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Punitive damages for the non-property damage derived from the crime of corruption: Constitutional and efficient?

Daños punitivos para el daño no patrimonial derivado del delito de corrupción: ¿constitucional y eficiente?

Oscar Sumar Albujar
Dean of the Faculty of Law of the Universidad Científica del Sur
City: Lima
Country: Peru

Julio Orellana Presentación
Law School at the Universidad Científica del Sur
City: Lima
Country: Peru

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RESUMEN: Este artículo analiza la constitucionalidad y justificación económica sanción del supuesto daño no patrimonial a favor del Estado en los casos de delitos de corrupción. Los autores llegan a la conclusión de que los daños punitivos tienen muchos problemas en general que resultan en su inconstitucionalidad e ineficiencia, especialmente cuando es derivada de un proceso penal.

PALABRAS CLAVE: Daños punitivos, responsabilidad civil, daño moral, daño no patrimonial, delitos de corrupción, justificación económica.

ABSTRACT: This research analyzes the constitutionality and economic justification of the use of punitive damages for the sanction of the supposed non-patrimonial damage in favor

of the State in the cases of crimes of corruption. The authors conclude that punitive damages have many problems that result in their unconstitutionality and inefficiency, especially when it is derived from a criminal proceeding.

KEYWORDS: punitive damages, tort law, moral damage, non-patrimonial damage, corruption crimes, economic justification.

JEL CODE: K14, D63.

INTRODUCTION

On September 21, 2020, the ad hoc prosecutor's office of the famous LavaJato case identified more than $394,400.00 US dollars as patrimonial damage to the State in the main process where the irregularities of the Interoceánica Sur highway, sections 2 and 3, are being investigated. What the Attorney General's Office did, in a manner compatible with the doctrinal and jurisprudential criteria currently prevailing in Peru, is to use punitive damages to punish the alleged violation of the right to the image of the Peruvian State. We consider this to be of great academic interest or even from a public policy perspective, not only because of its economic and social implications but also because it is a relatively virgin topic.

The relationship between punitive damages and other systems such as administrative and criminal law has received little attention in the civil and economic literature (Sustein & Schkade, 1997, p. 57). Specifically, we have not found any work that addresses the problem concerning civil liability for non-pecuniary damages derived from criminal proceedings for corruption offenses.

The use of punitive damages for these cases, as is obvious, is intended to punish the perpetrators; but also, to deter

them from committing acts of corruption in the future. In this brief essay, we will address the problem of the use of punitive damages to sanction non-pecuniary damages, especially those derived from crimes of corruption, where the State is the victim. As we will see, in this case, it is not possible to achieve an adequate balance, since the reparation of non-pecuniary damages in these circumstances ends up being redundant and arbitrary, which has constitutional and economic implications.

The research has the following structure: first, we will briefly discuss the functions of civil liability, noting that there is no consensus on a single function, but there is usually a consensus on its use for sanction and deterrence, beyond the mere repair of damages. Then, we will deal with the assimilation of liability for non-pecuniary damage to punitive damages that have operated not only in international but also in Peruvian doctrine. This assimilation is justified, to a large extent, by the difficulty in determining non-pecuniary damages and the supposed need to have an extra tool to reinforce, precisely, the dissuasive and punitive function that it has. Thirdly, we will address the issue of the use of punitive damages in civil proceedings arising from corruption offenses. We will see that, at first, no distinction was made between types of damages - pecuniary or non-pecuniary - but then - since the approval of the criteria - it has become the norm and has been applied to the most relevant cases. Finally, we will analyze this policy, explaining the reasons why this type of reparation -assimilated to the concept of punitive damages- turns out to be unconstitutional and at odds with economic efficiency.

1. FUNCTIONS OF CIVIL LIABILITY

There is no consensus on what are all the functions that a civil liability system should fulfill, although we must admit

that there is agreement on the main functions. There is also an arduous debate as to which of these functions should be prioritized.

