FOCUS: PUNITIVE DAMAGES IN CHINA

CHINESE PUNITIVE DAMAGES SEEN IN A COMPARATIVE PERSPECTIVE

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Whereas common law countries think highly of punitive damages and Chinese law accepts them, continental European countries reject them. This paper enumerates and evaluates the various arguments that have periodically been put forward in favour and against punitive damages. It examines why such damages are awarded in some quarters of the globe and not in others and proffers alternative remedies which achieve some of the goals of punitive damages in a manner commensurate with the aims of tort law. To the extent that gaps remain, the author calls for development in other areas of law, particularly criminal and administrative penal law. Punitive damages do not belong in tort law. The author concedes, however, that unjust enrichment and tort law itself could also benefit from development to meet the demands of reasonable compensation and in this way, prevention.

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INTRODUCTION

One of the fundamental questions is whether the law of tort can and should provide awards which exceed the compensation of simply the damage suffered by the victim. Such awards are generally referred to as “punitive damages,” a term obscuring the fact that in reality they are not solely directed at compensating damage but are aimed additionally at imposing monetary penalties. In answering the question one has to take

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regard of some influential differences between the legal systems in civil law countries and common law countries. The codifications which are the basis of the Continental European legal systems design the law of delictual liability as a more or less homogenous area with the task of providing the victim with compensation for damage suffered (see § 823 of the German Civil Code or § 1295 of the Austrian Civil Code). In contrast, the common law recognizes a vast number of different torts with different prerequisites and different legal consequences. It must be emphasised, that on the one hand not every one of these various torts require the occurrence of damage and a common notion of damage does not exist in these systems. Therefore, it has been pointed out:\(^1\) “As there are, according to one estimate, some 70 or more torts recognised by the common law, it could be said that there are in fact 70 or more different conceptions of damage in English tort law.” On the other hand, whilst the consequence of a successful action using many of these torts often is “damages” this is not always the case. Furthermore the notion of “damages” itself differs and not all types of “damages” available to the claimant are concerned with compensation. All the torts which are actionable per se do not, as the name suggests, require the claimant to demonstrate a particular loss and as a consequence are not aiming at compensation of loss. Some torts provide for the defendant’s obligation to disgorge their profits, exemplary or punitive damages aim at punishment, further torts provide solely for a declaration of rights or the return of property (conversion).\(^2\) Therefore Reinhard Zimmermann\(^3\) rightly characterizes tort law as follows: “‘Tort’ does not constitute a coherent body of law, definable in general and abstract terms, but is no more than the sum total of a variety of individual torts that have developed, under the writ system, in characteristically casuistic and haphazard fashion.” The same is expressed by Tony Weir\(^4\) very pointedly: “‘Tort’ is what is in the tort books, and the only thing holding it together is their binding.”

Because of these decisive differences the recognition of punitive damages in civil law legal systems cannot be explained simply by referring to the common law of torts as if they are directly comparable in design and aim. Therefore, outside common law the question whether punitive damages should be accepted by the national legal system has to be examined thoroughly alongside the question of whether they really fit into that system. Where they are not accepted clearly it must be discussed whether there is an urgent need for introducing such remedies and whether there are convincing reasons for doing so. Finally the key question of whether such legal instrument should be integrated into tort


\(^{2}\) Rogers, *Winfield and Jolowicz on Tort* 19 (2010) no 1, 2, 17 f.


law or not must be addressed. The following pages will try to provide some arguments and answers for the Chinese law.

