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# Should Estonian Law Provide for an Award of Punitive Damages?

Punitive damages are an institute of law practiced in the Anglo-American legal system. They are defined as damages awarded in addition to the actual material or non-material damages to punish the defendant and deter him or her from committing violations of law in the future. Estonian lawyers too have somewhat unexpectedly proposed to set forth in Estonian law the possibility of awarding punitive damages, especially for violations of personal rights (e.g., defamation). The reasoning behind the proposal is that today defamation is not punished as a criminal offence in Estonia, and injured parties allegedly remain without effective judicial protection.<sup>\*1</sup> The aim of this article is to analyse the nature of punitive damages, whether that institute could or should be applied to Estonian law, but also whether provision of punitive damages could be in conflict with the values stated in our Constitution. The central issue of this article is whether application of punitive damages is necessary for cases of defamation and violation of other personal rights.

## 1. Nature of the institute of punitive damages

As I said, Anglo-American law defines punitive damages (also known as exemplary damages) as damages that are in excess of the compensatory damages in order to punish the defendant and deter new violations of law. This is a conceptual difference from the Continental-European doctrine according to which the indemnification obligation of civil law damage primarily has a compensatory function, i.e., the purpose of the damages is to restore the former situation for the injured party. The same principle is provided in Estonian law in § 127 (1) of the Law of Obligations Act<sup>\*2</sup>, which sets forth that the purpose of compensation for damage is to place the aggrieved person in a situation as near as possible to that in which the person would have been if the circumstances which are the basis for the compensation obligation had not occurred. Continental-European law doesn't traditionally seek to punish the tortfeasor through damages, only to redeem or compensate the damage inflicted to the injured party.<sup>\*3</sup>

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<sup>1</sup> See interview with the Minister of Justice Rein Lang. – Postimees, 29 May 2007 (in Estonian).

<sup>2</sup> Võlaõigusseadus. – RT I 2001, 81, 487; 2005, 61, 473 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X60032K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F51a%F51gus> (21.06.2007).

<sup>3</sup> The Civil Chamber of the Supreme Court has underlined the same in case 3-2-1-137-05. – RT III 2006, 3, 26 (in Estonian). See also G. Wagner: Deutscher Juristentag. Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden. Verlag C. H. Beck 2006, p. 15.

Punitive damages are applied primarily in judicial practice in the United States<sup>\*4</sup>, but are known also in the United Kingdom, Canada, Australia, New Zealand and India.<sup>\*5</sup> The amount of a punitive damage is decided by the jury, but the judge has the right to later reduce the amount at the request of the defendant, which is often the case. It is generally possible to award punitive damages in all tort cases. Punitive damages are mainly awarded when the tortfeasor's behaviour is found to be especially harmful, i.e., intentional or gravely negligent. Punitive damages can exceptionally be awarded also in cases of breach of contract, especially in the case of contracts of employment and insurance contracts.<sup>\*6</sup> The actual amount of a punitive damage depends inter alia on the level of liability of the tortfeasor and his or her financial situation.<sup>\*7</sup>

Although the name might leave an impression that the purpose of punitive damages is only to punish the tortfeasor, it is not quite so. Although the main aims of punitive damages are indeed punishment and deterrence of new offences<sup>\*8</sup>, punitive damages do actually have several other functions. Those other functions are primarily profit-erasing of the tortfeasor (the violator of another person's right), compensation of the injured party's legal expenses, redemption of the offence<sup>\*9</sup>, but also compensation of the enforcement gap.<sup>\*10</sup>

Yet, the judicial practice of the U.S. juries in punitive damages cases has fallen under growing criticism and for some time now relevant literature calls for a tort reform.<sup>\*11</sup> The institute of punitive damages and the relevant U.S. judicial practice is blamed for primarily the following:

- the institute of punitive damages is problematic from the constitutional perspective<sup>\*12</sup>;
- there are no clear criteria for determining the amount of the damage, which means that a judgment is absolutely not predictable;
- juries act too emotionally<sup>\*13</sup>;
- sometimes the damage awarded is even more than the initial claim by the injured party<sup>\*14</sup>;
- enormous damages threaten to push producers to bankruptcy, which suppresses entrepreneurship and initiative<sup>\*15</sup>;
- boundaries between penal law and private law are blurring.

Measures have already been taken to restrain the awarding of uncurbed damages: eleven states have adopted a law on the maximum amount of a punitive damage, limiting it to just 1–5 times the compensatory (regular) damage; some states have laid down maximum levels of punitive damages (from 300,000 up to five million U.S. dollars); 13 states have adopted a regulation regarding transfer of a certain percentage of the awarded damage to the Treasury or the Alliance for Equal Justice.<sup>\*16</sup> Also, the U.S. Supreme Court has ruled in 2003 that as a rule punitive damages should not exceed the amount of the compensatory damage by more than nine-fold.<sup>\*17</sup>

<sup>4</sup> First rulings in the U.S. involving award of punitive damages are known to have been made in 1784 and 1794, and already in 1851 punitive damage can be referred to as an established and acknowledged institute in the whole country. See J. Mörsdorf-Schulte. *Funktion und Dogmatik US-amerikanischer punitive damages*. Tübingen 1999, p. 180.

