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LEGAL MICROSYSTEMS: A LUSO-BRAZILIAN PERSPECTIVE (?)

O DIREITO DAS RELAÇÕES PRIVADAS DOS MICROSSISTEMAS JURÍDICOS: UMA PERSPETIVA LUSO-BRASILEIRA (?)

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RESUMO

A uma sociedade complexa corresponde uma ordem jurídica complexa. Sendo certo que o movimento recodificador foi questionado nos anos setenta, por Natalino Irti, num texto clássico relativo à "idade da descodificação", a verdade é que a prolifera-ção de leis especiais aglomeradas em verdadeiros microssistemas ou Estatutos, que englobam normas de vários ramos de direito, constitui uma realidade que, ainda hoje, e após a confirmação da existência de um movimento de recodificação, se mantém no Brasil. A propósito da participação do autor num módulo de pós-graduação relativo ao "Direito das Relações Privadas dos Microssistemas Jurídicos", na Escola Superior de Magistratura Tocantinense, surgiu este texto, em que se afere a relevância dos microssistemas no direito brasileiro e se procuram reflexos dessa rea-lidade no direito português. Encontram-se diferenças assinaláveis nesta matéria, que resultam da diferente "arquitetura" de ambas as ordens jurídicas.

Palavras-Chave: Direito; Microssistemas jurídicos; Luso-brasileira.

ABSTRACT

A complex society demands a complex legal system. Although the recodification movement was questioned in the 1970s by Natalino Irti, in a classic book on the subject, the truth is that the proliferation of special laws agglomerated in true microsystems or Statutes, which include rules of various branches of law, is a reality that, even today, exists in Brazil, after the recodification movement has occurred. This text was written on the occasion of the author's participation in a postgraduate module on "Legal Microsystems", at the Superior School of Magistrature of Tocantins. The author analyses the relevance of the microsystems in Brazilian law and concludes that, in Portuguese law, this reality does not exist in the same way. The striking differences in this matter result from the different "architecture" of both legal systems.

KEYWORDS: Law; Legal microsystems; Luso-brazilian.

1 INTRODUCTION

I recently had the opportunity to participate in the Lato Sensu Post-Graduate course in Private Law at the Escola Superior de Magistratura Tocantinense. It was an invitation that I gladly corresponded to, but the challenge was greater, taking into account the topic to be addressed: "The Law of Private Relations of Legal Microsystems". As this is a terminology that is not used in the Portuguese legal system, the first question I was asked was to identify the concept of microsystems and to assess the existence of microsystems in Portuguese law. This is the subject that I propose to address in this text, analyzing the issue in Brazilian law and seeking to gauge its impact on Portuguese law. It should be noted that microsystems are also known as Statutes or even Minicodes.

Before moving towards a framing of the issue in Brazilian law, it is necessary to look at the Italian legal order, where the idea of a microsystem arises, particularly by the hand of Natalino Irti[1].

2 THE "AGE OF DECODING" IN THE IRTI CHRISTMAS VISION

For this author, we cannot go back to "the world of yesterday", since the powers of our time - politics is understood, just as the ideology underlying the codes of the 19th century was political - cannot be enclosed within the stable limits of codes[2]. The "age of decoding" and the fragmentation of the legal order into microsystems emerge, leaving the Civil Code relegated to a function of "residual right", disciplining cases not contemplated by particular norms. "It is not so much true that the special laws develop the criteria set forth in the Code as that the Code integrates and completes the provisions of the special laws "[3]. Between the two great wars, "to the realm of immutability and of the lasting happens the nervous "historical acceleration". Faced with the multiplication of special laws, the codes assume a different function, no longer representing the exclusive and unitary right of private relations, but rather a common law, that is, the discipline of broader and general situations[4]. In this period, which can be said to be of transition, the Italian Civil Code of 1942 emerged, which substantially maintained the tradition[5].

The appearance of the Republican Constitution on January 1st, 1948 constituted a fundamental change in the Italian legal system, which could not fail to have consequences in the Civil Code itself. Despite maintaining the eighteenth century tradition of political and civil liberties, through Catholic and socialist influence, new figures are added to the traditional list of rights, with a view to enhancing human rights and economic and social relations. The citizen is no longer seen only as an individual, but also as a member of intermediate groups. This new backdrop to the Italian legal system has led to an acceleration in the pace of production of special norms to meet this new quality of the individual. The Constitution assumes an influence on the content and form of ordinary legislation[6].

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[1] Cfr. Natalino irti, «L'Etádelladecodificazione» Vent'anni dopo, Milano, Guiffrè, 1998. Todas as citações textuais desta obra correspondem a traduções realizadas por mim.

[2] Cfr. Natalino Irti, op. cit., p. 12.

[3] Natalino Irti, op. cit., p. 40.

[4] Irti aponta a falência das tentativas de penetrar no velho edifício do Código Civil, dando como exemplo a experiência italiana da reforma do Direito da Família, em 1975, visto que foi introduzida no Código Civil de 1942 uma lógica diversa, com um novo léxico jurídico, que suscitou antinomias interpretativas. Assim, estas novidades, ou criam conflitos insanáveis entre princípios, ou perdem a singularidade da sua lógica nas antigas estruturas do Código (op. cit., p. 48). Pelo contrário, Irti aponta como exemplo de um microssistema autónomo e separado as leis especiais em matéria de arrendamento (op. cit., p. 105 e ss).

[5] Natalino Irti, op. cit., pp. 26-29.

[6] Natalino Irti, op. cit., pp. 29-30 e 68.

With this in mind, it is particularly in the field of special laws that one will feel the constitutional influence, whose ideology contrasts with the patrimonialism still underlying the Civil Code of 1942[7]. Such laws regulate matters and relations previously provided for in the Civil Code, which is being emptied of content. The so-called special legislation consolidates and expresses principles that acquire a general scope and is not limited to being a mere development of the general discipline provided in the Code. Autonomous logics and organic principles emerge, which first oppose those established in the Civil Code, and end up supplanting them completely". A phase of conflict is followed by a moment of prevalence and substitution. In this new context, it becomes necessary to rethink the problem of systematic interpretation and the juris analogy, in particular, considering that, once the Civil Code was removed from the center of private law, special laws became "the general law of an institute or of a matter in its entirety" forming true "group statutes". In this scenario, the protection of the status, i.e., the position of the individual in the various social communities, is achieved through what is negotiated with the public authorities. Therefore, the individual is no longer "alone and undressed" before the public authorities, but takes refuge within the group, depending on the capacity of pressure and threat that such group constitutes for the aforementioned powers[8]. The principle of equality does not lead to uniformity, but to differentiation, taking into account the qualities of the subjects and their economic singularities. Crushed as legal institutes, the traditional figures decompose. Thus, there is no longer one property, but several properties; there is no longer a lease, but several leases; the sale multiplies in sales etc[9].

In this new period, the Civil Code no longer has any "constitutional value" and, outside the legitimacy of the Constitution itself, there is no other way to establish the unity of legal treatment and to protect concrete equality among citizens than a rigorous system of power relations between the State and the power of groups. For this reason, and more broadly, one can say that the problem of the Civil Code is one of power; the crisis of the "centrality" of the Civil Code being a reflection of the crisis of the modern state and the emergence of groups and economic categories of elites that require specific legal statutes[10]-[11]. Consequently, laws that arise with an exceptional and provisional nature acquire unexpected stability. Around them emerge other laws that complete their discipline, thus giving rise to a microsystem, that is, "a small world of norms" from which the interpreter can draw general principles and in which he can discover an autonomous logic. In this context, as already mentioned, the Civil Code ceases to assume a general law function and becomes a residual discipline. For Irti, our time is not one of new

[7] "O Código Civil, já com seis anos, pertence ao passado: a legislação especial constitui um instrumento necessário e inerradicável que implementa os princípios da Constituição para institutos individuais ou para categorias de interesses. A especialidade assume um novo significado: não mais o desenvolvimento dos critérios já acolhidos no Código Civil, ou introduzidos pelo legislador ordinário, mas realização de princípios constitucionais. Não mais uma relação de género e espécie, mas de programa em execução. Agora, as normas especiais caraterizam-se como normas implementadoras de princípios constitucionais. Na hierarquia das fontes, normas do Código Civil e normas especiais, enquanto normas ordinárias, ocupam o mesmo grau; no aspeto histórico - político, umas encontram-se aquém e outras além da entrada em vigor da Constituição. Se a sequência diacrónica é Código Civil – Constituição – normas especiais somente estas últimas podem implementar os princípios da Carta republicana" (Natalino Irti, op. cit., p. 75).

[8] Natalino Irti, op. cit., pp. 39-41.

[9] Natalino Irti, op. cit., p. 95

[10] Veja-se que a palavra privilégio vem, precisamente, de privuslex, ou seja, lei privada.

[11] Natalino Irti, op. cit., pp. 42, 44 e 49.

codifications or general reforms. The Civil Code will remain only the old institutes, such as the testamentary succession or certain aspects of the Law of Obligations or Rights in Rem[12].

In the process that has been described, the special norms do not correspond to a realm of arbitrariness, but to the appearance of new "logics of sector". These are consolidated into sets of special norms, which, addressing particular legal institutes or certain classes of relations, have principles in common. These are not subsystems, since they imply a logic of subordination. On the contrary, we are dealing with intersystems, that is, relationships between systems of standards defined on the basis of their content. The unity of the legal system is being lost with this fragmentation[13]. The Civil Code becomes a system among other systems and the legal order evolves from a monosystem to a polysystem, whose unity is guaranteed by the Constitution[14]. The Constitution introduced an element of certainty and stability into the system. "Yesterday's certainty was based on what the norm said; today's certainty, on what the ordinary norm cannot say (due to the control of constitutional legitimacy) "[15].

In this new face of the legal order, the role of the lawyer also changes: he is called to the task of exegesis and construction of microsystems. The stability of the Civil Code has made it possible to consider the age of exegesis to be over, fundamentally revealing the systematic construction; on the contrary, the special norms imply a daily task of technical reading. The jurist appears as a "technician of the microsystems: exegete and organizer of a set of special norms". The construction of micro-systems must start with the Civil Code, since it is still the "richest and most refined arsenal of legal instruments"[16]. This return to exegesis constitutes "the most series and conspicuous consequence of the unity crisis". In a rigorous experimentalism, the jurist exercises the exegesis of laws, then trying to establish logical connections between norms and groups and norms; this being aware of the relentless change of norms and the historical relativity of legal concepts[17].