I. CHINESE LAW AND COMPARATIVE INTRODUCTION

Article 1 Chinese Tort Liability Law (CTL) does not mention compensation as the main aim of tort law but stresses as a purpose of tort law the punishment of tortious acts. It may be that by adopting this wording the CTL only wants to express in a very general way the idea that the obligation to compensate damage is a remedy which also has a preventive effect. This would seem possible as Article 15 CTL lists all available remedies, among others compensation of the loss, but does not mention punitive damages. However, one has to bear in mind that Article 47 CTL in Chapter V on Product Liability rules that punitive damages can be awarded if the victim suffered serious damage to health or even death and the manufacturer or seller definitely knew of a defect in a product but continued to manufacture or sell it. Even before entry into force of the CTL, Article 49 Consumer Protection Law 1993 provided: “Business operators engaged in fraudulent activities in supplying commodities or services shall, on the demand of the consumers, increase the compensation for victims’ losses; the increased amount of compensation shall be twice the costs that the consumers paid for the commodities purchased or services received.” Further Article 96(2) Chinese Food Safety Law 2009 rules that a producer may be required to pay up to ten times the price paid by the purchases as punitive damages if he knew in advance that his product was defective.

As to common law and Continental European legal systems, there is a serious difference between these two: common law countries, especially the USA, but also — to a lesser degree — England, and further Israel, think highly of punitive damages; continental European countries mainly reject them. This contrast — which seems irreconcilable — stems from fundamentally different ways of thinking and aims of tort law. Only to a small extent does reconciliation of the opposing ideas seem possible.

I think it is best to begin with two cases: First, the American case BMW of North America v. Gore where Dr. Gore discovered that his new BMW had been repainted after it had been scratched during transportation. He brought an action for fraud and recovered $4,000 compensation for the difference in value between the repainted car and a brand-new one as well as $4 million in punitive damages. The jury calculated the punitive damages award by taking regard of the total harm caused, thus multiplying the number of repainted vehicles sold by BMW — about 1,000 — by the depreciation of each car i.e. $4,000 million. It seems that everyone should long to become a victim!

5 An overall view is provided by the country reports in H. Koziol/V. Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009); L. Meurkens/E. Nordin (eds), The Power of Punitive Damages: Is Europe Missing Out? (2012).

In contrast, a German case: In 1992, the Supreme Court had to decide on the enforceability by execution of an American decision. In the case of John Doe, an American court had adjudicated that a juvenile was to be awarded $750,000 for being sexually abused; $400,000 of which were punitive damages. The German Court was of the opinion that punitive damages could not be enforced in Germany: This would be against ordre public as punishment is the responsibility of the criminal courts.

II. ARGUMENTS IN FAVOUR OF PUNITIVE DAMAGES

One argument is, as the English Law Commission has pointed out, that criminal law and administrative law are limited in their spheres of activity and need supplementation by private law. The German scholar G. Wagner argues the same. However, it has to be remembered that private law has the function of settling legal disputes between private persons. Punishment is the responsibility of criminal and public law. It is true, as Wagner points out, that historically tort law and criminal law are two of a kind and that their strict separation is only the fruit of modern ages. However, it is decisive that the separation between tort law and criminal law is reasonable, as they pursue different aims and the sanctions under criminal law are more serious than those under tort law. This has an effect on the prerequisites of establishing the sanctions: Above all I have to mention the principle that the punishment — also in regard of the measure of the sentence — should be laid down in the law (nulla poena sine lege); further criminal procedural safeguards have to be mentioned, particularly the rules on the burden of proof. As we can see, European legislators designed their civil and criminal codes on the basis of these modern ideas of differentiation and therefore, continental European lawyers have to take regard of this and I think the same is true for Chinese lawyers.

Further, placing punitive damages in the realm of private law has the consequence of awarding the claimant a windfall as the fine has to be paid to him and not to the state. It is said by the supporters of punitive damages that this has to be accepted as the defendant’s punishment and the deterrence both of him specifically and others generally are in the

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7 BGHZ (Entscheidungen des Bundesgerichtshofs in Zivilsachen, Decisions of the Supreme Court in Civil Matters) 118, 312.
10 I. Englard, Punitive Damages — A Modern Conundrum of Ancient Origin, JETL 2012, 1, 15 ff., considers the notion of a stark division between private and public law a “romantic one.” He writes that “… a typical tendency of many scholars is to cloth ideologies with theoretical legal notions and concepts. Thus an essential distinction between public and private law is fundamentally based upon ideological premises.”
public interest. However, this argument would be convincing only if there are no other
options to support these interests.\footnote{See V. Wilcox, Punitive Damages in England, in: H. Koziol/V. Wilcox (eds.), Punitive Damages: Common Law and Civil Law Perspectives (2009) no 76 ff.}