<sup>5</sup> F. Dasser. *Punitive Damages: vom "fremden Fötzel" zum "Miteidgenoss"*. – *Schweizerische Juristenzeitung* 2000 (96), pp. 1 and 2. Available at <http://www.homburger.ch/fileadmin/publications/PUNDAM.pdf> (21.06.2007).

<sup>6</sup> P. Müller. *Punitive Damages und deutsches Schadensersatzrecht*. Walter De Gruyter 2000, p. 9; F. Dasser (Note 5), pp. 2–3.

<sup>7</sup> C. Post. *Yellow Press and Privacy: die Rechtsprechung des US Supreme Court*. – *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 2006, Heft 4, pp. 284, 285.

<sup>8</sup> P. Müller (Note 6), p. 11.

<sup>9</sup> F. Dasser (Note 5), p. 3.

<sup>10</sup> This is a new argument that the best justification for punitive damages is the filling of gaps in the implementation of law. It is argued that since in reality the inflictor of damage often remains unpunished and the injured party without compensation, then just the award of punitive damages does not produce the desired deterrent effect: the inflictor of the damage can rely on the fact that most likely liability is not applied to him or her, and even if it is done, then it would probably not exceed the amount of the damage actually inflicted. This means that violation of law often actually pays. One solution could be the so-called multiplication of indemnity — i.e., the indemnity is multiplied by a certain indicator (such as two or three), which is determined on the basis of the probability that the inflictor of the damage gets away with his or her offence. See R. S. Avi-Yonah. *Developments — the Paths of Civil Litigation*. – *Harvard Law Review* 2000 (113), p. 1795.

<sup>11</sup> G. Wagner (Note 3), p. 68; C. Post (Note 7), p. 284; J. Mörsdorf-Schulte (Note 4), p. 182 ff.

<sup>12</sup> J. Mörsdorf-Schulte (Note 4), p. 184. For example the U.S. Supreme Court has found that extremely large punitive damages are in conflict with the Due Process Clause. See the U.S. Supreme Court ruling from 7.04.2003 in *State Farm Mutual Automobile Industries Comp v. Campbell*. Available at <http://www.horvitzlevy.com/Bulletins/campbe042304.htm> (21.06.2007).

<sup>13</sup> F. Dasser (Note 5), p. 4; G. Wagner (Note 3), p. 68.

<sup>14</sup> R. S. Avi-Yonah (Note 10), p. 1784.

<sup>15</sup> *Ibid.*, pp. 1784–1785.

<sup>16</sup> *Ibid.*, p. 1793.

<sup>17</sup> See the U.S. Supreme Court ruling from 7.04.2003 in *State Farm Mutual Automobile Industries Comp v. Campbell* (Note 12).

## 2. Punitive damages in Europe

The punitive aim of damages in its narrower sense (redemption, repentance and revenge) is not known at least in the Continental-European private law tradition.<sup>\*18</sup> Punitive aims derive from the tortfeasor, not the injured party, and are intrinsic to penal law. There is a predominate opinion that punitive damages are not part of Continental-European legal culture, and neither the European Principles of Tort Law (see article 10:101) nor the Study Group on a European Civil Code provide for punitive damages.

However, there is a noticeable tendency in Continental-European legal orders to take account of punitive elements upon awarding damages at least in some sectors. In German law, for example, the increasing importance of the deterrence factor in a compensatory obligation is more and more talked about, especially in connection with damage to a creditor's non-material rights.<sup>\*19</sup> If the violation concerns such benefits, then it can only formally be claimed that the purpose of the monetary compensation is to make up for the damage and restore the benefits. In those areas of activity German judicial practice has reached similar conclusions regarding amounts and bases for calculation of damages as the U.S. judicial practice on award of punitive damages. Damages awarded under German judicial practice are often more than compensational, and the argumentation used in motivation partly resembles the punitive damage approach.<sup>\*20</sup> Deterrent function exists for example in damages for wasted holiday time, which on one hand compensates the non-material damage inflicted on a passenger, and on the other hand should help to avoid bad business practice by package holiday travel agents.<sup>\*21</sup>

In several countries of the Continental-European legal system the deterrent function of damages plays an important role in the award of compensation for violation of personal rights: the purpose of the compensation for the loss inflicted by such violations is not only to compensate the loss to the injured party, but also the deterrence of such violations in the future.<sup>\*22</sup> The topic of punitive damages has found its way also to studies of Continental-European legal scholars. For example one of the main topics at the 66<sup>th</sup> Day of Jurists of the Federal Republic of Germany was whether it is necessary to amend the German indemnification regulation, especially whether it is necessary to establish institutes of punitive damages and collective action. However, it was admitted that punitive aims in their narrower sense are foreign to private law and should remain that way.<sup>\*23</sup>

At the European Union level the attitude toward punitive damages type compensation is unclear and non-consistent in different legal acts and decisions.<sup>\*24</sup> For example, according to the second sentence of article 29 of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air<sup>\*25</sup> punitive, exemplary or any other non-compensatory damages are not recoverable. Also for the Rome II regulation<sup>\*26</sup> long debates were held over whether or not to provide in the regulation *expressis verbis* that punitive damages could be in conflict with a Member State's public order.