In a polysystem, the problem of how to solve the succession of a general to a special standard becomes particularly relevant: if, on the one hand, according to the chronological criterion (lex posterior derogat priori), the general posterior standard should prevail over the previous special standard; according to the specialty criterion (lex posterior generalis non derogat priori speciali), the previous special standard should retain its effectiveness[18]. Taking into account that the qualification of a norm as special translates a relational attribute, the change of one of the conflicting norms will imply a change of the other norms of that relationship. In this sense, the successive general norm can only be qualified as such in relation to the previous special norm and vice versa. For this reason, a previous special rule that provides in a sense contrary to the subsequent general rule will logically assume the qualification of an exceptional rule. If the subsequent general rule indicates a closed number of exceptions, then the previous special rule (converted into an exceptional rule) will be revoked.

[12] Natalino Irti, op. cit., pp. 46-48.
[13] Natalino Irti, op. cit., pp. 70-72.
[14] Natalino Irti, op. cit., p. 76.
[15] Natalino Irti, op. cit., p. 96.
[16] Natalino Irti, op. cit., pp. 98-99.
[17] Natalino Irti, op. cit., p. 182.
[18] Trata-se de uma questão que assumiu particular importância no direito brasileiro no que se refere à relação entre o CCB de 2002 e o Código de Defesa do Consumidor, que lhe é anterior.

In any case, except for the latter, the succession of a general rule to a previous special rule will be resolved on the basis of the criterion of speciality: the special law, even if previous, derogates from the general law, even if later[19].

Equally relevant in the polysystem is the way conflicts between general principles are resolved. Thus, for example, while the Civil Code establishes the principle of freedom in determining prices, special laws enshrine the principle of heteronomic determination of these, through an administrative authority. Traditional doctrine resolves the conflict by the technique of exception, denying the rule outside the Code the ability to express a general principle, which translates not into the resolution of the problem, but in its denial. The controversial conception sees this conflict as a sign of a fruitful movement and creative crisis, and the issue is overcome on the basis of diverse criteria: from the identity or diversity of the matters regulated, to recourse to superior norms of a constitutional nature[20].

For Mário Luiz Delgado[21], Natalino Irti's thesis is understandable considering the period in which it was conceived, that is, 1978. At that time, the dispersion of sources allowed and sustained this vision and the strength of the recoding was not even on the horizon, especially considering the 2001-2002 reform of the BGB. The movement was precisely in the opposite direction to that recommended by Irti: the Civil Code absorbed matters previously dealt with in special laws v.g. as occurred with the matter of Consumer Law, absorbed by the BGB. And even if such absorption does not occur, the Code establishes principles or general clauses that allow the integration and interaction of the system. The same occurred with the Brazilian Civil Code[22], of 2002, which again regulated matters that were previously regulated in special legislation (e.g. stable union, fiduciary alienation, limited liability companies, etc.) and which also introduced clauses of systematic integration in several matters (e.g. objective civil liability, Consumer Law, personality rights, Corporate Law, etc.). This Code has also tacitly repealed several special laws.

In my opinion, Natalino Irti's thesis is a fundamental contribution to the understanding of the complexity of the different legal systems today. The thesis "is based like a glove" on the Brazilian legal system. Although, as I will mention in the following point, the existence of a recoding movement can be pointed out, this thesis had the merit of pointing out that the "rules of the game" have changed irreversibly, having operated a Copernican revolution at the center of the legal order. And if his thesis has been contradicted, to a certain extent, by reality, regarding the future of the legal order - according to Irti, codification would constitute an outdated phenomenon - it has not ceased to be confirmed elsewhere, when one takes into account the importance of the

[19] Natalino Irti, op. cit., pp. 79-81.

[20] Natalino Irti, op. cit., pp. 184-185. Trata-se de uma questão que aponta no sentido do diálogo das fontes tal como preconizado no Brasil por Cláudia Lima Marques, na sequência das ideias defendidas por Erik Jayme (cfr. o ponto n.º 5 deste estudo).

[21] Mário Luiz Delgado, Codificação, descodificação e recodificação no direito civil brasileiro, São Paulo, Editora Saraiva, 2011, pp. 247-248. Também Paulo Lôbo salienta que as teses de Natalino Irti foram, em certa medida, negadas pela própria realidade da recodificação [cfr. "Novas perspectivas da constitucionalização do direito civil", disponível em: https://jus.com.br/artigos/25361/novas-perspectivas-da-constitucionalizacao-do-direito-civil (consultado a 8-07-2019),em particular, cfr. o ponto n.º 3 ("Críticas à constitucionalização do direito civil"]. Cfr., igualmente, António Menezes Cordeiro, ao salientar que, apesar de ter sido proclamada a idade da descodificação "a Ciência do Direito continental retomou, todavia e com alguma facilidade, o seu ascendentes sobre o Direito e a produção de leis", o que afastou "um pensamento de tipo cético e pessimista, que punha em dúvida a valia do pensamento abstrato e sistemático, de saber transcendental, ancorado na dupla Kant/Hegel", [cfr. Tratado de Direito Civil, I – Introdução, fontes do direito, interpretação da lei, aplicação das leis no tempo, doutrina geral, 4.ª edição (reformulada e atualizada), Coimbra, Almedina, 2012,p. 149].

[22] De agora em diante mencionado como CCB.

differentiation process existing in the current legal order, translated into special laws that have been consolidated, and that constitute true microsystems, alongside the macrosystem that the Civil Code represents. It seems to me, in short, that if a certain recoding movement is undeniable, so is the existence of legal microsystems.

In Brazil, the reality of microsystems is quite clear, constituting a rich field of analysis. However, the difference between the "political value" of the 1942 Codice Civile - "which is a law identified with the Italian cultural reality, and which has remained intact and adapted despite the constant constitutional and political crises in Italy - and the reduced "political value" of the Brazilian Civil Code (CCB) of 2002 - "projected during the Brazilian military dictatorship, in the face of the normative force of the democratic Brazilian Federal Constitution," should be noted[23]. Taking this caveat into account, Cláudia Lima Marques[24] understands that Natalino Irti's lesson can serve as inspiration; in particular, the ideas of "centrality, subsidiarity and plurality". The analysis of the problem of legal microsystems in Brazilian law calls for several issues:

a) What is the form of articulation between the microsystems and the Brazilian Civil Code?

b) What is the importance of the Civil Code in Brazilian law?

c) What is the role of the Federal Constitution in Brazilian private law?

d) What guidelines should Brazilian judges follow to deal with the complexity of Brazilian law?

This is the thread that will guide me in an analysis of the matter in Brazilian law. However, it remains to be seen that the study I made of the ideas of Natalino Irti will have already provided some clues for the resolution of the issues in question.

3 THE CYCLICAL CRISIS OF ENCODINGS AND MICROSYSTEMS IN THE BRAZILIAN LAW[25]

The evolution of law is always marked by cyclical and alternate movements of concentration and fragmentation of sources. Using Hegelian terminology, a thesis implies an antithesis, so that, in the end, we have the synthesis. This movement is proven by history, if we take into account the eighteenth-century codification process that followed the decline of codification in the twentieth century; finally, in the last decade of the twentieth century and the beginning of the twenty-first century, there was a new breath of codification with the Quebec Civil Code (1991), the Dutch Civil Code (1992), with the reform of the BGB (2001), and with the discussion around the elaboration of a European Civil Code[26].

Like any human being, it is also part of the nature of a Code that, as soon as it comes into force, begins to age, to one day die. It is the inevitable evolution of society that dictates it, taking into account that the Law exists to be applied, and not to be enclosed in books. The emergence of new issues implies the need for diplomas located outside the Codes. From a certain moment, the systematization that the Code implies begins to be questioned due to the excessive dispersion of legal texts, and all this generates legal insecurity. In particular, in contemporary society, marked by

[23] As palavras são de Cláudia Lima Marques, "Superação das antinomias pelo diálogo das fontes: o modelo brasileiro de coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002", Revista da Escola Superior de Magistratura de Sergipe, n.º 7, 2004, pp. 15-54, em particular, p. 18. Também Menezes Cordeiro salienta que, enquanto alguns autores brasileiros aplaudem o CCB, outros consideram-no "prematuramente envelhecido" (cfr. Tratado de Direito Civil, I – Introdução, fontes do direito, interpretação da lei, aplicação das leis no tempo, doutrina geral, p. 154).

[24] Cláudia Lima Marques, ibid.

[25]

[26]

a dynamic and plurality in its relations, this movement is accentuated. Once the process has reached a certain point, order is sought again, and a movement of recoding emerges. Of course, as I mentioned in the previous point, in this process, the appearance of microsystems will not be erased - or, at least, totally erased - by this eventual recoding. It is also possible to give the appearance of consolidations - that is, the alteration of the existing texts and union in a single text - as occurred in Chile or France.

In this movement, the first step, as I mentioned, is the process of aging the codes. As it happens in relation to people, the aging of codes does not happen in a uniform way either, everything depends on their permeability to social changes. At times, the legislator himself chooses to enshrine "open areas", real gaps perhaps, to allow the Codes to adapt to society. In this context, we can point out the importance of general clauses and undefined concepts[27]. In this regard, the great Master Baptista Machado tells us that: "the legal order needs to be based on clear concepts and on a conclusive systematic framework in order to guarantee legal security or certainty. But also, on the other hand, and especially in the present times, it needs to be open to the change of social conceptions and to the changes in life brought about by technical society - that is, it needs to adapt itself and to make itself permeable to its own ethical-social foundations". Thus, indeterminate concepts and general clauses emerge that "constitute, so to speak, the shaky and absorbing part of the same ordering, while serving to adjust and evolve the law in the sense of bringing it to meet the changes and particularities of life situations[28].

Thus, for example, although there is no divorce on request in Portugal, in the reading of most of the doctrine, article 1.781, d), of the Civil Code by Portuguese, determines[29] as grounds for divorce without the consent of one of the spouses: "any other facts which, regardless of the fault of the spouses, show the definitive rupture of the marriage. This is a general clause. On the other hand, it results from article 1.906/1 CCP that: "Parental responsibilities in matters of particular importance to the life of the child are exercised in common by both parents under the terms in force in the continuity of the marriage, except in cases of manifest urgency, in which either parent may act alone and must provide information to the other as soon as possible". We are clearly faced with the use of undetermined concepts. In fact, one of the characteristics of Portuguese Family Law in the 21st century is precisely the use of indeterminate concepts[30].

Examples of codes that have aged because they have these characteristics are the BGB and the Swiss Civil Code. The Brazilian Civil Code also has these characteristics, which will allow you to age. In the implementation of the general clauses and undetermined concepts, the judge must comply with the constitutional and infra-constitutional principles.