For his part, Monateri, Pier & Schkade (1998, pp. 19-27), conceives the three main functions of civil liability the compensatory function, the punitive function and the preventive function. It is worth saying, briefly, that this function arises in Anglo-Saxon Law because of *punitive damages*, through which - in certain cases - compensations higher than those necessary to compensate the damages suffered by the victims are granted. However, this function is alien to our legal tradition, since in our system the calculation of compensation is always made based on the damage caused. This is not diminished by how compensation for extra-patrimonial damages is calculated, although in these cases -certainly- the judge has greater discretion.

Notwithstanding the foregoing, we must point out that it does not seem convenient to qualify the punitive function autonomously. This is because, even in common law, the figure of *punitive damages* seeks to generate a greater disincentive rather than to punish. *Punitive damages* are not awarded in all cases but, on the contrary, only in those situations where there is a special desire to discourage. In this way, in any case, the alleged *sanction* is a means to an end, namely, the greater disincentive of certain conducts. Consequently, we believe that rather than qualifying it as an autonomous function, it should be recognized as a means that contributes to *deterrence*.

Fernández (2001, pp. 393-445) has classified the functions of civil liability from a dyadic "or micro-systemic" perspective and a systemic "or macro-systemic" perspective. Thus, from the dyadic perspective, he points out that civil liability fulfills a satisfactory, equivalence, and distributive

function, while from the systemic perspective it would fulfill a function of incentivizing or discouraging activities and a preventive function.

On the other hand, Calabresi, in formulating his theory on accidents and describing the costs derived from those events, distinguishes - as we explain in detail below - primary costs (derived directly from the accident and which can be reduced through general, specific, or mixed prevention), secondary costs (sums of money to be paid as compensation to those who suffered damages, which can be reduced through fractionation and the Social Diffusion of Risk Theory) and tertiary costs (those derived from setting in motion the legal apparatus so that, among others, the victims can enforce their rights and obtain the compensation due, which can be reduced in various ways) (Trazegnies, 2005, p. 88). The purpose of a tort liability system is to prioritize these costs and implement measures aimed at their reduction.

2. ROLE OF NON-PECUNIARY DAMAGES: ASSIMILATION TO "PUNITIVE DAMAGES"

In principle, non-pecuniary damages follow a scheme like pecuniary damages; however, given the difficulty of calculating them, some authors have emphasized their "punitive" function, arguing that these damages should be used to show social reproach for conduct and to deter its occurrence in the future. In this way, non-pecuniary damages are assimilated into punitive damages (Sustein & Schkade, 1997, p.57).

For authors such as Massino Franzoni (1999):

> [...] the tendency to assimilate non-pecuniary damage with non-pecuniary damage results in the fact that its pre-eminent function is actually to punish the person

> responsible for the antisociality of the act, satisfying the victim, at the same time. (pp. 68-87)

For his part, Diez-Picasso (1999) pointed out that:

> Nor can the idea of a sanction be found in the rules that fulfill a compensatory function, unless by sanction is understood, in a very generic way, the attachment to the behavior of certain consequences that may be unfavorable for someone. The rules on civil liability cannot go beyond the economic scope of the damage effectively produced and cannot come into operation if the damage has not existed, no matter how reproachable the conduct of the defendant or accused may have been. (p. 46)

In the Peruvian case, we see that both positions have also been accepted, but the consideration of moral damages as punitive damages has prevailed. According to Morales Godo (2009):

> [...] we think that if there are extra-monetary ways to compensate the victim of a personal injury, good time; but this is not an obstacle to dispense with reparation in pecuniary terms, understanding it as a way to produce a compensatory satisfaction to the victim. (p. 466)

The same criterion has been shared by Liñán, Morales Hervías, Fernández Cruz and Fernando de Trazegnies. So, we can say that there is a certain consensus that -in general- the reparation of moral damages fulfills the justiciary function (satisfaction of the victim), but also a social function, which is associated with the punishment of the act. But why punish the act? As we have seen, the aim is to punish an act not only for the sake of justice, but also to discourage it, and this, in turn, is associated with the economic function of civil liability.

From this perspective, moral damages fulfill a dissuasive function of conduct that we consider especially reprehensible, with which the mere economic compensation of the damage would not be enough -as pointed out by Diez-Picasso-, but it is necessary to go beyond it, by sanctioning the offender.