The European Court of Justice, on the other hand, has taken a stand in an antitrust case that if a national court awarded a punitive damage for an infringement of antitrust law, then the same should be done in cases of infringement of the European Union antitrust law provisions.<sup>\*27</sup> The European Court of Justice has at least in two instances ruled in equal treatment lawsuits that damages awarded for discrimination of workers must have a deterrent effect.<sup>\*28</sup> The European Union Court of Justice judicial practice shows that, for the effective protection of a worker, who is the weaker side, a damage awarded for job-related discrimination should in excess of the traditional compensatory nature also have deterrent influence.

<sup>18</sup> See G. Wagner (Note 3), pp. 14–15, 133.

<sup>19</sup> J. Rosengarten. Der Präventionsgedanke im deutschen Zivilrecht. – Neue Juristische Wochenschrift 1996/30, pp. 1935–1937.

<sup>20</sup> V. Behr. Myth and Reality of Punitive Damages in Germany. – Journal of Law and Commerce 2005 (24), p. 221.

<sup>21</sup> H. Lange, G. Schiemann. Schadensersatz. 3. Aufl. Tübingen: Mohr (Siebeck) 2003, p. 12. Similar provision is included also in § 887 (2) of the Estonian Law of Obligations Act.

<sup>22</sup> The German Federal Supreme Court first referred to the deterrence function of compensation in its 15.11.1994 so-called Monaco princess judgment. M. Körner. Zur Aufgabe des Haftungsrechts – Bedeutungsgewinn präventiver und punitiver Elemente. – Neue Juristische Wochenschrift 2000/4, p. 242. Similar trends can be noticed in, e.g., French, Greek and Italian law. See U. Drobniq, C. von Bar. Study on property law and non-contractual liability law as they relate to contract law, p. 130 ff. Available at [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/study.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf) (21.06.2007).

<sup>23</sup> G. Wagner (Note 3), p. 133.

<sup>24</sup> *Ibid.*, p. 71.

<sup>25</sup> OJ L 194, 18.07.2001, p. 39.

<sup>26</sup> European Parliament and Council regulation of 21 February 2006 on the law applicable to non-contractual obligations (“Rome II”) (COM (2006) 83). Now adopted: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”).

<sup>27</sup> European Court of Justice judgment of 13.07.2006, joined cases C-295/04 – C-298/04. – OJ C 224, 16.09.2006, p. 3.

<sup>28</sup> European Court of Justice judgment of 10.04.1984, C-14/83 (Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen). – European Court reports 1984, p. 01891; European Court of Justice judgment 22.04.1997, C-180/95 (Draehmpaehl). – European Court reports 1997, p. I-02195.

Possible punitive damages are being deliberated also in the European Union in the context of infringements of antitrust law. The European Union green paper on antitrust law proposes automatic so-called double damages for the compensation of infringements of antitrust law.<sup>\*29</sup> Such a proposal is evidently inspired by the U.S. antitrust law, where the classical punitive damages institute has today been replaced by the so-called treble damages option provided by law.<sup>\*30</sup> The main aim of multifold damages is to prevent future infringements of antitrust law (the deterrent function). Other aims are to compensate the damage done to those who have suffered loss, profit erasing, and to encourage individuals claim damages in case of future similar infringements. In addition to the above a similarly important function is definitely filling of enforcement gaps, since damages inflicted by infringements of antitrust law are so small, that it does not motivate consumers to take action: the amount that a consumer pays extra to for example a petrol cartel is not large enough to make financial sense to sue.<sup>\*31</sup>

Thus, there is no consensus on the European Union level regarding the fact that punitive damages are *a priori* in conflict with the European Union law.

### 3. Punitive damages in the context of Estonian Constitution

One of the aims of this article is to analyse whether application of punitive damages would at all be permissible by the Estonian Constitution. A question might arise due to the nature and purpose of punitive damages, whether award of such damages under civil proceedings would be constitutional. The author thinks that application of punitive damages in Estonia is problematic from the constitutional perspective mainly due to the following reasons.

As indicated above, the main aim of a punitive damage is to punish the tortfeasor and deter new offences. Punishment as such should be the sole competence of the state and criminal law.<sup>\*32</sup> A punitive damage is by nature very similar to a fine under penal law or a fine to the extent of assets: the tortfeasor must pay money, and that obligation has two aims: to punish and deter. Award of punitive damages under civil proceedings would disturb the boundaries established between civil and penal law and transfer penal law functions into civil law.