Under the Brazilian Civil Code of 1916, the code was the "center of gravity" of private law: a true monosystem, which took to the extreme the dogma of the plenitude of the legal system. As we have seen, the evolution of society changed this situation, with the Code constituting just one more element of a complex legal system, that is, one more system in the context of a polysystem,

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[27] Aspecto salientado por Gustavo Tepedino, "O Código civil, os chamados microssistemase a Constituição: premissas para uma reforma legislativa", in Gustavo Tepedino (Org.), Problemas de direito civil-constitucional, Rio Janeiro, Renovar, 2000, pp. 1-16, em particular, pp. 10-11,disponível em: http://www.tepedino.adv.br/wpp/wp-content/uploads/2017/07/Codigo_civil_chamados_microssistemas_constituicao_fls_0001-0016.pdf (consultado a 4-7-2019).

[28] Para ambas as citações, cfr. João Baptista Machado, Introdução ao Direito e ao Discurso Legitimador, Coimbra, Almedina, 2000, p. 113.

[29] De agora em diante mencionado como CCP.

[30] Nesse sentido, cfr. Jorge Duarte Pinheiro, O Direito da Família Contemporâneo, 6.ª edição, Lisboa, Associação Académica da Faculdade de Direito de Lisboa, 2018, p. 56.

fragmented by a plurality of autonomous statutes, directly connected with the Federal Constitution. This plays a central role in the reunification of the system in interpretative terms, a clue already left in Irti's theses[31].

In the words of the Brazilian doctrinator Francisco Amaral[32]: "if codification is a historical synthesis, decoding represents an antithesis. If codification is the result of European rationalism, the current era, which began with the tide of special and extravagant legislation in the first decades of the century, represents the movement and plurality in law, proving the crisis of the systematic unity of civil law, if not the very refusal to the idea of a system. The Civil Code no longer guarantees the unity of private law, leaving the central position it held and passing the center of civil power to the Constitution itself, now the axis around which the entire legal system of Brazilian society gravitates. No longer the monosystem regime, under the aegis of the unitary Civil Code of the liberal era, which expressed a comprehensive view of society, but the polysystem, as a plurality of legal nuclei that represent the fragmentation of this unity, each with its own principles and interpretative logic. The State, as a spectator that it was in modern times, becomes the protagonist, and the civilist, who used to be the encyclopedic scholar of private law, now appears as a sector specialist, as a technician of microsystems or special laws, as a secondary character". Words in which one sees the clear echo of Irti's ideas!

In several areas, the Brazilian Civil Code of 1916 proved inadequate:

- to the protection of the environment, which has suffered damages with the progress in the industrial area, not showing the Law of Things, nor the regime of civil responsibility, able to give adequate answers to the concrete environmental needs, with diffuse interests, collective damages and anonymous agents;
- consumer relations, where the contractual freedom of the economically stronger would jeopardize any parity;
- labor relations, previously subsumed to the discipline of service provision;
- d) the new typical contractual relationships, which required their own regulations that did not fit into the framework of the old code (e.g. bank contracts, franchising etc)[33]

And precisely in view of this inadequacy, several legal microsystems are beginning to proliferate, in the form of autonomous Statutes: v.g. Agrarian Law, Labor Law, Social Security Law, Corporate Law, Banking Law, Notarial Law, Competition Law and, more recently, Consumer Law and Environmental Law.

As Mário Delgado[34] points out, these by-laws regulate entire sectors of society and cover not only civil law, but also administrative, procedural and criminal law, and are endowed with their own principles and methods of interpretation. In other words, as we have seen, they are sparse laws that meet legal particularisms, expressing the will of groups and corporations, and the protection of these groups and corporations in the polysystem depends directly on their size and degree of organization. They represent, in short, conjunctural compromises between particular interests. The definition of microsystems as "an organized set of norms, principles and rules intended to express logic and unity to the legal relations of certain groups, minorities or themes,

[31] Cfr. Gustavo Tepedino, op. cit., pp. 5 e 13.

[32] Francisco Amaral, "Transformação dos sistemas positivos: a descodificação do direito civil brasileiro", disponível em: http://www.anoreg.org.br/index.php?option=com_content&
view=article&id=398:imported_366&catid=32&Itemid=181 (consultado a 15-07-2018), ponto n.º 8 ("Conclusões. A insuficiência de razões que justifiquem um novo Código Civil").

[33] Cfr. Mário Delgado, op. cit., pp. 230-231.

[34] Mário Delgado, op. cit., pp. 231-232.

encompassing norms of material and procedural law, both public and private "seems to me happy.[35] That is, authentic legislative islands with their own legal logic. The micro-systems are distinguished from the Codes "whose features reside in a broader degree of thematic scope, but limited to a branch of legal science "[36]. Therefore, the "era of statutes" is truly announced[37].

Microsystems have the following advantages:

They give systematic treatment to institutes hitherto scattered throughout the legal system;

They generate legal security by bringing in sector-specific or industry-specific concepts and rules;

They regulate matters exhaustively, covering several branches of law;

They respond appropriately to the increasing complexity of social relationships;

They allow for faster modification of their content compared to codes;

They materialize the personalization of legal norms, which begin to consider particular aspects of legal relations[38].

As Mário Delgado[39] points out, in Brazilian Law, the trend towards decoding begins to gain ground after the 1934 Constitution, with the Mining Code, Water Code, Juvenile Code, Forestry Code, and the Consolidation of Labor Laws itself. Between 1824 and 1930, Brazil had only the Civil and Criminal Codes and the respective Codes of Procedure, besides the Commercial Code of 1850. After the 1988 Federal Constitution, the so-called Consumer Defense Code[40] (Law no. 8.078 of 1990) stands out in the sparse legislation. In the context of a reunification of the system in interpretative terms, "the validity of the Consumer Code (...) has been fruitful: the principles of objective good faith and the balance of benefits reduce the importance of individual will, in obedience with the constitutional principles of human dignity, social solidarity and substantial equality, that integrate the content of the social state of law outlined by the constituent "[41]. Besides the Consumer Protection Code, there is a range of rules that, together, make up the consumer protection micro-system[42]. In this regard, it is important to emphasize that this Code is not a true Code, particularly in view of its multidisciplinary nature.

Still as examples of microsystems, we can point out:

> a) The Child and Adolescent Statute (Law no. 8.069, 1990), which has a particularity in terms of principles, namely, the best interest of the child, and

[35] Cfr. Fernando António Sacchetim Cervo, "Codificação, descodificação e recodificação – do monosistema ao polissistema jurídico",Revista Magister de Direito Civil e Processual Civil, 58, 2014, pp. 80-86, em particular, p. 83.Disponível em: http://www.lex.com.br/doutrina_26099622_CODIFICACAO_DESCODIFICACAO_E_RECODIFICACAO__DO_MONOSSISTEMA_AO_POLISSISTEMA_JURIDICO.aspx (consultado a 04-07-2019).

[36] Fernando António Sacchetim Cervo, op. cit., p. 81.

[37] Nas palavras de Gustavo Tepedino, "A evolução do cenário económico e social passou a exigir do legislador uma intervenção que não se limita à tipificação de novas figuras de direito privado (antes consideradas de direito especial), abrangendo, ao revés, uma legislação própria, toda uma vasta gama de relações jurídicas que atingem diversos ramos de direito. Cuida-se de leis que regulamentem exaustivamente extensas matérias, e passam a ser designadas como estatutos, veiculando não apenas normas de direito material, mas também processuais, de direito administrativo, regras interpretativas, e mesmo de direito penal.
Anuncia-se, em doutrina, a era dos estatutos". O itálico é meu (cfr. op. cit., p. 4).

[38] Sobre estas vantagens, cfr. Fernando Cervo, ibid.

[39] Mário Delgado, op. cit., p. 232.

[40] De agora em diante designado Código de Defesa do Consumidor.

[41] Nas palavras de Gustavo Tepedino, op. cit., p. 13.

[42] Cfr. Mário Delgado, op. cit., p. 235.

specific institutes, such as the socio-educational measures, foreseen in article 112; assisted freedom, in article 118; semi-freedom, in article 120, etc;

b) The Statute for the Elderly (Law nº 10.741, of 2003), which brings some institutes of its own, such as free interurban transportation, if very special conditions are met, present in article 39 and following, as well as accessibility to leisure with specific requirements for its exercise;

c) The Racial Equality Statute (Law No. 12288 of 2010); d) The Youth Statute (Law No. 12852 of 2013) etc;

d) The Youth Statute (Law No. 12,852 of 2013) etc.

This multiplication of sparse texts was one of the dominant characteristics of the legislation that existed before the Brazilian Civil Code of 2002 came into effect, generating numerous antinomies with the codified law. As Mário Delgado[43] states so emphatically, the former civil law specialists are slowly being transformed into specialists: family law specialists, contract law specialists, consumer law specialists, juvenile law specialists, agrarian law specialists, environmental law specialists, copyright specialists, real estate law specialists, banking law specialists, corporate law specialists, etc. For the same author, this reality reached its peak between 1988 and 2002 and will only be surpassed, as is already happening, by the dialog between the microsystems and the Brazilian Civil Code, with the Federal Constitution as a backdrop.

4 THE IMPORTANCE AND CONSEQUENCES OF THE CONSTITUTIONALIZATION OF BRAZILIAN PRIVATE LAW

The constitutionalization of civil law has also played a relevant role in Brazilian law, giving the "coup de grâce" to the Brazilian Civil Code of 1916. It is a reality that demonstrates that Brazilian civil law today is part of a "hyper-complex system", which has the Federal Constitution at its apex[44].

It is curious to verify that even the Brazilian Civil Code of 2002 consecrates a patrimonial approach, which is also in contrast with the personal matrix of the Federal Constitution (human dignity). This, in any case, constitutes the "lens" through which the entire reading of the Brazilian legal system is performed[45]. Since the Brazilian Constitution of 1934, there has been a fundamental change, since it no longer refers only to the organization of the State and the protection of the individual against political power, but also to topics that were previously found only in the Civil Code, such as property, contracts and the family. As described by Natalino Irti, the same process occurred in Italy, with the Constitution of 1948, whose democratic character generated difficulties of articulation with a Civil Code still from the time of fascism. In Brazil, this situation reached its peak with the 1988 Federal Constitution, giving impulse to a new doctrinaire current that is conventionally called Constitutional Civil Law[46]-[47].

[43] Mário Delgado, op. cit., pp. 236-237.

[44] Utilizando uma expressão feliz de Paulo Lôbo, op. cit., ponto n.º 8 ("Imprescindibilidade da constitucionalização do direito civil").

[45] Mário Delgado utiliza, precisamente, a expressão "lentes da Constituição" (op. cit., p. 243).

[46] Cfr. Mário Delgado, op. cit., pp. 237-239.

