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**10 December 2018, Monday ✦ 12.30pm – 1.30pm**

(Registration starts 12.00 noon)

NUS Law (Bukit Timah Campus), Eu Tong Sen Building Level 1, Lee Sheridan Conference Room

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## **Tort Law as a Functional Substitute for Ineffective Market Regulation: Lessons from Brazilian Punitive Damages, 1988-2018**

**Speaker:** Professor Thiago Reis, FGV Sao Paulo School of Law

**Chairperson:** Assistant Professor Christian Hofmann, NUS Law

### **ABSTRACT**

As in other civil law jurisdictions, punitive damages have become a major focus of debate in Brazilian theory and practice of tort law. Today's discussion is particularly marked by a contradiction. On the one hand, as in Europe, Brazilian scholars and practitioners argue that punitive damages are incompatible with the compensatory nature of codified torts. On the other hand, and unlike in Europe, where debates turn around the non-enforceability of U.S. punitive damages awards by E.U. courts, in Brazil the main driving force pushing for punitive damages is the Judiciary itself. Since 1988, especially in consumer cases, Brazilian judges have increasingly decided, *contra legem*, that non-financial damages feature a punitive or deterrent function apart from their traditional compensatory nature. Today, litigation concerning non-financial losses accounts for approx. 10% of the collegiate decisions of Brazil's Superior Court of Justice (SCJ), which is the highest court for non-constitutional matters in the country and receives around 330 thousand new cases every year. Akin to criticism of punitive damages in the U.S., critics denounce the existence of an industry or a lottery of non-financial damages awards in Brazilian law.

What are we to make of this contradiction between law in books and law in action? What are the implications of Brazilian court rulings on non-financial damages for the coherence and predictability of private law? My research attempts to answer these questions by focusing on changes that affected both the structure and functions of Brazilian tort law under the democratic Constitution of 1988. The working hypothesis is that, by drawing on the constitutionalization of private law as an interpretive method, judges have transformed a certain field of tort law into a functional substitute for ineffective market regulation. This transformation is twofold: on the structural level, constitutionalization meant flexibilization of classic tort law categories such as fault, causality, liability and harm, leading to greater judicial discretion and uncertainty; on the functional level, by affirming the punitive character of damages, judges responded to the abuse of economic power in key economic sectors such as banking, telecommunications, transportation and energy. An empirical study of Brazil's SCJ collegiate decisions between 2003-2018 indicates a correlation between poor regulation enforcement in these sectors and the increase of punitive damages awards by the Brazilian Judiciary. Especially the banking sector, well-known for its high market concentration rates since monetary stabilization in 1993, has attracted considerable attention – and punishment in the form of non-financial damages – from the Judiciary. By focusing on the Brazilian interpretation of punitive damages, my research sheds light not only on the relation between private law and its institutional infrastructure, but also on the challenges faced by developing countries in enforcing market regulation and promoting competition.

### **ABOUT THE SPEAKER**



Thiago Reis is a Professor at FGV São Paulo Law School since 2013, where he teaches private law, legal history and legal theory. After graduating from law school in Brazil, he earned his Doctorate degree from the University of Frankfurt in 2011. His dissertation on Friedrich Carl von Savigny's legal theory was awarded the Walter Kolb Memorial Prize 2012 for distinguished academic work. He was a postdoctoral fellow at the Max Planck Institute for European Legal History in Frankfurt in 2012-2013 and a Visiting Professor at the University of Florence in 2018. Apart from tort law, he is currently working on a legal history project called "Legal realism and political corporatism", which focuses on the relationship between law, capitalism and authoritarian rule in Brazil under Vargas, 1930-1945.

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### **REGISTRATION**

There is no registration fee for this seminar, but seats are limited.  
Light refreshment will be provided on a first-come, first-served basis.  
To register, go to <https://tinyurl.com/y7vrlfd9> or scan the QR code  
Closing Date: **05 December 2018, Wednesday**  
For enquiries, please contact Atikah Shaftee at [rescle@nus.edu.sg](mailto:rescle@nus.edu.sg)