This argument has been rightly contested by the argument that the deterrent effect as such would in any case not be confined only to criminal law, but goes with establishment and application of all liability, including civil liability. Therefore the deterrent and compensation functions cannot be clearly separated and limited.<sup>\*33</sup> Article 10:101 of the European Principles of Tort Law also underlines the deterrent function of compensation.<sup>\*34</sup> The author thinks that although it is true, that a compensation obligation under civil law also serves a deterrent function in addition to compensating of the inflicted damage, yet the aim to punish in its narrower sense cannot be deemed justified.

German legal literature has indicated that a situation where penalties can be inflicted without due constitutional guarantees, especially the guarantees provided in the criminal procedure code, is in conflict with the principle of rule of law.<sup>\*35</sup> The author is on the opinion that a similar conflict arises also in Estonian law. Section 23 of the Constitution<sup>\*36</sup> provides that no one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed. From this provision and the principle of rule of law it can be concluded that penalties can be inflicted only for a criminal offence and that can occur only pursuant to the procedure provided by criminal proceedings and according to the standards therein. Criminal proceedings have generally somewhat higher burden of proof and rules of proof than in civil law.<sup>\*37</sup> The criminal proceedings law also provides for specific principles and institutes for the protection of the accused, not known by civil proceedings: e.g., the *in dubio pro reo* principle (in doubt, on behalf of the alleged culprit), required presence of the criminal defence counsel at the criminal proceedings, the maxim banning mandatory

<sup>29</sup> Green paper: Damages actions for breach of the EC antitrust rules. COM (2005) 672. See question E, option 16.

<sup>30</sup> A similar proposal was made in 2005 to amend also the German Act against Restraints of Competition (ARC), but was later drawn back. See G. Wagner (Note 3), p. 105.

<sup>31</sup> G. Wagner (Note 3), pp. 104–105, 116–117.

<sup>32</sup> This position was taken by for example the German Federal Constitutional Court. See decision from 4.06.1992. – BGHZ 118, 312ff.

<sup>33</sup> G. Wagner (Note 3), p. 76.

<sup>34</sup> “Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.”

<sup>35</sup> See G. Wagner (Note 3), p. 76.

<sup>36</sup> Põhiseadus. – RT 1992, 26, 349; 2003, 64, 429 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus> (21.06.2007).

<sup>37</sup> E. Kergandberg, M. Sillaots. *Kriminaalmenetlus* (Criminal Proceedings). Tallinn: AS Juura 2006, p. 33 (in Estonian).

self-incrimination (the *nemo tenetur se ipsum accusare* principle, § 22 (3) of the Constitution), direct and oral court hearing principle (in civil law default judgments and written proceedings are allowed). A conflict with an individual's right to be tried in his or her presence is plausible (§ 24 (2) of the Constitution). For example, if a tortfeasor is judged by default on a defamation published in media, and this default judgment awards a punitive damage, then this is a case of conflict with § 24 (2) of the Constitution.

A conflict with constitutional values may, in case of tort liability, arise also from the fact that Estonian tort law assumes that the tortfeasor is liable for the damage (§ 1050 (1) of the Law of Obligations Act). This would cause conflict with the presumption of innocence of § 22 (2) of the Constitution, which provides that no one has the duty to prove his or her innocence in a criminal procedure. True, according to the Constitution the presumption of innocence only applies to criminal proceedings. The author thinks that it should apply also in cases where punitive damages are awarded under civil proceedings. However, as a rule there would be no conflict, since pursuant to § 1050 (1) the Law of Obligations Act the liability of the tortfeasor is assumed, but the intention or gross negligence (which are usually prerequisites for award of punitive damages) must be proven by the plaintiff.<sup>38</sup> Conflict with the Constitution would arise only if punitive damages were allowed also for liability independent of guilt or just light negligence.

Conflict is in principle possible also with the double jeopardy (the so-called *ne bis in idem*) principle. Pursuant to § 23 (3) of the Constitution no one can be prosecuted or punished again for an act of which he or she has been finally convicted or acquitted pursuant to law. The fundamental right that derives from the above ban secures that it is possible for an individual to know what the enforcement implications are when the offence he or she has committed is detected; it secures legal peace, and rules out the possibility that after a binding punitive decision regarding an individual he or she might be surprised with an intention to inflict additional penalty for the same act.<sup>39</sup> Conflict with the said principle may arise in case the penal code provides criminal punishment for an act and civil law allows to award of an additional punitive damage (e.g., if Estonian law allowed award of punitive damages for infringements of antitrust law, liability of producer or in case of causing a bodily injury). In case an individual is first punished pursuant to criminal procedure and then a punitive damage is awarded pursuant to civil procedure, a question might arise here whether the punitive damage is actually a second punishment in the meaning of § 23 (3) of the Constitution. Regarding the issue whether and when means of enforcement by state can be treated as a punishment in the meaning of 23 (3) of the Constitution, the Supreme Court has taken a position that this cannot be solved merely on the grounds of penal code provisions. It must be checked whether some means of enforcement by a state, which in formal penal power is treated as a punishment, should nevertheless essentially or materially be treated as a punishment. The guarantee of fundamental rights must also exist upon the application of those means of enforcement by a state, which are not provided as punishments in formal penal power, but which can materially be treated as punishments. It must thus be evaluated whether that is a punishment in its material sense, i.e., a measure applied in case of an offence, which has the nature and objective of a punishment and is sufficiently severe to be comparable to a criminal punishment in its formal meaning.<sup>40</sup> Estonian legal literature has taken the position that the possibility to apply the prohibition on business provided in § 91 (3) of the Bankruptcy Act<sup>41</sup> is essentially a side punishment in the meaning of penal power, and the application thereof under a bankruptcy proceeding may create a conflict with the § 23 (3) of the Constitution.<sup>42</sup>