[47] Segundo Mário Delgado (op. cit., p. 239), no Brasil, esta corrente foi capitaneada por:
Gustavo Tepedino, no Rio de Janeiro; Luiz Edson Fachin, no Paraná; Paulo Luiz NettoLôbo, no Recife; João Baptista Villela, em Mina Gerais; Junqueira de Azevedo e Renan Lotufo, em São Paulo. Segundo Paulo Lôbo "A constitucionalização do direito civil, no Brasil, é um fenómeno doutrinário que tomou corpo, principalmente a partir da última década do século XX, entre os juristas preocupados com a revitalização do direito civil e sua adequação aos valores que tinham sido consagrados na Constituição de 1988, como

The process of constitutionalization of private law is not only reflected in the constitutional treatment of certain matters traditionally reserved to the civil orbit, but also in the idea of a direct application of constitutional principles and fundamental rights set forth in the Constitution to the horizontality of private relations[48]. For some scholars, this process marks the end of the opposition between public law and private law, since Law aims at a single objective: to discipline human collaboration, so that everyone can be assured a dignified life and existence[49]. The reflection of the "lenses of the Constitution" throughout the Brazilian legal system also implies a "repersonalization" of all civil law, in a new anthropocentric conception of private law. We are far from the patrimonialism of the 19th century codes, still present in the Italian Civil Code of 1942. In these new times, the dignity of the human person assumes a central role in the construction of the legal system. It is from this viewpoint that all hermeneutic activity is performed: in conformity with the Constitution and with its anthropocentric approach. There is no longer any disarticulated codification of the constitutional commandments[50]. Otherwise, the constitutionalization of civil law is not episodic, but arises as a consequence of the Social State of Law[51].

This process of constitutionalization of civil law was not exempt from criticism by the more traditional civilistic currents, as it was understood that civil law and Constitutional Law should keep their respective places. On the other hand, a trivialization of the process was pointed out, with the elevation of all civil law relations to the constitutional level. From this perspective, civil law would become a sort of appendix to Constitutional Law; however, these critical voices claim that civil law has not changed its nature and its matters should only be dealt with by the Constitution exceptionally and suppletively[52].

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expressões das transformações sociais. Disseminou-se a convicção da insuficiência da codificação, e até mesmo da superação de sua função, ante a complexidade da vida contemporânea e o advento de microssistemas jurídicos pluridisciplinares, como o direito do consumidor, o direito ambiental, os direitos da criança, do adolescente e do idoso" [cfr. op. cit., ponto n.º 2 ("Desenvolvimento do tema no direito brasileiro"].

[48] No entanto, Paulo Lôbo salienta que a constitucionalização dos direitos não se confunde com a supressão de matérias tradicionais de direito privado, trasladadas para o âmbito do direito Público, denominada publicização [cfr. op. cit., ponto nº 1 ("aspetos da constitucionalização do direito civil")].

[49] Posição defendida por Mário Delgado, op. cit., 240; embora não deixe de ser verdade que a velha dicotomia direito público e direito privado "permanece exercendo função prestante de classificação prática das matérias, à falta de outro critério mais adequado" (Paulo Lôbo, ibid.).

[50] Cfr. Mário Delgado, op. cit., pp. 242-244.

[51] Cfr. Paulo Lôbo, op. cit., ponto n.º 4 ("O direito civil no estado social"). Para este autor, numa sociedade dominada pela solidariedade social são três as caraterísticas básicas da mudança: a) a relativização dos direitos privados pela sua função social; b) a vinculação ético-social desses direitos; c) o recuo do formalismo do sistema de direito privado clássico do séc. XIX.

[52] Sobre estas críticas, cfr. Paulo Lôbo, op. cit., ponto n.º 3 ("Críticas à constitucionalização do direito civil"). A este propósito, salienta Eugênio Facchini Neto que "a constitucionalização do direito privado não implica a absorção deste último pelo direito constitucional", não se podendo ignorar "a persistência de claras distinções (embora não mais dicotómicas) entre direito público e direito privado. Por isso, "apesar do ocaso das grandes dicotomias, da inexistência de fronteiras rígidas entre o público e o privado, dos fenômenos contrapostos da publicização do direito privado e da privatização do direito público, assim como do movimento em direção à constitucionalização do direito privado, percebe-se que ainda persiste o espaço próprio do
direito privado, que não restou absorvido pelo direito constitucional. Trata-se de um direito, porém, que perdeu as suas antigas características de um direito individualista e materialista, para tornar-se mais solidário e ético, passando a ter uma verdadeira função social" (cfr "A constitucionalização do direito privado", Revista do Instituto de Direito Brasileiro, 2012, n.º 1, pp. 185-238, em particular, pp. 227, 232 e 233).

Regardless of these criticisms, the constitutionalization of civil law in Brazil is an undeniable reality. Given the importance of the Federal Constitution, several questions that I mentioned before entering into the analysis of the problem of micro-systems in Brazilian law are already being answered. In fact, in the Brazilian legal system, the Federal Constitution plays a fundamental role, since it allows an articulation between the Civil Code and the microsystems. As results from Natalino Irti's ideas, it constitutes the element of certainty and stability introduced into the legal system; its new center, which assumes a function previously assured by the Civil Code, as the heart of private Law[53]. All the institutes of private law are therefore influenced by this new heart of the legal order that the Federal Constitution represents.

In the scope of the Family, for example, and as in the Brazilian legal system as a whole, two fundamental principles stand out: human dignity and solidarity[54]. The "dignity of the human person" (Article 1, clause III) appears as a fundamental principle of the Democratic State of Law in the Federal Constitution. In its scope, the family is functionalized to the development of the dignity of the people that compose it, as an instrument of existential realization of its members[55]. This principle of human dignity is inextricably linked to the principle of solidarity (article 3, clause I)[56]. In the family sphere, the principle of freedom also stands out - particularly with regard to the establishment and termination of a family entity - as well as the principle of formal and material equality - e.g. with regard to the equality of rights between spouses or partners and between children. They also add the principles of affection, family cohabitation and the best interests of the child[57].

The Federal Constitution also has strong reflections on property[58]. Here the tension between an individualistic conception and a solidary conception can be seen with more intensity. The latter is mirrored in Article 5, Clause XXII, which guarantees the right to property, when articulated with Clause XXIII, from which results the social function of property. Thus, one can verify the presence of the solidarity dimension of the Social State, in this field, as it could not be otherwise. In

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[53] Ideia enfatizada por Mário Delgado, op. cit., p. 253; bem como por Paulo Lôbo, ibid.

[54] Sobre as fontes constitucionais de Direito da Família, cfr. Paulo Lôbo, op. cit., ponto nº 7 ("Constitucionalização dos principais institutos de direito civil").

[55] Esta importância da dignidade da pessoa humana no Direito da Família brasileiro encontra--se espelhada na Convenção Sobre os Direitos da Criança, de 1990; bem como no Estatuto da Criança e do Adolescente, do mesmo ano (artigos 4.º, 15º e 18º). Pelo contrário, embora o CCB de 2002 não faça qualquer alusão ao princípio da dignidade da pessoa humana, este não pode deixar de determinar a sua interpretação, devido à necessidade de o interpretar em conformidade com a Constituição Federal (cfr. Paulo Lôbo, ibid.).

[56] No âmbito familiar, este princípio manifesta-se no dever imposto à sociedade, ao Estado e à família, de proteção ao grupo familiar (artigo 226.º CF), à criança e ao adolescente (artigo 227.º CF) e às pessoas idosas (artigo 230 CF) (cfr. Paulo Lôbo, ibid.).

[57] Cfr. Paulo Lôbo, ibid. Segundo este autor, o princípio da afetividade encontra-se implícito na Constituição, embora esta não se confunda com o afeto, visto como facto psicológico ou anímico. A afetividade pode-se presumir, mesmo que falte o afeto e surge como o dever imposto aos pais em relação aos filhos e vice-versa, ainda que "haja desamor ou desafeição" entre eles. Por outro lado, a convivência familiar é a "relação afetiva diuturna e duradoura entretecida pelas pessoas que compõem o grupo familiar, em virtude de laços de parentesco ou não, no ambiente comum". Finalmente, o princípio do melhor interesse da criança significa
que "a criança (...) deve ter os seus interesses tratados com prioridade, pelo Estado, pela sociedade e pela família, tanto na elaboração quanto na aplicação dos direitos que lhes digam respeito, notadamente nas relações familiares, como pessoa em desenvolvimento e dotada de dignidade". Para todos estes princípios releva particularmente o artigo 227º CF.

[58] Sobre as fontes constitucionais da propriedade, cfr. Paulo Lôbo, op. cit., ponto n.º 7 ("Constitucionalização dos principais institutos de direito civil").

this field, it should be emphasized that the right of property must be compatible with the preservation of the environment (Article 225 of the Federal Constitution)[59]. The current property right does not only encompass the traditional domain over tangible things, it involves the economic activity itself, namely, corporate control, movable assets, ownership of brands, patents, biotechnologies and other intellectual properties. Several dimensions of the right to property are subject to its social function, as results from the Federal Constitution.

Finally, with regard to the contract, the Federal Constitution also has an important word[60]. The contract emerges as the form of realization of the economic order[61]. It results from the general principles of economic activity (article 170 and ss. of the Federal Constitution), that the contract is no longer seen as an agreement entered into between formally equal and autonomous individuals, as it occurred in the liberalism paradigm. Although the pacta sunt servanda rule continues to have relevance, within the scope of private autonomy, individual interests are conditioned, taking into account the material inequality of the parties. In this context, it is worth highlighting the aforementioned Consumer Protection Code, whose scope is quite vast, since its object is all the relationships that take place between end users of products and services present in the consumer market, by those that the law considers suppliers, i.e., those that develop permanent and organized activities of production and distribution of the goods in question. Also of note is the importance of the phenomenon of general contractual clauses, which implies an increased protection of the weaker contractual party.

In short, "The conceptual content, the nature, the purposes of the basic institutes of civil law, namely the family, property, and the contract, are no longer the same as those that came from legal individualism and nineteenth-century liberal ideology, whose salient features persist in civil legislation. The individual owner is no longer in the picture, to reveal, in all its vicissitudes, the human person. Affection, as an essential value of the family; the social function, as a content, and not only as a limit, of the property, in its various dimensions; the social principles and the protection of the vulnerable contracting party, in the contract emerge "[62].