In continental Europe one very often hears the argument that tort law, aiming solely at
compensation, is not able to provide sufficient protection for legally accepted interests
and to develop the necessary deterrent effect, especially if the tortfeasor’s gain by his
unlawful activity is much higher than the compensation of the victim’s loss. This may be
ture, but one has to put the question why it should not be possible to extend criminal and
administrative law as far as there is a need. Would this approach not be more reasonable
than to burden private law with a function which has been separated from it for centuries?
Further, the apprehension that punishment, which criminal law does not want to impose,
comes back in through the private law back door without any restrictions known to
criminal law, does not seem far fetched.

Even if, in spite of all these possibilities, there should still be an irresistible need to
involve private law, one has to examine whether punitive damages under tort law are the
appropriate tool.\footnote{W. van Boom, Efficacious Enforcement in Contract and Tort (2006) 29, 33.} In particular, it is certainly worth considering whether in some cases
the rules on unjust enrichment would be an alternative and why it should not be more
reasonable to adapt the law of unjust enrichment instead of burdening tort law with an
outside function, namely siphoning off the defendant’s gain through punitive damages
instead of compensating the claimant’s damage.

Finally, if punitive damages under private law nevertheless should be considered to be
unavoidable it seems questionable to harbour them under tort law. Continental European
lawyers would argue that tort law, according to their codes, primarily aims at
compensation\footnote{In more detail H. Koziol, Prevention under Tort Law from a Traditional Point of View, in: L. Tichý (ed.), Prevention in Law (2013) 19.} and that because of the different aims different rules seem necessary.
Moreover, E.J. Weinrib\footnote{Corrective Justice (2012) 91 ff.} points out, that limiting the remedy to restoring the loss
suffered by the victim complies with the fundamental principle of corrective justice.
Nevertheless, one has to acknowledge that under common law the law of torts recognises
70 or more torts.\footnote{K. Oliphant in: B. Winiger/H. Koziol/B.A. Koch/R. Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 36 (no 1/12/1).} Not only are the prerequisites of claims under the law of torts different
but also the remedies differ to a great extent: some torts do not even require damage and
the remedies include injunctions, disgorgement of profits, declaration of rights, nominal
damages, exemplary or punitive damages and compensatory damages.\footnote{W.V.H. Rogers, Winfield and Jolowicz on Tort\footnote{W.V.H. Rogers, Winfield and Jolowicz on Tort (1899) no 1.2.} 18} Only the last one

\footnote{14 W. van Boom, Efficacious Enforcement in Contract and Tort (2006) 29, 33.}
\footnote{15 In more detail H. Koziol, Prevention under Tort Law from a Traditional Point of View, in: L. Tichý (ed.), Prevention in Law (2013) 19.}
\footnote{16 Corrective Justice (2012) 91 ff.}
\footnote{17 K. Oliphant in: B. Winiger/H. Koziol/B.A. Koch/R. Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 36 (no 1/12/1).}
\footnote{18 W.V.H. Rogers, Winfield and Jolowicz on Tort (1899) no 1.2.}
common law is therefore not a coherent body of law and, therefore, punitive damages fit into the unsystematic law of torts.

With respect to China one has to say that Article 1 CTL underlines the purpose of punishment of tortious acts and that therefore punitive damages seem to comply with the aims of the code. Nevertheless, as already noted one should also have regard of the fact that Article 15 CTL, which lists all available remedies, does not mention punitive damages, but on the contrary expressly refers to compensation of the loss. Further, as will be seen, quite some weighty arguments speak out against punitive damages under tort law and therefore I think that Article 1 CTL should be interpreted as restrictively as possible.