A similar problem has been noticed in the European Union antitrust law: as referred to above, the European Union green paper on antitrust law<sup>43</sup> allows deliberating a possibility to foresee the so called double damages for the compensation of violations of antitrust law. However, literature has rightly noted that such a regulation may be in conflict with the *ne bis in idem* principle.<sup>44</sup> However, it is possible to award damages to compensate for the actual loss, also non-material damages for emotional distress and suffering.<sup>45</sup>

Thus, a conflict may arise with the double jeopardy clause in § 23 (3) of the Constitution in cases where the aim of a punitive damage is only to punish the injured party or deterrence. However, in defamation cases

<sup>38</sup> P. Varul, I. Kull, V. Kõve, M. Käerdi (eds.). *Võlaõigusseadus I. Üldosa* (§§ 1–207). Kommenteeritud väljaanne (The Law of Obligations Act. I General Part (§§ 1–207). Commented Edition). Tallinn: Juura 2006, p. 334 (in Estonian).

<sup>39</sup> SCebd 3-4-1-10-04. Available at <http://www.nc.ee/?id=399> (15.07.2007).

<sup>40</sup> SCebd 3-4-1-10-04 (Note 39); CrCSC 3-1-1-21-06. – RT III 2006, 20, 182 (in Estonian).

<sup>41</sup> Pankrotiseadus. – RT I 2003, 17, 95; 2006, 61, 456 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X70024K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=pankrotiseadus> (21.06.2007).

<sup>42</sup> S. Lind, R. Otsa, J. Sootak. Penalty and Other Punitive Sanctions in the Estonian and European Legal Order. – *Juridica International* 2005 (10), pp. 188–190.

<sup>43</sup> Green Paper: damages actions for breach of the EC antitrust rules. See question E, option 16. (COM (2005) 672, 19.12.2005).

<sup>44</sup> Reaction to the Green Paper on damages actions for breach of EC antitrust rules. Europe Institute, Leiden University. Available at [http://www.law.leidenuniv.nl/general/img/bvanbockel%20-%20reaction%20to%20green%20paper%20ec%20antitrust%20rules\\_tcm11-8695.pdf](http://www.law.leidenuniv.nl/general/img/bvanbockel%20-%20reaction%20to%20green%20paper%20ec%20antitrust%20rules_tcm11-8695.pdf) (21.06.2007).

<sup>45</sup> In principal the same by R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 399 (in Estonian).

it should not be possible to cause such a conflict, since defamation or insinuation are today in Estonia not punishable under criminal procedure.

Neither can one justify the principle that instead of going to state budget a fine (which in essence the punitive damage is) goes to an injured party. Thus, the injured party profits from the infliction of the damage, i.e., is at the end in a better position due to the infliction of the damage than he or she would have been had the damage not been inflicted. In Estonian law such a result would as a rule be in conflict with the provision of § 127 (5) of the Law of Obligations Act. The said principle has been criticized also in the U.S., and as a result 13 states have adopted a regulation on the transfer of a certain percentage of the awarded damage to the Treasury or the Alliance for Equal Justice.<sup>\*46</sup> This percentage varies from state to state, reaching from 30% to 75%.<sup>\*47</sup> Such a regulation where a part of a punitive damage goes not to the injured party but the state budget, further blurs the boundaries between an indemnity under private law and a fine under penal power, and is therefore extremely problematic from the constitutional aspect.<sup>\*48</sup> This is in clear conflict with the double jeopardy principle, as it involves in essence two monetary penalties, both of which, if applied, go to the state and at least the partial aim of which is deterrence and punishment. Imposing punitive damages might also be in conflict with the principle of proportionality.<sup>\*49</sup> Pursuant to the second sentence of § 11 of the Constitution restrictions must be necessary in a democratic society and should not distort the nature of the rights and freedoms restricted. The principle of proportionality is binding also to the legislator, i.e., imposition of restrictions by law should see that the established restrictions were suitable/appropriate for the desired aim, necessary and proportionate in the narrower sense (moderate). A measure is necessary, if there is no other suitable and at least similarly effective measure, which is less restrictive to fundamental rights.<sup>\*50</sup> The author is on the opinion that disproportionately large damages of primarily punitive nature awarded for defamation may unfoundedly prejudice an individual's freedom of self-expression (§ 45 (1) of the Constitution). However, § 45 (2) of the Constitution provides a qualified reservation to that end by allowing restrictions to freedom of expression in order to protect others' honour and good name. To establish whether such a restriction is constitutional, it must be inter alia taken into account that every intervention with freedom of expression must be proportional with the desired lawful aim.<sup>\*51</sup> The European Court of Human Rights has taken the stand that in certain cases damages awarded under civil proceedings may prove to be too high, or in other words it may prejudice the principle of proportionality. In *Tolstoy Miloslavsky v. United Kingdom* the European Court of Human Rights considered the indemnity of 1.5 million pounds to be disproportionately high for defamation, and found that it compromises an individual's right of free expression. It is important to mention regarding that case that the awarded damage did not even have to do with a punitive damage, it was simply an indemnity for a non-material damage, but it was still considered to be disproportionately high compared to the caused loss.<sup>\*52</sup>