5 THE "THEORY" OF THE DIALOGUE OF SOURCES AND ITS RELEVANCE IN BRAZILIAN LAW

Like a faithful guide for a Portuguese jurist venturing into the meanderings of Brazilian law, Mário Delgado does not fail to point out the next clue on the path I have been treading to understand the problem of legal microsystems in this legal system: the dialogue of sources[63]! In

[59] Nas palavras de Paulo Lôbo "O meio-ambiente é bem de uso comum do povo e prevalece sobre qualquer direito individual de propriedade, não podendo ser afastado até mesmo quando ecologicamente sustentável. É oponível a todos e exigível por todos. A preservação de espaços territoriais protegidos veda qualquer utilização, inclusive para fins de reforma agrária, salvo mediante lei" (ibid.).

[60] Sobre as fontes constitucionais do contrato, cfr. Paulo Lôbo, op. cit., ponto nº 7 ("Constitucionalização dos principais institutos de direito civil").

[61] Segundo Paulo Lôbo "a atividade econômica é um complexo de atos contratuais direcionados a fins de produção e distribuição dos bens e serviços que atendem às necessidades humanas e sociais" (ibid.).

[62] Como tão bem sintetiza Paulo Lôbo, op. cit., ponto nº 8 ("A imprescindibilidade da constitucionalização do direito civil").

[63] "Em suma, o que importa saber é apenas se a Lei Geral, no caso o Código Civil, e as Leis Especiais, guardam uma relação de coerência entre si, de modo a concluirmos que estão inseridas no mesmo sistema normativo. Ou seja, devemos examinar se existem antinomias e se tais antinomias seriam elimináveis, sem afastar-se a aplicação de quaisquer das normas. Para tanto é indispensável o «diálogo das fontes» preconizado por Erik Jayme e Cláudia Lima Marques" (Mário Delgado, op. cit., p. 252).

fact, let us recall the questions posed just before the beginning of the analysis of the problem of legal microsystems in Brazilian law:

a) What is the form of articulation between the microsystems and the Brazilian Civil Code?

b) What is the importance of the Civil Code in Brazilian law?

c) What is the role of the Federal Constitution in Brazilian private law?

d) What guidelines should Brazilian judges follow to deal with the complexity of Brazilian law?

We have already seen that the Federal Constitution today assumes a central role in unifying the Brazilian legal system, allowing an articulation between the microsystems and the Brazilian Civil Code, through its principles and rules, which determine the analysis of all sources of law, constituting the "lens" in the light of which these same sources are interpreted. Since the relevance of the Brazilian Civil Code has yet to be determined, I will now turn to the problem of the articulation of the various sources among themselves, in this "hyper-complex" legal system that is Brazilian law, in order to answer the last of the questions posed: How will the Brazilian judge be able to "navigate" in the turbulent waters of this legal order?

According to Cláudia Lima Marques[64], the dialogue of sources, recommended by Erik Jayme, allows us to overcome the classic criteria for the solution of conflicts of laws in time. These criteria presuppose the withdrawal of one of the laws - be it the previous one, the general one or the one with a lower hierarchy -, according to the criteria of anteriority, specialty and hierarchy. Through the dialog of sources, it is avoided that any of the laws in conflict be sacrificed, resolving eventual apparent antinomies. The author analyzed the issue, in particular, with regard to the articulation between the Consumer Protection Code and the Brazilian Civil Code of 2002, to conclude that the former was not revoked by the latter[65].

"Whether one accepts post-modernity or not, the truth is that in today's complex society, with decoding, topicality and micro-recodification (such as that of the CDC) bringing about a strong plurality of laws or sources, the updated doctrine is seeking harmony or coordination among these diverse norms of the legal system (conceived as a system) "[66]. The dialogue of sources intends to guarantee this harmony, suggesting new criteria for the coordination of conflicting norms in the system. One moves from a logic of "monologue", in which only one of the conflicting norms remains in the system (revocation), to a "dialog" between the conflicting norms, so that none is sacrificed. It is not, therefore, exactly a theory, but a method for the articulation of legislative sources. In this new perspective, there are three possible "dialogues "[67].

First of all, the systematic dialogue of coherence, in which, in the simultaneous application of two laws, one of them can serve as a conceptual basis for another, particularly if one of them is the central law of the system (general) and the other is a specific microsystem that is not materially complete, being only subjectively complete when it aims to protect a group of society. As an example, we have the concepts of legal entity, nullity, prescription, etc., which are not defined in the consumer protection microsystem - unlike other concepts such as supplier, service and product - and result from the Civil Code, and the entry into force of the Brazilian Civil Code from 2002 implied an updating of these concepts. Otherwise, the basic rules of the Brazilian Civil Code apply to the consumer purchase and sale, with the principles of the Consumer Protection Code; all in a dialogue of coherence).

[64] Cláudia Lima Marques, op. cit., p. 16.

[65] Cláudia Lima Marques, op. cit., p. 35.

[66] Nas palavras de Cláudia Lima Marques, op. cit., p. 43.

[67] Sobre estes diálogos, cfr. Cláudia Lima Marques, op. cit., pp. 44-46.

Secondly, there is the systematic dialogue of complementarity and subsidiarity. This translates into the possibility of a law having a complementary impact (dialogue of complementarity - it has a direct impact) or a subsidiary impact (dialogue of subsidiarity - it has an indirect impact) on the application of another law, in a sense contrary to the classical revocation or abrogation, in which one law was superseded and removed from the system by another. From this dialogue results the conclusion about the non-revocation of the Consumer Protection Code, from 1990, by the Brazilian Civil Code, from 2002, namely, due to the fact that this Code does not provide on consumer relations.

The dialogue of subsidiarity clearly results from the possibility of applying the rules of the Brazilian Civil Code to consumer relations (article 7, of the Consumer Protection Code[68]). Thus, if the solution of the Brazilian Civil Code proves to be more beneficial to the consumer, the rule originally provided in the Consumer Protection Code may be topically set aside, by applying the rule provided in the general system. That is what happened, for example, in regard to the statute of limitations, in a case in which the Superior Court of Justice set aside the five-year statute of limitations, provided in article 27 of the Consumer Protection Code, and applied the rule of the Brazilian Civil Code in effect on the date of the birth of the claim (1916), which provided for a twenty-year statute of limitations [69]-[70]. With regard to the complementary dialogue, one must bear in mind, for example, that in contracts that are consumer contracts and adhesion contracts at the same time, with regard to abusive clauses, article 51 of the Consumer Protection Code and article 424 of the Brazilian Civil Code may be applied, both for consumer protection.

Lastly, we have the dialogue of coordination and systematic adaptation, that is, the dialogue of systematic reciprocal influences. This presupposes that the Brazilian Civil Code and its norms function as a conceptual basis for the interpretation and application of the Consumer Protection Code, and also that the general law (CCB) and the special law (CDC) influence each other mutually. This dialogue implies that the way jurisprudence defines common principles or institutes of the two normative systems (CDC and CCB) can be applied in both, without prejudice to the authority of the law. Thus, the jurisprudence that is produced from the consumer protection norms also serves to interpret and apply the civil norms (transposition).

This idea of dialogue between sources gained intense relevance in the judgment of the direct action of unconstitutionality n° 2.591, in 2006, which considered, according to the Constitution, the application of the Consumer Defense Code to banking activities, notwithstanding the existence of a complementary law that regulates such relations[71]. The new logic of dialogue

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[68] Artigo 7º CDC: "Os direitos previstos neste código não excluem outros decorrentes de tratados ou convenções internacionais de que o Brasil seja signatário, da legislação interna ordinária, de regulamentos expedidos pelas autoridades administrativas competentes, bem como dos que derivem dos princípios gerais do direito, analogia, costumes e equidade".

[69] Artigo 27º CDC: "Prescreve em cinco anos a pretensão à reparação pelos danos causados por fato do produto ou do serviço prevista na seção II deste Capítulo, iniciando-se a contagem do prazo a partir do conhecimento do dano e de sua autoria".

[70] BRASIL. Superior Tribunal de Justiça. Resp nº 782.433/MG. Relatora: Ministra Fátima Nancy Andrighi. Nesta decisão entendeu-se que: "O mandamento constitucional de proteção do consumidor deve ser cumprido por todo o sistema jurídico, em diálogo de fontes, e não somente por intermédio do CDC. Assim, e nos termos do art. 7º CDC, sempre que uma lei garantir algum direito para o consumidor, ela poderá se somar ao microssistema do CDC, incorporando-se na tutela especial e tendo a mesma preferência no trato da relação de consumo. Diante disso conclui-se pela inaplicabilidade do prazo prescricional do art. 27º do CDC à hipótese dos autos, devendo incidir a prescrição vintenária do art. 177º CC/16, por ser mais favorável ao consumidor (...)". Disponível em: https://stj.jusbrasil.com.br.

[71] Disponível em: https://stf.jusbrasil.com.br

between sources provides magistrates with a method to deal with the complexity of the Brazilian legal system. In other words, it allows us to answer the question of what is the relevance of the Brazilian Civil Code from 2002. This becomes the center of the private legal system, connecting the various microsystems, but in light of the axiological framework of the Constitution. These are not new ideas, taking into account the clues left by Natalino Irti, to which he opportunely refers [72].

6 CONCLUSIVE SUMMARY WITH REGARD TO BRAZILIAN LAW

Looking at the codes and the way they are aging, which encourages the emergence of microsystems (special laws) that regulate numerous matters, we see how the Brazilian legal system has grown in complexity. Of enormous importance in this process is the constitutionalization of civil law, since the Federal Constitution emerges as the center and unifying element of the entire legal order. In addition to this aggregative power of the Constitution, the "dialog of sources" emerges as an important tool to guide the judge with regard to the relationship between the microsystems and the Brazilian Civil Code; and of these among themselves, in particular, from the perspective of the relationship between this Code and the Consumer Protection Code.

The thesis of the exclusivity of the microsystems, to the exclusion of a recodification, defended by Natalino Irti, in Italy, was denied by reality itself, which demonstrates the importance of the coordination and integration function that the Brazilian Civil Code performs and that makes it indispensable within private law. This "dwells" now in a legal system "overshadowed by the sun of the Federal Constitution", around which several legal microsystems orbit. It is from the Brazilian Civil Code that guides for the regulation and interpretation of private-law relations will emerge, referring to property, contracts, civil liability, etc. These cannot be built only on the vague constitutional principles, lacking the solidity of civil legislation. Therefore, not forgetting that the Federal Constitution is at the apex of the pyramid, even if the Brazilian Civil Code assumes a "residual" function, using Irti's terminology - and assuming that it is indeed a merely residual function - the importance of this same function should not be underestimated[73].

In short, the microsystems enrich the Brazilian legal system, in articulation with the recodification and the importance of the Federal Constitution, even in the area of private law. The dialogue of sources allows for the concretization of constitutional principles, by guiding the articulation between the Brazilian Civil Code and the microsystems and of the microsystems among themselves. As we shall see below, this whole scenario points to a legal system that is very different from the Portuguese.