However, I have to acknowledge that G. Wagner tries to justify punitive damages in substance, even under the continental European legal systems, by making the interesting proposal of shifting to “preventive damages” which do not serve the aim of punishment but of prevention. This, to some extent, is similar to the law and economics outlook on punitive damages. By “preventive damages,” Wagner wants to avoid most of the arguments directed at punitive damages. According to his opinion, such damages have to be awarded on the one hand if the defendant committed the infringement with the intent to gain a profit that exceeds the damages he may have to pay, and on the other hand if claims for damages would be insufficiently enforced.

But this does not seem very convincing as “preventive damages” cause the same problems as punitive damages: why should the claimant enjoy a windfall by receiving damages for the loss suffered by others who do not — for various reasons — claim their damages?

This leads to the decisive, fundamental objection to Wagner’s proposal and also to the economic theory: prevention is not the sole aim of continental European tort law and, therefore, is unable to justify on its own a claim for damages. According to continental legal systems, prevention is not even the main aim of tort law; rather, the primary aim is the idea of compensation as the claim for damages always requires that the claimant suffered a loss and as damages have to be calculated in correspondence to the loss suffered by the victim. G. Wagner — and the same is true for the economic theory — is of the opinion that the idea of compensation is useless as the idea of compensation does not say anything about the decisive question of when the victim receives compensation.

20 H. Koziol & ZHU Yan, Background and Key Contents of the New Chinese Tort Liability Law, JETL 2010, 336 f.
This is, of course, true, but nobody expected that the idea of compensation would be able to solve this question. Nevertheless, the idea expresses the fundamental aim and by that lays down fundamental principles. If the main aim of continental tort law is to grant the victim compensation for his loss under certain conditions, this indicates therefore that the claim can not exceed the loss.\(^\text{23}\) It is exactly this idea which is disregarded by G. Wagner.

Further, tort law is not in a position to achieve the aim of prevention, because if prevention were the decisive aim of tort law, punitive damages would have to be awarded regardless of whether the claimant suffered any damage, only taking regard of the defendant’s misbehaviour. Therefore, the mere attempt at wrongdoing would have to be sufficient to trigger an award of punitive damages. It also seems inconsistent, to require the occurrence of damage in order to establish a claim for punitive damages although such damages have nothing to do with damage.

By all this I do not argue that tort law has no preventive consequence; I am convinced that tort law has such an effect. I only want to stress that this effect is secondary to the main aim of compensation. This means that under tort law the victim’s claim can not go beyond his/her loss. Further, I am not of the opinion that remedies with pure preventive aims are prohibited under private law — of course not, as the rules on the application of an injunction show. I only reject the dishonest and covert way in which the departure from existing principles of tort law is disguised by some continental European scholars and courts. It has to be emphasised that punitive or preventive damages are different remedies from those provided for by tort law or the law of injunctions and that creating such remedies which are unknown to civil law as it exists on the continent requires special justification.

My endeavour to clearly draw a borderline between tort law, aiming at compensation of a loss, and remedies with a primarily preventive aim is based on the realisation that different remedies depend on different prerequisites. It is anything but convincing that the same reasons as in the case of a claim for compensation of the loss speak out in favour of the victim’s claim for payments far beyond his loss and thus for a windfall. One should not abuse tort law for other — albeit sensible — aims but look to or design a different branch of law which takes regard of the different aims sought.

Last but not least, as far as “preventive damages” have the function of siphoning off a gain netted by a wrongful activity, the rules on unjust enrichment seem to be more appropriate than tort law where the damage and not the gain is decisive. It is an unreasonable violation of tort law to use it as a basis for gain-oriented claims. There is a rather strange tendency in these times to neglect differences and to put the same label on

\(^{23}\) This is underlined also by the European Court on Human Rights, for more details, see V. Wilcox, Punitive and Nominal Damages, in: A. Fenyves/E. Karner/H. Koziol/E. Steiner (eds), Tort Law in the Jurisprudence of the Court of Human Rights (2011) 726 ff.
different things.

