F. Quarta, n 4 above, 385.

[37] *Lee* v *Ashers Baking Company Ltd and others* [2018] UKSC, analysed in depth by L.E. Perriello, 'Discrimination Based on Sexual Orientation and Religious Freedom in European Contract Law' 2 *The Italian Law Journal*, 639 (2018).

3, Charter of Fundamental Rights of the European Union).[38] Any such assessment must not, however, be calibrated according to the interest of the injured party but on the extent of the tortfeasor's/debtor's wrongdoing[39] and, largely, on the importance of the general interest that is compromised by his or her conduct. The compensation may be higher than the damage ('extra-compensation') only within the limits of these constraints.

The reduction of benefits is a given, but the means usable by the Courts to rule vary depending on whether the punitive damages are awarded directly by a Court or were agreed upon in advance by the interested parties.

In the sphere of non-contractual liability (ie in the absence of prior agreement), any reduction can be obtained through the system of appeals.

In the context of contractual liability (ie when there is an agreement between the interested parties), any reduction depends on the existence of a contractual 'pathology'. Under these circumstances, the defect only affects the part of the contractual pecuniary performance that exceeds what is necessary to fulfil the requirements of proportionality. Thus, the concept of 'the partial nullity of a contract or the nullity of single clause' (Art 1419 of the Civil Code) allows the enforcement of the part of the agreed pecuniary benefits that are consonant with the principle of proportionality. Otherwise, the notion of 'noncompliance with mandatory rules' (Art 1418 para 1 of the Civil Code) would justify the total nullity of the agreed punitive damages. The second solution, however, appears to go against the public policy goal (*ratio*) of the extra-compensation.

In systemic terms, the reduction of disproportionate punitive damages has an important role in public policy. The risk of paying an injured party excessive sums in damages may lead a potential tortfeasor to refrain from conduct that is useful (or necessary) to society. For this reason, the requirement that the compensation awarded must be proportionate prevents the social phenomenon of 'overdeterrence'.[40]

VII. Systemic Aspects: From the ' "Publicisation" of Private Law' to the ' "Civilisation" of the Protection of General Interests'

On the ideological level, methods of assessment such as these attest to an evolutionary trend in the legal system: an occurrence disciplined in private law (the attribution of property in a relationship between parties) is used to uphold a general interest able to balance the principle of protection of property from abuses of authority, which is diminished.

[38] On the application of the principle of proportionality, but with (partially) different operating rules, A. Malomo, n 24 above, 48, especially 56.

[39] Some Scholars emphasise the role of this standard. In this sense, see F. Benatti, n 3 above, 121 and 350; L.E. Perriello, n 2 above, 452.

[40] On the risk of overdeterrence, see A. Montanari, n 4 above, 447.

This phenomenon has been criticised as it expresses a generalised move towards the ' "publicisation" of private law'.[41] This interpretation depends on a hypostatisation of legal categories. A different conclusion, instead, may be reached by looking at the question from a historical perspective. Empirically, the division between private and public law corresponds to the need to guarantee the autonomy of the interested parties in the distribution and management of resources.[42] Accordingly, it must be considered that a positive assessment of punitive damages extends (rather than limits) the area of contractual validity.[43] For this reason, the metaphor of the ' "publicisation" of private law' is misleading.

From an evolutionary perspective, the use of private law techniques to satisfy public policy goals has been normalised by the principle of 'horizontal' subsidiarity. Thus, an order to pay punitive damages concerning a contractual relationship takes on the positive appearance of ' "civilisation" with regard to the protection of general interests'.[44]

On a critical note, the objection has been raised that the protection of general interests under private law increases the difficulty facing Courts in analysing cost-benefit of their decisions.[45] This is because it is argued that Courts would have to calculate the 'overall social cost' of individual conduct. Thus, in the absence of a hierarchy regarding the private and public costs arising from the decision, the discretion of the Courts would become arbitrary. This argument runs counter to the theory that there is a clear hierarchy of values in a 'multilevel' legal system. The interests of the community do not necessarily prevail over the interests of the individual. In particular, the values relating to human rights are given priority over the property of public bodies: for example, human health may justify public losses. The hierarchy of values in the current legal system is not based on a distinction between public and private but on the primacy of 'the inviolable rights of the person' and 'the fundamental duties of social solidarity' (Art 2 of the Constitution). [46] All judicial decisions may be assessed in the light of this balance of interests. Thus, it is not true that the protection of general interests in private law comes into conflict with the principle of legal certainty.

In sum, the lawfulness of punitive damages as a punishment for breaches

[41] ibid 380.

[42] A. Gambaro, 'Interessi diffusi, interessi collettivi e gli incerti confini tra diritto pubblico e diritto privato' *Rivista trimestrale di diritto e procedura civile*, 785 and 792 (2019).

[43] Similarly, for M. Grondona, *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattitto sui «risarcimenti punitivi»* (Napoli: Edizioni Scientifiche Italiane, 2017), 149, the sanctioning function of civil liability reflects the contemporary tendency to expand individual freedom.

[44] The reasons for moving beyond 'private law/public law' distinction are examined amply in P. Perlingieri, *Il diritto civile* n 9 above, 138; C. Mazzú, *La logica inclusiva dell'interesse legittimo nel rapporto tra autonomia e sussidiarietà* (Torino: Giappichelli, 2014), 16.

[45] A. Gambaro, n 43 above, 792, especially 793.

[46] On the primacy of the values concerning constitutional personalism and solidarity, P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Jovene, 1972), passim, especially 161.

of contract is not at odds with the Italian legal system as a whole. This conclusion, however, rests on the methodological premise that the categories within the system are historical – rather than self-referential – concepts.

VIII. Concluding Remarks

In summary, the precept 'according to the hierarchy of values of the legal system' is able to justify the award of punitive damages in the absence of a specific statutory provision. This operational solution can be used to punish both torts and breaches of contract if the interest of the aggrieved party or debtor converges with the satisfaction of public policy goals. The judicial order to pay extra-compensatory damages for breaches of contract also requires that they are previously agreed upon by the interested parties.

On the methodological level, a final consideration is appropriate: these operating rules are not legitimated by the argument concerning the 'multi-functional nature of civil liability', but rather they are laid down by the reasoning focused on their constitutionality.