7 THE PROBLEM OF LEGAL MICROSYSTEMS IN PORTUGUESE LAW AND THE DIFFERENT "ARCHITECTURE" OF THIS LEGAL SYSTEM

7.1 The creative role of judges in Portugal and Brazil and the constitutionalization of Portuguese civil Law

[72] Cfr. o ponto nº 2.

[73] Recorde-se a afirmação do próprio Natalino Irti, de que a construção dos microssistemas deve partir do Código Civil, visto que este continua a ser o mais "rico e refinado arsenal de instrumentos jurídicos" (op. cit., pp. 98-99).

Perhaps the most complex point of this study of mine is, precisely, the analysis of the problem in question in the Portuguese legal system. Therefore, its title presents a question mark: Is it possible to analyze the Law of Private Relations of Legal Microsystems from a Luso-Brazilian perspective?

A good starting point will be Menezes Cordeiro's statement[74] that, in addition to a certain underlying skepticism and pessimism, the fact that topic and rhetoric are the order of the day has contributed to the defense of a decoding, as well as the existence of a "special reverence for the apparently loose schemes of Anglo-Saxon Law" (the italics are mine). This last aspect calls the attention of a Portuguese jurist who seeks to understand the theme of legal microsystems in Brazil and Portugal, since it brings to mind the different "architecture" of the two legal systems that one intends to interpret (one looser than the other!). In this regard, Brazilian doctrine has recently pointed out the approximation that has occurred in this legal system to the common law system, particularly after the Civil Procedure Code of 2015 (Law No. 13105 of March 16th)[75] came into effect. The latter incorporated, in Brazilian law, elements of this system, particularly with regard to the rule of precedent[76]. As we have seen, in Brazilian law, the integration between the

[74] António Menezes Cordeiro, Tratado de Direito Civil, I – Introdução, fontes do direito, interpretação da lei, aplicação das leis no tempo, doutrina geral, p. 149.

[75] Nesse sentido, cfr. Lucas Alves Edmundo Gomes, "TheInfluencesofCommonLawonthe Brazilian New Codeof Civil Procedure", disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204827 (consultado a 10-7-2019). Não significa isto que o direito brasileiro se esteja a converter num sistema de commonlaw, embora se trate da conclusão a que chegam diversos estudos recentes em matéria de Direito Processual Civil [cfr. Pedro Henrique Reschke, "Porque o Brasil não está caminhando para o commonlaw e por que isso importa", disponível em: http://melloesouza.adv.br/2018/05/03/por-que-o-brasil-nao-esta-caminhando-para-o-common-law-e-por-que-isso-importa/ (consultado a 11-07-2019)].

[76] Entre os novos institutos introduzidos no direito brasileiro, temos o amicuscuriae, que foi um instituto criado no direito romano, amplamente utilizado nos sistemas de commonlaw. Este permite que pessoas e entidades que não têm interesse direito no processo possam influenciar a decisão no mesmo para o usar como um precedente no futuro. Este instituto já existia no Código de Processo Civil de 1973, no artigo 483º, mas apenas podia ser utilizado numa declaração de inconstitucionalidade, o que ocorre em poucos casos. Atualmente, a relevância do instituto no novo Código é bastante mais ampla. Assim, de acordo com o artigo 138º CPC: "O juiz ou o relator, considerando a relevância da matéria, a especificidade do tema objeto da demanda ou a repercussão social da controvérsia, poderá, por decisão irrecorrível, de ofício ou a requerimento das partes ou de quem pretenda manifestar-se, solicitar ou admitir a participação de pessoa natural ou jurídica, órgão ou entidade especializada, com representatividade adequada, no prazo de 15 (quinze) dias de sua intimação" (o itálico é meu).

Em segundo lugar, temos o uso do precedente. Trata-se de um instituto que existe no direito brasileiro desde a Emenda Constitucional nº 45/2004, que fortaleceu a jurisprudência maioritária, através da sua súmula e publicação, servindo de orientação para decisões futuras. As súmulas constituem uma espécie de sumários da jurisprudência anterior e podem ter um efeito vinculante. De acordo com o artigo 103.º-A da Constituição Federal Brasileira: "O Supremo Tribunal Federal poderá, de ofício ou por provocação, mediante decisão de dois terços dos seus membros, após reiteradas decisões sobre matéria constitucional, aprovar súmula que,
a partir de sua publicação na imprensa oficial, terá efeito vinculante em relação aos demais órgãos do Poder Judiciário e à administração pública direta e indireta, nas esferas federal, estadual e municipal, bem como proceder à sua revisão ou cancelamento, na forma estabelecida em lei" (o itálico é meu). Também o artigo 489º, § 1, V, do novo Código de Processo Civil determina que não se considera fundamentada qualquer decisão se o juiz "se limitar a invocar precedente ou enunciado de súmula, sem identificar seus fundamentos determinantes nem demonstrar que o caso sob julgamento se ajusta àqueles fundamentos" (o itálico é meu). Isto claramente aponta para a relevância do precedente. Finalmente, ainda de acordo com o artigo 489º, § 1, VI, não se considera fundamentada qualquer decisão se o juiz "deixar de seguir enunciado de súmula, jurisprudência ou precedente invocado pela parte, sem demonstrar a existência de

microsystems and the codified macrosystem is achieved through their commonalities, represented, above all, by the fundamental constitutional principles, the basis of the legal order as a whole. They are the systematic link between the Brazilian Civil Code and the statutes (microsystems). Here, the role of the judiciary is fundamental. With this in mind, an important point to grasp the problem under analysis in its entirety is to take into account the different role that jurisprudence assumes in Brazilian law - characterized by a strong judicial activism - when compared to Portuguese law. This point also shows the looser nature of the Brazilian legal system, particularly in terms of microsystems, when it comes to bringing together rules from various branches of law in a single piece of legislation.

In Portuguese law, it can be pointed out that "if it is true that jurisprudence is not a source of law, it is always a source of knowledge of the law "[77]. This, without prejudice to the fact that the judge must take into consideration all the cases that deserve similar treatment, in order to obtain a uniform interpretation and application of the law (article 8/3, of the Code of Civil Procedure), which gives rise to the constant jurisprudence.

In order to avoid contradictory decisions by higher courts on the same fundamental question of law under the same applicable law, a uniform jurisprudence arises[78]. However, it does not have

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distinção no caso em julgamento ou a superação do entendimento" (o itálico é meu). Isto também aponta no sentido da relevância da regra do precedente.

Em terceiro lugar, o recurso especial constitui outro exemplo de aplicação de um instituto de commonlaw no direito brasileiro. Segundo o artigo 105, III, da Constituição Federal Brasileira: "Compete ao Superior Tribunal de Justiça: III - Julgar, em recurso especial, as causas decididas, em única ou última instância, pelos Tribunais Regionais Federais ou pelos tribunais dos Estados, do Distrito Federal e Territórios, quando a decisão recorrida: c) Der a lei federal interpretação divergente da que lhe haja atribuído outro tribunal" (o itálico é meu). Ainda sobre o recurso especial diz o artigo 1.029.º do CPCB: "O recurso extraordinário e o recurso especial, nos casos previstos na Constituição Federal serão interpostos perante o presidente ou o vice-presidente do tribunal recorrido, em petições distintas que conterão: § 1o Quando o
recurso fundar-se em dissídio jurisprudencial, o recorrente fará a prova da divergência com a certidão, cópia ou citação do repositório de jurisprudência, oficial ou credenciado, inclusive em mídia eletrônica, em que houver sido publicado o acórdão divergente, ou ainda com a reprodução de julgado disponível na rede mundial de computadores, com indicação da respectiva fonte, devendo-se, em qualquer caso, mencionar as circunstâncias que identifiquem ou assemelhem os casos confrontados" (o itálico é meu).

Por último, tenha-se presente o agravo em recurso especial e em recurso extraordinário. Nos termos do artigo 1042.º CPC: "Cabe agravo contra decisão do presidente ou do vice-presidente do tribunal recorrido que inadmitir recurso extraordinário ou recurso especial, salvo quando fundada na aplicação de entendimento firmado em regime de repercussão geral ou em julgamento de recursos repetitivos" (o itálico é meu).

Conclui-se, por isso, que o direito brasileiro, especialmente após a aprovação do Código de Processo Civil de 2015, é fortemente influenciado pelo sistema de commonlaw. Isto resulta claro da maior ênfase dada ao amicuscuriae, bem como à aplicação do precedente. A relevância deste último tem vantagens, tais como a celeridade processual, bem como a segurança jurídica, contribuindo para a estabilidade do direito brasileiro.

[77] A frase é de Miguel Teixeira de Sousa, Introdução ao Direito, Coimbra, Almedina, 2013, p. 136. Sobre a jurisprudência enquanto fonte do direito no direito português, cfr., exmultis, esta obra, que constitui umas das reflexões mais recentes, bem como mais interessantes, sobre a matéria na nossa ordem jurídica, em particular, pp. 134-142.

[78] O recurso ao pleno das secções cíveis do Supremo Tribunal de Justiça, permite a obtenção dessa uniformização no Processo Civil (artigo 732.º-A e 732.º-B CPC). Esta revista ampliada pode assumir um âmbito individual e com função decisória no caso subjudice, sendo interposto pelas partes (artigo 763.º/1 CPC), ou ser interposto pelo Ministério Público unicamente no interesse de unificação do direito e sem função decisória no caso subjudice (artigo 766.º CPC). Esta uniformização de jurisprudência também se

normative value, i.e. it is not binding on the other, even inferior, courts and, therefore, it is not a source of law. In any case, it cannot be denied a special persuasive value, and it is always possible to appeal against a decision that does not follow uniform jurisprudence (e.g. article 678/2/c, of the Code of Civil Procedure)[79]. On the contrary, the settlements, as antecedents of this form of uniform jurisprudence, were sources of law. In the original version of the Code of Civil Procedure, article 2 stated that: "In the cases stated in the law, the courts may fix, by means of settlements, doctrine with general mandatory force" (the italics are mine). These were issued when it was necessary to resolve a contradiction of judgments, on the same fundamental question of law and in the same field of legislation, by means of a judgment with general binding force (article 763/1 of the 1967 Code of Civil Procedure). In the constitutional revision of 1982, the then Article 115/5, now Article 112/5, was introduced, prohibiting any law from attributing to acts of a different (judicial) nature the power, with external effectiveness, to interpret or incorporate legislative acts. In view of this precept, the Constitutional Court declared unconstitutional article 2 of the Code of Civil Procedure in the part that gave the seats general mandatory force. By means of article 4/2 of Decree-Law no. 329-A/95 from December 12th, the option of our legislator was to repeal the institute of seats.