For this reason, it is not surprising that, in the case of liability derived from the crime, moral damages have been used in Peru as a form of economic sanction.

3. NON-PECUNIARY DAMAGE DERIVED FROM THE CRIME OF CORRUPTION

Initially, no distinction was made as to the type of damage - pecuniary or non-pecuniary - but it was imposed jointly[1].

1 It is important to mention four Peruvian cases in which civil liability was imposed in cases of public officials who committed crimes against the State.
The First Transitory Criminal Chamber of the Supreme Court of Justice with resolution N° 05-02-2008 Lima, May 2009, imposed jointly and severally to four former parliamentarians the payment of S/. 1'000,000.00 for civil reparation derived from improper passive bribery and receiving. Context: paid defectors subsidized by Vladimiro Montesinos with public funds.
The Permanent Criminal Chamber of the Supreme Court of Justice, with resolution No. 984-2005 Junín, dated June 7, 2005, ordered a former director of a juvenile school who stole US$ 1,900.00 that was to be used for the purchase of computers, to pay S/. 1,000.00 for civil reparation derived from the crime against public administration to the detriment of the State and the school, paying S/. 500.00 to each one.
The Permanent Criminal Chamber of the Supreme Court of Justice, with resolution No. 07-2007, dated 07.10.2009 imposed to a former parliamentarian for the crime of illegal appointment to public office the payment of S/. 30,000.00 in favor of the State.
The Special Criminal Chamber of the Supreme Court of Justice, in case AV-23-2001, with the resolution of July 20, 2009, imposed a former president, for the crimes against public administration - fraudulent misconduct against the State and public faith - ideological falsehood against the State, the payment of S/. 3'000,000.00 jointly and severally with three other defendants.

The Manual of criteria for the determination of the amount of civil reparation in corruption crimes (Ministerio de Justicia y Derechos Humanos, 2018), has begun to distinguish non-pecuniary damages from pecuniary damages, for corruption cases. As can be inferred from the STC of the Transitory Criminal Court Cassation No. 189-2019 Lima Norte, the State is considered a victim of non-pecuniary damages, in cases derived from the corruption of public officials.

In these cases, it is formally considered that the image of the State has been damaged, but -in reality- what is applied are punitive damages, which do not depend on the value of the damage, but on the seriousness of the crime and independent criteria of the non-pecuniary damage. Thus, the reparation has a form of calculation that is associated with deterrence, considering the following criteria:

a) The seriousness of the wrongful act: Associated with the nature of the legal interests affected and the importance of the duties breached.

b) The circumstances of the commission of the unlawful conduct: The place, context, and manner of the commission of the unlawful act shall be considered.

c) The advantage obtained by the responsible parties: The degree of advantage obtained will be a factor to be considered, the greater the advantage, the greater the amount of compensation.

d) The level of public dissemination of the unlawful act: This refers to the transcendence and social extension or public knowledge of the unlawful conduct.

e) The affectation or social impact of the illicit act: The influence on the living conditions of the population.

f) The nature and functional role of the harmed public entity: Following the previous criterion, the public function of the state entity within which the unlawful act was committed must be identified.

g) The scope of competence of the aggrieved public entity: It is essential to consider whether the aggrieved public institution has a local, regional, or national scope.

h) The position or position of public officials: Consider the hierarchy of the position held by the public official.

As can be seen, being associated with the illicit benefit (seriousness of the crime), the non-pecuniary damage serves specifically to discourage its realization in the future, while at the same time it can satisfy - in the case of damage to the State - the population. We see, however, some problems associated with the consideration of the disincentive as a justification for non-pecuniary damages.

These criteria, as mentioned in the introduction, have been used in cases of major relevance, such as the LavaJato mega-corruption case. Concerning the compensation claim, the attorney general's office postulates the amount:

i) For the crime of collusion (Fact 1): USD 403'354,688.35, for pecuniary damage and S/ 1,292'476,500.00, for non-pecuniary damage.

j) For the crime of money laundering (Fact 2): USD 60'436,772.00 for non-pecuniary damage; and

k) For the crime of money laundering (Fact 3): S/. 545'484,102.30 for non-patrimonial damage, the corresponding legal interests should be considered in all cases.