## 4. Need for punitive damages in Estonian law for cases of violation of personal rights

The U.S. courts often award punitive damages for violation of personal rights, especially defamation. For severe violation of personal rights European courts generally tend to revive civil penalty: it is found that ordering tabloids, who have published fictitious interviews with celebrities in order to increase their sales, to pay just the actual damage would in essence be useless, since the actual damage is significantly less than the profit earned.<sup>\*53</sup> For example, in German courts the arguments in deliberations over the amount of damage are essentially exactly the same as in the U.S. courts, and practically similar results are attained in the final instance.

This was finely demonstrated in the comparison of two cases: the *Cher v. Forum International Ltd.* in a U.S. court and *Caroline von Monaco (Caroline I and II)* debated at the German Federal Constitutional Court.<sup>\*54</sup> Both

<sup>46</sup> R. S. Avi-Yonah (Note 10), p. 1793.

<sup>47</sup> J. Mörsdorf-Schulte (Note 4), p. 222.

<sup>48</sup> For this reason the state of Colorado once again abolished its corresponding regulation. J. Mörsdorf-Schulte (Note 4), p. 224.

<sup>49</sup> The U.S. Supreme Court has seen the same problem and ruled that extremely large punitive damages are in contradiction with the Due Process Clause. See case *State Farm Mutual Automobile Industries Comp v. Campbell* (Note 12).

<sup>50</sup> Panel of editors led by E.-J. Truuväli. *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented Edition)*. Tallinn: Juura 2002, p. 112 (in Estonian).

<sup>51</sup> *Ibid.*, p. 315.

<sup>52</sup> T. Annus. *Riigiõigus (Constitutional Law)*. Tallinn: Juura 2006, p. 315 (in Estonian); *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, application No. 18139/91. Available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Miloslavsky&sessionid=978151&skin=hudoc-en> (21.06.2007).

<sup>53</sup> C. von Bar. *The Common European Law of Torts*. München: Verlag C.H.Beck 1998, p. 629.

<sup>54</sup> Judgment of the Federal Constitutional Court of the Federal Republic of Germany of 15 November 1994. – *Neue Juristische Wochenschrift* 1995, p. 861 ff (Caroline I); judgment of the Federal Constitutional Court of the Federal Republic of Germany of 5 December 1995. – *Neue*

cases involved a situation where press violated personal rights of a celebrity by publishing fictitious interviews or statements about their personal life. A 100,000 dollar damage was awarded to Cher in a U.S. court for the violation of her personal rights.<sup>55</sup> Although the German Federal Constitutional Court avoided using the term punitive damage, the reasoning about the amount of the damage clearly indicated punitive elements. The German Federal Constitutional Court underlined that what is important in such cases is usually giving moral satisfaction (*Genugtuung*) to the injured party and that the indemnity has a deterrent function.<sup>56</sup> In the second case (Caroline II) the Court underlined that in such cases of violation of personal rights the compensation idea must retreat in front of the deterrence purpose.<sup>57</sup> The Court also found that the actions of the magazine's publisher led to involuntary commercialisation of the plaintiff with the aim to foster the publisher's economic interests, and stressed the need to avoid such activities. For that end the indemnity must be such that it would avoid future violations of the injured party's rights by the tortfeasor.<sup>58</sup> One argument that the German Federal Constitutional Court also took into account in deciding the amount of the damage was that the tortfeasor should not make a fortune at the expense of violating the injured party's rights, and that the profit made should go to the injured party, and found that only then could the deterrent function actually work.<sup>59</sup> It is clear that such an argumentation is based not only on the compensatory function of the damage, but clearly underlines its deterrent function, and thereby at least partly overlaps with the idea of a punitive damage.<sup>60</sup>

The case was sent back to the court of appeal for the final decision, which awarded Princess Caroline damages of 180,000 German marks. Let us recall that in case *Cher v. Forum International Ltd.* a U.S. court awarded the injured party 100,000 dollars — hence, the awarded amounts are more or less similar, even if the U.S. court awarded a punitive damage and the German constitutional court a regular indemnity. There was a very similar case in France in 1988, where a magazine published a celebrity's nude photographs without the individual's consent. Court awarded damages of 250,000 francs. One argument the court considered in deciding the amount of the indemnity was the benefit earned by the tortfeasor. French legal literature notes that one of the purposes of such cases is deterrence, as well as to punish the tortfeasor.<sup>61</sup>

Our question is whether the same arguments — giving moral satisfaction to the injured party, deterrence and profit-erasing — can in cases of violation of personal rights be used also in Estonian law for the determination of the amount of the damage. If so, then punitive damages need not be transposed into Estonian law, since we would use slightly different methods and reach exactly the same results as German and the U.S. courts.