### III. Arguments Against Punitive Damages

Now some arguments are against punitive damages. First of all, the idea of punishment is an alien element in private law. This is even true for tort law, although this certainly is the part of private law for which the idea of sanction could most likely be of relevance. Therefore, Englard rightly points out that the joining of compensation and punishment in the litigation between private parties generates a number of problems.

Nevertheless, speaking out against the ordering of punishment by private law is that they are awarded to another individual who has not suffered damage to the extent of that amount. Therefore, punitive damages arouse the impression of being a stroke of good luck, a windfall for the claimant. Franz Bydlinski has convincingly explained that ordering such punishment is against the structural principle that, under private law, legal consequences need bilateral justification. He points out that in the area of private law a rule always concerns the relationship between two or more legal subjects. In his opinion, not only has it to be justified why one person is conceded a favourable position and a disadvantageous legal consequence is imposed on another person, but also why this is reasonable in the relationship between these two persons. Therefore, under private law the principle of bilateral justification of legal consequences applies. In substance the same idea is emphasised by Weinrib. He points out that punitive damages are inconsistent with corrective justice for reasons both of structure and of content. As to structure, he underlines that corrective justice requires that the normative considerations applicable to the relationship between defendant and plaintiff reflect the parties’ correlative standing as sufferer of and doer of the same injustice. Therefore, it excludes considerations that refer to one of the parties without encompassing the correlative situation of the other. “The standard justification for punitive damages — deterrence and retribution — are one-sided considerations that focus not relationally on the parties as

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27 Corrective Justice 96 ff.
doer and sufferer of the same injustice, but unilaterally on the defendant … as doer. The place of such considerations is not private law but criminal law, because criminal law is concerned not with whether the accused has injured someone’s particular right, but with whether the accused has acted inconsistently with the existence of a regime of rights in general.” So far as content is concerned, E.J. Weinrib elaborates that “punitive damages are inconsistent with the role of rights in corrective justice. Punitive damages do not restore to plaintiffs what is rightfully theirs, but instead give them a windfall.” According to Weinrib, punitive damages, based on deterrence and retribution, thus violate the limitation thesis that the remedy should only restore the plaintiff’s right and not give the plaintiff more than that right or its equivalent.

Applying this principle worked out by F. Bydlinski and E. J. Weinrib to our subject for discussion we reach the following conclusion: even if there are very strong arguments for imposing a sanction on the defendant, these arguments alone cannot justify awarding the plaintiff an advantage, although he has suffered no corresponding damage nor has an unjust enrichment claim against the defendant to be adjusted. If there are only arguments for punishing or preventing one party but not for compensating the other party, then criminal law is appropriate or the payment made by the wrongdoer has to flow into a fund serving a public purpose.

Apart from the fact that punitive damages are inconsistent with fundamental principles of private law and contradict the main aim of existing continental European tort law principles, they also show quite some shortcomings. First of all, I would like to again point out that the goal of general prevention cannot be reached if punitive damages — just as compensatory damages — can only be claimed if damage has occurred.

Further, I have to point out that punitive damages cause unreasonable consequences in cases of more than one victim. For example — besides the before mentioned BMW-case: a claimant seeks compensation and punitive damages after being severely poisoned by a can of meat, its rotten contents undetected owing to the recklessness of the defendant company. The claimant is awarded punitive damages and the amount calculated by the court takes regard of the entrepreneur’s outrageous conduct. Shortly afterwards another victim claims damages. If the defendant has been punished to an adequate extent by the punitive damages the first claimant received, it would be highly unreasonable to punish him again and again every time a new victim shows up.

On the other hand, it seems unjust when only the first victim, who physically recovered more quickly than the others and thus had the opportunity to lodge a claim earlier, would at the stroke of good luck receive some hundred thousand or million dollars in addition to compensation for his damage and the other, even more seriously injured victims end up with no punitive damages. Indeed, they are landed with the prospect that by the time their case is heard, the defendant may not even afford to pay their compensatory awards because the punitive award paid to the first victim has driven the
defendant to bankruptcy.