As can be seen, in recent cases, starting with the Manual of Criteria, pecuniary damage has begun to be separated from non-pecuniary damage, which has been applied with a punitive criterion, with the aim of deterrence. However, as can also be seen, these damages have been imposed or requested in conjunction with prison sentences, which leads us to think that there is redundancy or over-penalization that may lead to a level of deterrence above the optimum or create inadequate incentives for other actors -including the State- that could be in a better position to reduce the costs of corruption in the future.

4. CRITICISM OF THE CONSIDERATION OF NON-PECUNIARY DAMAGES AS PUNITIVE DAMAGES

4.1. Unconstitutionality

Punitive damages arising from criminal proceedings have several problems that not only make it an inconvenient policy but possibly unconstitutional. We start from the assumption that punitive damages must meet the same criteria as criminal law (Jeffries, 1986., pp. 139-158). If this is so, several criteria are not met by punitive damages in general, and some are specifically affected when used in the framework of a criminal proceeding.

Beyond the formal criteria, the application of punitive damages can lead to an erosion of the rule of law, being arbitrary and inherently unfair.

4.1.1. Arbitrariness and inconsistency

There is extensive literature documenting how punitive damages are erratic and arbitrary. There are no clear criteria on how they are awarded, and the applicable evidentiary standards do not meet the standards of punitive law. In the Peruvian case,

it has been applied under the guise of damage to the image of the State, damage that has been assumed without even the minimum intent of proof. The lack of predictability also affects the principle of legality of the penalty. Penalties, fines, or sanctions in general, must be pre-established to be applied legitimately.

In the Peruvian case, although there is a manual of criteria for the determination of the amount of civil reparation in corruption offenses and it contains criteria for its application, these criteria are divorced from effective damage, but rather respond to characteristics of the case that - in turn - do not give us lighter on how the damage could be quantified. The alleged "damage to the image of the State" derived from corruption cases has been used with such a loose and discretionary criterion that it ends up being arbitrary.

On the other hand, if this type of punitive damage is only used in cases where there is non-pecuniary damage, this leads to two potential problems, depending on the orientation of the jurisprudence with the proof of the existence of moral damages. If the judiciary adopts a flexible criterion, non-pecuniary damage is presumed in all cases, which generates the problem of the standard that we will see below. If, on the contrary, the judiciary assumes a more restrictive criterion, this leads to the problem of the differentiated treatment that cases with and without non-pecuniary damage will receive.

In other words, based on this second criterion, only some cases will have punitive damages, despite being substantially the same as others, for the sole reason that moral damages cannot be proven. This would create an incongruity in the system that would be difficult to overcome by making punitive damages dependent on a different criterion, which

does not depend on the seriousness of the damage or the reachability of the conduct.

4.1.2. Illegality

Additionally, the use of non-pecuniary damages for the imposition of punitive damages has been the result - as we have seen in section 3 - of a doctrinal criterion but has not been supported by any law. Can a sanction be created via jurisprudence, or must it be included in the law? We consider that the creation of a complete penalty item must be provided for in the law.

In the Peruvian case, the Civil Code -applicable even to liability arising from criminal proceedings- speaks of reparation and compensation, but never of a sanctioning function of civil liability that can be operationalized beyond the recognition of actual damages, and even less of the application of punitive damages (1984).

4.1.3. Disproportionate

The successive application of fines, penalties, and civil sanctions for the same act, although it does not formally violate the ne bis in idem principle, is inconsistent and disproportionate. Beyond formalities, we are faced with a single act that receives triple sanction by the system. All these sanctions, at the end of the day, are intended to dissuade those who cause damage or crimes and are therefore redundant.

In principle, an administrative or criminal sanction should seek to complement a civil system that only compensates -but does not sanction- the tortfeasor. But if the civil system does sanction the tortfeasor, what is the need to use a system that is considered an ultima ratio? In other words, there would be no need to use Criminal Law when there are other sanctions that already fulfill the sanctioning purpose.