In Portuguese law there are some situations in which jurisprudence is a source of law, as in the case of Constitutional Court decisions that declare, with general binding force, the unconstitutionality or illegality of rules (article 281/1 and 3 of the Constitution of the Portuguese Republic) and decisions by administrative courts that declare, with general binding force, the illegality of administrative rules (article 76 of the Code of Procedure of Administrative Courts).

In view of what has been mentioned, with regard to the role of judges in the creation of law, we see that there is a considerable difference between the Portuguese and Brazilian legal systems. The revocation of the institute of the seats in 1995 demonstrates, perhaps, that Portugal is moving in the opposite direction from that which we observe in Brazil, being much more conservative in its understanding of the principle of the separation of powers. In addition to the example of the seats, one can point to the special appeal that exists under Brazilian law when the decision in the case "gives a federal law a different interpretation from that given by another court" (article 105, III, of the Brazilian Federal Constitution). On the contrary, in Portugal the appeal is only allowed when there is divergence between the decision and uniform jurisprudence. Moreover, the proposal to introduce the figure of the amicus curiae was rejected in Portugal in the reform of the Code of Civil Procedure in 2013[80]. Specific points that mirror a huge practical difference, with regard to the creative role of judges, in Brazil and Portugal.

Also to illustrate this difference between the legal systems under analysis, with regard to the magistrates' creative power, he referred to the discussion that took place during the various revisions of the Constitution of the Portuguese Republic[81], particularly with regard to its article 203 ("The courts are independent and subject only to the law"). This is a theme that was studied in

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pode verificar no Processo Penal (artigo 437.º a488.º do Código de Processo Penal); bem como no Contencioso Administrativo (artigos 148.º e 152.º do Código de Processo dos Tribunais Administrativos).

[79] Cfr. Miguel Teixeira de Sousa, op. cit., pp. 140-141.

[80] Cfr. Ricardo Quintas, "AmicusCuriae no Direito Processual civil português: o enigma da esfinge de Tebas?", Revista Jurídica Luso Brasileira, 2018, 2, pp. 1115-1170, em particular, pp. 1144-1145. Disponível em: http://www.cidp.pt/revistas/rjlb/2018/2/2018_02_1115_1170.pdf. Consultado a 10-7-2019.

[81] De agora em diante designada CRP.

a doctoral thesis recently defended at the Faculty of Law of the University of Lisbon and which was the subject of heated discussion[82]. The thesis is based on the following ideas

a) Law is normativity rooted in the community, not in each individual;

b) Reconnection of the sources of law and legal method to Constitutional Law, invoking the provisions of article 203 of the Constitution of the Portuguese Republic

c) Intimate connection between democracy and separation of powers on the one hand and legalistic positivism on the other

d) Demythologization of legalist positivism, by disassociating positivism and Law from Nazi Germany, which is an example of an eminently trans-legalism-principalist Law (Law that admits other sources of law than the legal texts)

e) The reservations before the judicial trans-legalism-principalism affixed, namely, by Vital Moreira

f) The binding nature of legal rules on interpretation, taken up by Teixeira de Sousa[83];

g) The rehabilitation of historicist subjectivism operated by Menezes Cordeiro [84]-[85].

According to this thesis, Portuguese law enshrines democratic legalistic positivism, in which it is up to the legislator, legitimated by the Portuguese community, to weigh conflicting interests. This weighting gives rise to the creation of legal norms that are positively embodied in legal texts. On the contrary, it is not up to the courts to weigh principles, as is clear from the aforementioned article 203. As is also clear from this thesis, the legalistic exegetical-subjectivistic-historicist positivism has been weighed and decided by the community repeatedly since 1976, in the context of the various constitutional revisions, as can be seen from the refusal, for decades, of a right beyond the law (on the occasion of the various constitutional revisions, in parliamentary votes, it has always been refused to change article 203 by adding the word Law). In the same parliamentary votes, the courts have also refused to enforce the dignity of the human person. Finally, in the same votes, the formula State of Law was refused, while the Democratic State of Law was consecrated (article 2, of the Constitution of the Portuguese Republic), which points out that Law results from democratic power, expressed in Law [86]-[87].

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[82] Cfr. João Pedro Charters Marchante, Das lacunas da lei, no direito português. Maxime, do disposto no art. 203.º da CRP ("Os tribunais apenas estão sujeitos à lei"), Dissertação de doutoramento em ciências jurídico-civis na Faculdade de Direito da Universidade de Lisboa, sob a orientação do Professor Doutor António Menezes Cordeiro, Lisboa, 2017, policopiado. Refira-se que as ideias defendidas por este autor não correspondem à visão maioritária na doutrina portuguesa, embora, na minha opinião, coloquem interrogações relevantes, que permitem ilustrar melhor a diferença entre as ordens jurídicas portuguesa e brasileira.

[83] Miguel Teixeira de Sousa, op. cit., p. 337.

[84] Na discussão relativa ao subjetivismo ou objetivismo na interpretação da lei, o autor entende que tem de haver um misto entre ambos, ficando as duas hipóteses na disponibilidade do intérprete-aplicador, enquanto vertentes da realização do direito. Por outro lado, acrescenta que, embora na teoria oficial da interpretação o elemento mais ponderoso seja o teleológico, muitas vezes, o elemento mais eficaz é o elemento histórico (cfr. Tratado de Direito Civil, I – Introdução, fontes do direito, interpretação da lei, aplicação das leis no tempo, doutrina geral, pp. 685 e 717).

[85] Cfr. João Pedro Charters Marchante, p. IV ("Pedido").

[86] Artigo 2º CRP: "A República Portuguesa é um Estado de direito democrático, baseado na soberania popular, no pluralismo de expressão e organização política democráticas, no respeito e na garantia de efetivação dos direitos e liberdades fundamentais e na separação e interdependência de poderes, visando a realização da democracia económica, social e cultural e o aprofundamento da democracia participativa" (o itálico é meu).

[87] No contexto dos trabalhos da Revisão Constitucional de 1982, vejam-se as palavras de Vital Moreira, a propósito da proposta de consagração da fórmula de que "Os tribunais (...) apenas estão

In short, it can be seen that the Portuguese constitutional legislator is extremely cautious when it comes to the magistrates' creative power, considering the legal insecurity that may result from it. The courts, therefore, should only obey the law, and not the Law. To deny this conclusion, it is necessary to start from the postulate that it is not up to the constitutional legislator to define what the sources of law are. However, the role of the Constitution in the legal system makes it legitimate to question this denial. This difference, with regard to the creative power of judges, *shows the attachment of Portuguese jurists to the law and the system, unlike the Brazilian legal system, where there is a greater weight of jurisprudence and, equally, greater freedom in the creative role of judges. Apparently, the proximity of the Brazilian legal system to common law systems has also encouraged greater openness to the microsystems technique. In this field, Brazil and Portugal are quite different brothers, with the Portuguese approach being more conservative.*

7.2 Constitutionalization of Portuguese civil law?

In addition to the difference mentioned with regard to the magistrates' creative power, it can also be seen that the constitutionalization of civil law in Portuguese law does not have the same force as in Brazilian law. This is a phenomenon that is not difficult to understand, since it is closely related to the role that is recognized to magistrates in the concretization of constitutional principles, with regard to their projection in civil law. Since we already know that the role of magistrates differs in Portugal and Brazil, it is also natural that the phenomenon of the constitutionalization of civil law has a different scope in these legal orders.

The problem of the effectiveness of fundamental rights in relations between private individuals was recently the subject of a reference monograph in Portuguese doctrine, by Reis Novais[88].The author points out that in the various legal systems, the problem does not depend so much on the text of the Constitution as on doctrinal elaboration and jurisprudential practice. As an example he mentions the case of Brazil, where doctrinaires converge in the sense of the direct applicability of fundamental rights in relations between private individuals, despite the fact that the Federal

sujeitos à lei e ao Direito" (aditamento da palavra Direito): "Na verdade, não temos dúvidas nenhumas de que no dia em que fosse aprovada uma coisa destas começariam a pulular os acórdãos judiciais a invocar o direito contra a lei e contra a Constituição. (...) Nós, entre o direito da Assembleia da República portuguesa e o direito dos juristas alemães, preferimos o direito da Assembleia da República. E queremos que os juízes portugueses se determinem pelo direito aprovado pela Assembleia da República e pelos órgãos de soberania, e não por aquilo que a mentalidade jurídico-conservadora alemã entende que é o direito. Era perigosíssimo que uma tal norma fosse aprovada em Portugal no actual contexto, com aquilo que ninguém de boa fé pode ignorar que aconteceria se uma tal norma fosse aprovada, com a sua utilização para abusar das leis democraticamente aprovadas. Admito que, ordem jurídica em que as leis não tenham fundamento democrático, possa ser um meio legítimo de luta política invocar o direito contra essas leis não democráticas. Em todo o caso, mesmo nestas circunstâncias, mais do que invocar o meríﬁco direito contra as leis, o melhor é lutar por alterar as leis (...). Numa República democrática, de leis democraticamente fundadas, não tem fundamento jurídico nem filosófico a invocação como figura autónoma ao lado, e, portanto, também contra a lei. A invocação de uma figura de direito que fica para definição na cabeça de cada juiz, de cada jurista, e assim fica ao abrigo de uma definição subjetiva que não dá quaisquer garantias de segurança, de previsibilidade e de garantias, ao fim e ao cabo, aos cidadãos" (cfr. João Pedro Charters Marchante, op. cit., p. 115 e ss., em particular, pp. 119-120).

[88] Cfr. Jorge Reis Novais, Direitos Fundamentais nas Relações entre Particulares, Coimbra, Al-medina, 2018.

Constitution decrees that "no one will be obliged to do or refrain from doing anything except by virtue of the law" (article 5, II), which points in the exact opposite direction. In this context, the way to solve supposed conflicts of fundamental rights will be to proceed to ad hoc ponderations in the light of human dignity. However, the author does point out that there is some misunderstanding by Europeans with regard to the Brazilian reality. Although Reis Novais shares a critical view regarding some judicial activism in Brazil, he points out that it is motivated by the legislature's failure to realize fundamental rights or by its systematic delay in addressing the most pressing social societies[89].

In 1998, when Gomes Canotilho[90]made a brief statement on the issue in Portuguese law, he highlighted the dangers of the colonization of private law by the fundamental rights provided for in the constitution, advancing ideas that have already been mentioned here with regard to Brazilian law, particularly with regard to an inevitable constitutional trivialization, whereby civil law regulations, whether legal or contractual, would see their content substantially altered and lose their irreducible autonomy. For this reason, and in short, he concluded that "if private law should collect the basic principles of fundamental rights and guarantees, fundamental rights should also recognize a space for civil self-regulation, avoiding becoming a 'non-free right' of private law".