It must first be noted that the author is on the opinion that the last argument — i.e., profit-erasing — should not be considered in deciding the amount of the award. Section 1039 of the Law of Obligations Act provides that the entitled person may demand that a violator who is or should be aware of the lack of justification for the violation transfer any revenue received as a result of the violation in addition to the usual value of that which is received. It applies to situations provided in § 1037 (1) of the Law of Obligations Act, i.e., an instance when one person has violated a right of ownership, **another right** or the possession of an other person without the consent of the other person. The author is on the opinion that a violation of a personal right qualifies as another right in the meaning of §§ 1037 and 1039 of the Law of Obligations Act, and the injured party could, in case of a press delict, claim that the magazine rendered the revenue earned from the publishing of the falsified interview, as unjustified enrichment on the part of the tortfeasor. It is not allowed in German law<sup>62</sup>, but that practice has been criticised in German legal literature, since it is not possible without it the actual deterrent effect on defendants of press delicts. It is noted that a claim of such unjustified enrichment is allowed for example in English and Swiss laws and that also Germany should acknowledge it in the future.<sup>63</sup> Thus, in the author's estimation, § 1039 of the Law of Obligations Act allows to claim the revenue earned by defendants of press delicts or violators of other personal rights on the basis of the unjustified enrichment regulation, and therefore the amount of that revenue should not be taken into account in the award of non-material defamation damages (§ 1043 and § 134 (2) of the Law of Obligations Act).

Which circumstances should be considered in the deliberation of a non-material damage for violation of personal rights, and what is the purpose of that indemnity? Before the entry into force of the Law of Obligations Act, the Estonian Supreme Court has taken a stand that in case of defamation the obligation to compensate non-material damage is also an expression of society's disapproval of the violator's unlawful act and a relief to

Juristische Wochenschrift 1996, p. 984 (Caroline II).

<sup>55</sup> See V. Behr (Note 20), pp. 207–211.

<sup>56</sup> Case Caroline I (Note 54).

<sup>57</sup> Case Caroline II (Note 54).

<sup>58</sup> *Ibid.*

<sup>59</sup> Case Caroline I (Note 54); case Caroline II (Note 54).

<sup>60</sup> One of the presiding judges later said in a public interview that “the indemnity must be painful to the publisher of the magazine”. V. Behr (Note 20), p. 211.

<sup>61</sup> Similar arguments can be found in Swedish, Danish, Greek and Italian decisions. U. Drobniq, C. von Bar (Note 22), pp. 130–134.

<sup>62</sup> G. Wagner (Note 3), p. 89.

<sup>63</sup> *Ibid.*, p. 90.

the injured party for the injustice inflicted, and that upon determination of the monetary indemnity amount for moral damage court must evaluate the form, extent and nature of defamation, the violator's level of liability, behaviour and attitude toward the injured party after the violation, as well as amounts of indemnities in similar cases.<sup>\*64</sup> Thus, the Supreme Court univocally finds that punitive arguments should be considered in deciding an indemnity amount for a violation of a personal right. However, the Supreme Court has taken that stand only specifically regarding violation of personal rights, not indemnification of other non-material damage.

On the other hand the Supreme Court has also admitted that not every defamation case needs a monetary compensation. Court proceedings and a relevant decision could be sufficient to remove the negative consequences caused by defamation<sup>\*65</sup> and court may deem that the moral damage inflicted by defamation is redeemable by an apology by the tortfeasor.<sup>\*66</sup> Subsection 134 (2) of the Law of Obligations Act provides a similar principle that in the case of an obligation to compensate for the damage arising from deprivation of liberty or violation of a personality right, in particular from defamation, the obligated person must compensate the aggrieved person for non-material damage only if this is justified by the gravity of the violation, in particular by physical or emotional distress. This means that lighter cases of defamation or other cases of personal rights violations should not necessarily be followed by an award of a damage for a non-material loss, it is nevertheless necessary in graver cases, where also deterrence elements should be considered in line with the decision 3-2-1-105-01 of the Supreme Court (e.g., the fact that non-material damage should *inter alia* express social disapproval and offer mental relief to the injured party). The author is on the opinion that the mere fact that one of the functions of recovering the damage under civil law is deterrence gives no basis to argue that it is a U.S. punitive damage type indemnity. The author agrees with the view that any application of liability has *inter alia* also a deterrent effect, which makes deterrence characteristic not only to penal law.