Under English law punitive damages are only adjudicated if the defendant has not been already punished by criminal or other sanctions. However, it seems an unreasonable result, that whether or not the victim receives a windfall depends on the pure chance of whether criminal procedures are started before or after the civil procedure.

Again it has to be emphasised that awarding punitive damages under tort law is contrary to the separation of criminal law and private law. The relapse into the archaic blend of punishment and compensation also violates fundamental principles of penalty law, e.g. the principle nulla poena sine lege.

IV. FURTHER OBSERVATIONS

Some further observations. Firstly, it is astonishing that continental European lawyers seem to feel much less need for punitive damages than their colleagues in the USA, and to some extent also in England and Israel. The reasons for this phenomenon may be some differences between European civil law systems and the American legal systems. It seems possible that under U.S. law, punishment under criminal law is of less importance than in continental Europe; this may be even true to a higher degree for the area of administrative penalty law. Thus there may be a greater need for punitive damages in the U.S.A. than in Europe.

Dan B. Dobbs recommends that “punitive” damages be measured by the direct and indirect profits the defendant has earned or will earn from the misconduct. Under most European legal systems, the law of unjust enrichment — which is applicable jointly with tort law — would be to some extent sufficient to siphon off gains; therefore, tort law is not as strongly required to reach that goal.

Further, according to the “American rule” and contrary to continental European law, the plaintiff does not receive restitution of the legal costs even if he wins his case. On top of that, he has to hand over quite a portion of his winnings to his attorney — up to 40%. Therefore, Americans need an incentive to lodge a claim and punitive damages are supposed to give such an incentive.

In the U.S.A. to some extent punitive damages have the function of filling the

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28 But one has to refer to different tendencies in France, see for further details V. Wester-Ouisse/Th. Thiede, Punitive Damages in France: A New Deal?, JETL 2012, 115 ff, and to some extent also in the European Union, see B.A. Koch, Punitive Damages in European Law, in: H. Koziol/V. Wilcox (eds.), Punitive Damages: Common Law and Civil Law Perspectives (2009) 197 ff.
loopholes of social security law, e.g. in the asbestos cases.

Last but not least, it seems that in the U.S.A. punitive damages are supposed to replace — in a hidden way — compensation for immaterial loss.32

Second observation. As mentioned before, in continental Europe one very often hears the argument that tort law even in combination with the law of unjust enrichment is not able to provide sufficient protection for legally accepted interests and to develop the necessary deterrent effect. This supposed insufficiency is pointed out especially in the area of intellectual property33 and complaints have already had quite some success: e.g. the acceptance of a claim for double the amount of a licence fee as punitive damages in the case of a violation of intellectual property rights (which in Continental systems is regulated under tort law).34 The argument goes that the area of immaterial property presents a special situation as such goods are not corporeal, thus “omnipresent” and because of this, many people can take advantage of them at the same time while in different places. This increased vulnerability causes — it is argued — special difficulties in assessing damages as the use of the intellectual property by the owner is not prevented by the violation of the right and the restriction of the liberty to make arrangements is very difficult to prove. A further argument is that even siphoning off the profits netted by the violation of an intellectual property right does not display strong preventive effects, because the defendant only has to hand over the profit gained and thus does not suffer any disadvantage. On top of this, the offender takes a rather insignificant risk of being discovered.