4.2. Inefficiency

As we shall see below, the constitutional problems encountered in the application of punitive damages arising from criminal proceedings also generate problems from the economic point of view. That is, they not only undermine the rule of law but also - predictably - generate social costs.

4.2.1. Disincentive beyond the optimum

The lack of certainty about the sanction imposed for committing a crime generates that people who are not risk-averse perform more of such activity than is socially optimal and that risk-averse people perform it in a lower proportion (Sustein & Schkade, 1997, pp. 17-18). Applied to the case of corruption in public works, the unpredictable system will tend to attract bad players and drive away those with more corporate locks. For example, compliance systems.

Moreover, a system that doubly penalizes the offender will tend to deter above the optimum. Although it may seem counter-intuitive, there is an optimal level of corruption (Tanzi, 2002, pp. 19-58), just as there is an optimal level of car accidents or other social ills. Just as it would be highly questionable to advocate the total elimination of cars to eliminate car accidents, it is unrealistic to eliminate corruption, for example, from major public works. Eliminating them may have the undesirable effect of decreasing the number of public works done in a country, with the economic and social effects that this would entail.

Specifically, in the case of large public works in Peru, many companies have received up to three sanctions for the same infraction: fines, penalties, and civil sanctions. This not only represents a disincentive beyond the optimum but can have the practical effect of bankrupting many of the companies

currently in the market, benefiting the larger ones, with greater financial backing.

4.2.2. Perverse incentives

As Fernández Cruz has already pointed out (Rosas, s. f., p. 1049), compensating the victim beyond the actual damage can have the perverse effect of encouraging socially inefficient behavior (reducing the level of care below the optimum). In cases of corruption linked to public works tenders, for example, the State itself bears a large part of the responsibility for the collision that may exist, by not designing more efficient or transparent bidding procedures. If the State itself is compensated for the damages suffered in processes that lend themselves to collusion, it will lack incentives to improve the process itself.

CONCLUSIONS

We can conclude that one way to approach the same point is through the "rule of the hand", linked to the concept of "cheapest cost avoider". Who is the most economically able to avoid collusion in bidding processes? Certainly, the State.

From the economic point of view, public policies must respond to rational criteria and be aimed at reducing social costs. Opening the door to punitive damages for non-pecuniary damage creates an incentive for populism. This, in turn, gives rise to the problems already pointed out in the previous sections: arbitrariness, inconsistency, and excessive penalization.

Punitive damages have serious issues that result in their unconstitutionality and ineffectiveness, especially when they arise from a criminal proceeding, since. As we have mentioned before, punitive damages must meet the same criteria as criminal law; however, despite the existence of these criteria for determining the amount of civil compensation in crimes of

corruption, these are far from effective damage. but it is only limited to the characteristics of each case. The "damage to the image of the State" is criticized, it would be arbitrary to apply this last concept as a basis for civil compensation since it is the same that can efficiently avoid crimes such as collusion in bidding processes. We repeat the fact that the State he oversees designs which processes he intervenes, processes in which there is room for the practice of collusion.

Moreover, after practices like this, the State is rewarded by situations where it receives economic compensation because of damage to the image of the State because it would not make sense to change the processes, improve efficiency that prevents crimes such as collusion or push transparency much further. There would be no incentives for the State itself to apply these changes, it is more convenient for these events to occur.

We do not conclude the fact that the State not only does not assume the consequences of events that are in its control but even financially compensates itself for the damage suffered. Public policies must respond to rational criteria and be aimed at reducing social costs, we are facing a scenario where the instigator of these "mega crimes" is not punished, which gives way to the sanctions no longer being applied based on objectives and begin to apply based on a matter of populism, where public opinion is valued more.

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Oscar Sumar Albujar: Dean of the Faculty of Law, Universidad Científica del Sur

City: Lima

Country: Peru

Email: osumar@cientifica.edu.pe

ORCID: https://orcid.org/0000-0001-7658-9606

Julio Orellana Presentación: Law student at Universidad Científica del Sur.

City: Lima

Country: Peru

Email: jorellana@ cientifica.edu.pe

ORCID: https://orcid.org/0000-0002-6916-4893