The author is on the opinion that the current Law of Obligations Act offers sufficient protection to an injured party against a press delict, by giving him or her a right to claim recovery pursuant to § 1039 of the Law of Obligations Act for the profit earned by way of a violation and pursuant to § 1043 and § 134 (2) of the Law of Obligations Act a non-material damage inflicted by defamation, whereas in the latter case the argument that an indemnity must have a deterrent function can be considered in deciding the amount of the damage. Thus, there is no need in Estonian law to give an injured party an additional judicial remedy by imposing punitive damages for cases of violation of personal rights.

It should be mentioned here that there is one more specific area in Estonia and other Continental-European countries, which in essence departs from the principle that only the actual damage is to be indemnified. Namely, claims for damages deriving from a violation of intellectual property rights are no longer strictly based on the difference hypothesis and the principle that the purpose of compensation for damage is to place the aggrieved person in the same situation in which the person would have been had the event causing the damage not occurred. In accordance with law applicable in Estonia the injured party has, in the event of a violation of intellectual property rights, the option to choose from the following methods of calculation of damages.<sup>\*67</sup>

Firstly, an injured party can claim the actual damages suffered by him or her (§ 1043, § 127 (1) of the Law of Obligations Act).

The second option is to rest on the second sentence of § 127 (6) of the Law of Obligations Act, which provides: if damages are claimed for the violation of a copyright, neighbouring right or design right, court may, if it is reasonable, award damages as a fixed amount, basing its decision *inter alia* on the amount of the fee that the violator should have paid, had he or she obtained the licence for the use of the relevant right. Thus, the second option for the injured party is to claim from the tortfeasor the payment of a hypothetical licence fee.<sup>\*68</sup> The said method of calculation is no longer strictly based on the difference hypothesis: the injured party is entitled to an indemnity in the amount of the hypothetical licence fee also in case the injured party would have never given a licence to the tortfeasor or exercised his or her rights in the economic sense.

Third, the injured party may rely on § 1039 of the Law of Obligations Act, which provides that the entitled person may demand that a violator who is or should be aware of the lack of justification for the violation transfer any revenue received as a result of the violation in addition to the usual value of that which is received.<sup>\*69</sup> This means that if a violator earned revenue from the use on another person's trademark or property right, then the injured party could recover that revenue from him or her, also in cases where the injured party would not have earned the revenue him- or herself or would not have earned it in such an amount.

<sup>64</sup> CCSCd 3-2-1-105-01. – RT III 2001, 28, 105 (in Estonian).

<sup>65</sup> CCSCd 3-2-1-11-04. – RT III 2004, 6, 66 (in Estonian).

<sup>66</sup> CCSCd 3-2-1-17-05. – RT III 2005, 18, 189 (in Estonian).

<sup>67</sup> The same options are laid down also in article 13 (1) of the directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. – OJ L 195, 2.06.2004, pp. 16–25.

<sup>68</sup> The author is on the opinion that by analogy the same principle may be used in case of violation of a person's name and image, which are legal rights in the meaning of § 1046 (1) of the Law of Obligations Act.

<sup>69</sup> CCSCd 3-2-1-124-06. – RT III 2006, 47, 397 (in Estonian).

In case of a violation of an intellectual property right, under Estonian law an author has the right to claim, in the event of violation of his or her personal rights, also compensation for non-material damage (§ 81<sup>7</sup> (1) 1) of the Copyright Act<sup>70</sup>, § 1043, § 134 (2) of the Law of Obligations Act), which in certain cases can also lead to punishing the tortfeasor or at least allows to consider penal aspects in deciding the amount of an indemnity for a non-material damage.

## 5. Conclusions

The author is on the opinion that the institute of punitive damages should not be introduced to Estonian law due to the following reasons. First, it may be unconstitutional. Application of punitive damages would in essence mean that civil courts got a possibility to impose penalties without having to follow the relevant criminal proceedings standards or institutional guarantees. This, in the author's opinion, is in conflict with the Constitution. Second, there is no actual need for the imposition of punitive damages, since in many cases, primarily in cases of defamation or violation of other personal rights, the current Estonian law has provisions to come to essentially a similar or very near result in the protection of the injured party, as is done in by means of punitive damages in the U.S.

Finally, the issue of imposing punitive damages comes primarily down to the division of tasks in society, i.e., which tasks are foreseen for the state and which not. Thus, the decisive role in deciding over punitive damages is what role the state attributes to its administrative apparatus and operations of law enforcement authorities, their aims and possibilities in deterrence and punishing a certain violation of law. In the U.S. it is considered normal and acceptable to society that injured parties essentially play the role of a private attorney general in claiming their damages. Submitting those claims serves in addition to the compensation for the actual claim also a general deterrence purpose. An example is liability of producer, where one of the main aims of punitive damages is to make producers pay more attention to product safety. In Estonia such aims have traditionally been accomplished by public law regulations and law enforcement activities, and the author thinks it would not be right to make conceptual changes to that.

<sup>70</sup> Autoriõiguse seadus. – RT I 1992, 49, 615; 2007, 13, 69 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40022K7&keel=en&pg=1&ptyyp=RT&tyyp=X&query=autori%F5iguse> (21.06.2007).