Of course, all the aforementioned arguments regarding punitive damages seem to speak against doubling the amount of the licence fee. However, I feel it is worthwhile to reconsider whether all the objections against punitive damages apply to such claims. Firstly where multiplying a licence fee is concerned, a strictly defined increase of damages is at stake and, therefore, one does not have to be afraid that the sanctions are uncertain and will get out of control. Secondly, I see the possibility of qualifying the doubling of the licence fees not as punitive damages which are in contrast to the idea of compensation but to justify them by another idea: the difficulty of finding out and pursuing the offender as well as the enforcement of the claim typically require considerable expenses. Often the victim suffers loss because of the disturbance of the market by the infringement. One has to also stress that the victim meets great difficulties in proving his loss. Because of these difficulties and the lack of other clues, the amount of the expenses and other losses could be equated to the licence fee. The doubling of the licence fee could thus be brought into harmony with tort law’s fundamental idea of

32 Cf Id.at 853 f.
33 For more details, see H. Koziol in: H. Koziol/V. Wilcox (eds.), Punitive Damages no. 83 ff.
compensation and the identification with a punishment can be avoided.

**CONCLUSION**

Tort law — as far as it only aims at compensation — even in combination with the law of unjust enrichment and other parts of private law is said to be unable to ensure prevention to a sufficient degree. I think that first of all one should try to further develop tort law as well as the law of unjust enrichment to a degree that they meet the demands of reasonable compensation and by this also of prevention. One possibility is to improve the compensation of emotional loss. Further, only to a very limited extent, providing a claim for a lump sum in cases where proof of damage is extremely difficult seems to be compatible with the principles of tort law as long as the sum roughly corresponds to the damage that has possibly occurred.

Even if all such measures really could not cover all reasonable demands, I think it necessary to point out that one has to consider the fundamental ideas of private law and come to the conclusion that tort law is not the right area for inserting tools of punishment or prevention such as punitive damages. Therefore, I think the only way out is to consider other possibilities of developing systems of legal protection which are able to provide sufficient preventive effects but do not violate fundamental principles of private law and comply with the basic aims of tort law. These should be discussed on a comparative bases more thoroughly than has been the case so far, as only by understanding the fundamentals can tort law progress to deal with new situations coherently in future. In my opinion, one prerequisite of such tools which fill the loopholes of legal protection is indispensable: the claimant must not receive a stroke of luck.

Of course, the best solution would be to develop criminal and administrative penalty law as well as procedural laws belonging to these areas in such a manner that necessary prevention is granted. This approach would include the advantage that all fundamental principles of penalty law would be observed.

Against this approach, the objection is raised that public prosecutors and criminal courts would be overloaded. I think that the overload on public prosecutors could be reduced by a system of private prosecution. As stimulus, one should consider granting these private prosecutors a lump sum for preparing the claim and for doing all the investigations.

However, if there are insurmountable hurdles under this approach, there could

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35 An attempt to fill this gap has been made by the European Centre on Tort and Insurance Law by embarking on a project “The Basic Questions of Tort Law from a Comparative Perspective.”

36 This complies with the ideas of England, JETL 2012, 20, who points out: “The objectives of punishment should essentially remain the domain of criminal and administrative law. The idea that private law should correct the deficiencies of these specific branches of law is in my view misconceived.”
possibly also be, to some extent, a way out which is compatible with the principles of private law. Some European legal systems permit certain associations to pursue applications for injunctions and compensation claims on the injured party’s behalf. In continued development of this idea, it seems possible to concede to associations the right to put forward claims on punitive damages and to deliver the money to public authorities or to social institutions. As stimulus, one should again consider granting these institutions a lump sum for preparing the claim and for doing all the investigations. Such a solution would have a preventive effect without overburdening criminal courts. Further, the principle “nulla poena sine lege” has to be observed and procedural safeguards similar to those in criminal trials have to be installed.

In conclusion, I think that punitive damages should not be adjudicated under tort law but that special rules have to be designed.\(^\text{37}\) As a heavier burden is placed on the defendant rather than under tort law, the prerequisites for establishing the obligation to pay punitive damages also have to be weightier than those suitable to trigger the obligation to pay compensation. On the other hand, the field of application has to be broader as what is decisive is not the occurrence of loss but a misbehaviour. However, I think that careful examinations are still required.

\(^{37}\) In the same sense, van Boom, Efficacious Enforcement 29, 33.