The thesis of the immediate effectiveness of fundamental rights in relations between private individuals is strongly criticized by Reis Novais. This criticism demonstrates a caution towards the constitutionalization of civil law that clearly contrasts with the enthusiasm it has aroused in Brazil. At the beginning of his study on the issue, he makes it clear that, in his view, if private individuals could directly invoke such rights in their relations with each other, they would have undergone a radical change in their nature: historically conceived to protect citizens against the absolute and unlimited power of rulers, they would have been transformed into a limit to freedom and a burden on the citizens themselves. On the other hand, all decisions would raise constitutionality issues, applying norms of the Constitution, and would be appealable to the Constitutional Court. This would become the ordinary court of appeal against decisions of ordinary courts. In short, Constitutional law would end up integrally absorbing the other branches of law[91]. This would translate into a trivialization of the idea of fundamental rights and their strength[92].

The thesis of the immediate efficacy of fundamental rights also translates into a distortion of the principle of separation of powers that is characteristic of the rule of law, by stimulating the possibility of using fundamental rights against the autonomy of individuals, with serious drawbacks in terms of legal security[93]. The judge could always invoke the aid of fundamental rights in any conflict between private individuals and, since these find their basis in the Constitution itself, they would always prevail over any acts with infra-constitutional value. In these terms, any result would be possible. Also, and for this very reason, private autonomy itself would be limited, given the potential use of fundamental rights as duties imposed on private individuals. For Reis Novais, a less

[89] Cfr. Jorge Reis Novais, op. cit., pp. 45-46, 204-205 e 314.
[90] José Joaquim Gomes Canotilho, "Civilização do Direito Constitucional ou constitucionalização do Direito Civil? Eficácia dos direitos fundamentais na ordem jurídico-civil no contexto do direito pós-moderno", in Eros Rogerto Grau/Willis Santiago Guerra Filho (org,), Direito Constitucional – Estudos em Homenagem a Paulo Benevides, São Paulo, Malheiros Editores, pp. 108-115, em particular, p. 113.
[91] Jorge Reis Novais, op. cit., p. 13.
[92] Jorge Reis Novais, op. cit., pp. 95-96. Por isso, de acordo com este autor, os defensores da tese da eficácia imediata confrontam-se com um dilema: "ou desvitalizam os direitos fundamentais enquanto garantia jurídica fazendo deles uma utilização meramente retórica, ou, em alternativa, tomam a sério a proclamação de aplicabilidade direta dos direitos fundamentais, mas, com isso, tornariam a vida privada impossível à luz do princípio de liberdade que funda as nossas sociedades".
[93] Jorge Reis Novais, op. cit., pp. 96, 103, 105 e 126.

reasonable judge would find here an ideal basis for "escaping" the legally imposed limits on judicial power, deciding as he saw fit. The thesis of the immediate effectiveness of fundamental rights would be, therefore, a fertile field for "judicial decisionism and arbitrariness" [94]. In addition to this, "since the Constitution rarely provides the judge, in the field of fundamental rights, with determined and precise decision guidelines and criteria (...) the possibilities of dysfunctional exploitation of this indetermination are considerable". "A less aware judge (...) finds in the thesis of immediate applicability the foundation/pretext for ignoring the legislator's decisions, namely those that were translated into its intentional silence"[95]. It is also important to avoid interpretation in conformity with the Constitution becoming an authentic correction of "the legislator's normative program "[96].

One can still point to the aforementioned thesis, which exempts the aggressors of other people's freedom from the reserve of law, but only when they are private individuals. In other words, any private individual can directly invoke his fundamental right against another private individual, and, according to this thesis, it is up to the judge to weigh the goods between the two fundamental rights supposedly in conflict. The result of this weighing will be the restriction of one or the other of these rights, which will be performed without the need for justification, i.e., without observing the principles of proportionality, equality and the rule of law[97].

For the same author, the most correct starting point in the analysis of this problem is that if an ordinary law does not regulate a certain situation, it means that the principle of freedom applies: that which is not legally forbidden is permitted[98]. In addition to this, there is the particularity of the question in the Portuguese legal system, since the Portuguese Constitution is one of the few that proclaims the binding nature of private individuals to the precepts concerning rights, liberties and guarantees (article 18/1)[99].

This author also rejects the thesis of the mediated applicability of the fundamental rights in the relations between private parties, by means of typical private law institutes, such as the general clauses and the indeterminate concepts, and by the interpretation of the legislation in conformity with the new constitutional principles[100]-[101]. This, considering the existence of situations that are

[94] Jorge Reis Novais, op. cit., pp. 127 e 133.

[95] Jorge Reis Novais, op. cit., pp. 183-184. Como refere Reis Novais, as consequências para a autonomia privada seriam desastrosas, visto que, em caso de conflito, as partes nunca poderiam estar seguras das consequências de um contrato livremente celebrado. Por outro lado, ao recusar a eficácia imediata dos direitos fundamentais, procura-se evitar que os direitos fundamentais sejam utilizados como pretexto de uma intervenção judicial que, em nome da defesa desses direitos, se traduza na imposição das visões políticas e particulares do juiz que não têm qualquer fundamento democrático (Jorge Reis Novais, op. cit., p. 195).

[96] Jorge Reis Novais, op. cit., p. 202.

[97] Jorge Reis Novais, op. cit., p. 178.

[98] Jorge Reis Novais, op. cit., pp. 21 e 74.

[99] Jorge Reis Novais, op. cit., p. 29. Ainda a este propósito, Reis Novais salienta o absurdo em que a inovação portuguesa se traduz, visto que "sendo a Constituição portuguesa praticamente a única que consagra a aplicação (eventualmente direta) dos direitos fundamentais às relações privadas, a ordem jurídica portuguesa é também das poucas em que os particulares não podem fazer valer junto do Tribunal Constitucional os direitos fundamentais eventualmente agredidos por outros particulares" (op. cit., p. 40).

[100] Jorge Reis Novais, op. cit., pp. 35-36). Embora em Portugal, esta tese seja defendida por civilistas, como António Menezes Cordeiro não significa isto que os civilistas defendam necessariamente a tese da eficácia mediata, e que os constitucionalistas propugnem o "imperialismo" constitucional, como resulta claramente da discussão pioneira sobre a questão na doutrina alemã. Para Menezes Cordeiro, as dúvidas colocadas pela eficácia civil dos direitos fundamentais estão relacionadas com os exageros a que se

not regulated by law and also considering that it is not always possible to resort to general clauses and indeterminate concepts. In this case, it would not be possible to rule out a threat to such fundamental rights, within the scope of relations between private parties[102]. Moreover, it is impossible to make a distinction between fundamental rights directed only to the State and others directed only to private individuals, since an answer to the problem of the effectiveness of fundamental rights in relations between private individuals will only be feasible if it applies to all fundamental rights. Otherwise, it will always be at the "unpredictable discretion of the operator in the concrete case to select the type of fundamental right susceptible of being applied in relations between private individuals and the consequent adoption of the theory to be applied to the case "[103].

On the contrary, Reis Novais[104] defends the thesis of the duties of protection that bind the judge, as a public entity. The judge should also intervene in relations between private individuals to guarantee the respect and access of individuals to constitutionally protected goods, even in the absence of a law or an applicable general clause, since in democratic societies, the actual and potential conflicts that occur or may occur in society have already been regulated by the legislator. An objective dimension of fundamental rights is recognized, from which special duties of protection derive for all the powers of the state, including the judiciary. These duties allow the judge to resort to the constitutional rule to resolve conflicts between private individuals, exceptionally, whenever the legislator has failed to fulfill the duties of protection that are incumbent upon it in the first place. This action by the judge is only possible, therefore, if its omission would result in insufficient protection[105]-[106].

Within the scope of the duties of protection thesis, it is admitted that the judge can intervene beyond what was decided by the legislator, whenever necessary to guarantee the minimum protection due to the affected fundamental right. On the other hand, for Reis Novais, "a more conservative view that exalts to the limit the meaning and role of the reserve of law in the field of restrictions to fundamental rights would bind the judge in such an absolute manner that it would not be possible to distinguish, in terms of practical consequences, the theory of the duties of protection from the theory of mediated effectiveness; only the theoretical framework would be distinct "[107]-[108]. This thesis contrasts with the thesis of immediate effectiveness, because it

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chegou neste domínio (cfr. Tratado de Direito Civil português, I – Parte Geral, Tomo I, 3.ª edição, Coimbra, Almedina, 2007, pp. 374-381).

[101] Segundo Reis Novais, numa primeira fase, logo após a aprovação da Constituição de 1976, a doutrina portuguesa dividiu-se entre os defensores da tese da eficácia mediata e aqueles que defendiam a eficácia imediata dos direitos fundamentais, procurando interpretar o artigo 18.º/1 da Constituição à luz dos argumentos resultantes da discussão germânica sobre o assunto. A tal como aconteceu na Alemanha, nessa discussão consolidou-se a ideia de que os direitos fundamentais teriam de ter alguma projeção nas relações entre particulares (op. cit., pp. 47-48).

[102] Jorge Reis Novais, op. cit., p. 49.

[103] Jorge Reis Novais, op. cit., pp. 55-56.

[104] Jorge Reis Novais, op. cit., p. 67.

[105] Jorge Reis Novais, op. cit., pp. 69 e 72-73.

[106] Para Reis Novais, não se pode recusar simplesmente qualquer situação de aplicação do Direito Constitucional em nome da autonomia do direito civil. Partindo do pressuposto de que a dignidade da pessoa humana é una e indivisível, não se pode restringir a eficácia dos direitos fundamentais às relações do indivíduo com o Estado. Invocar a autonomia do direito privado seria fazer prevalecer os direitos patrimoniais e o direito de propriedade sobre os direitos de liberdade pessoais (op. cit., pp. 76 e 79).

[107] Jorge Reis Novais, op. cit., p. 188.

[108] "Há, por isso, normalmente, um espaço de decisão que tem de se reconhecer ao juiz baseado na necessidade de ponderação de factores como a gravidade e intensidade da lesão ou da ameaça que um

proposes that judicial interference in contracts or behaviors resulting from individual autonomy only occurs exceptionally, as a last resort solution, and not as a normal situation, as a consequence of the constant need to solve collisions of fundamental rights [109]-[110]. The greatest difficulty faced by this thesis, however, is the definition of the functional limits of the judge in situations where the protection that should result from legislative activity is lacking[111].

8 LEGAL MICROSYSTEMS IN PORTUGUESE LAW?

Perhaps, after the road we have traveled, we can understand the perplexity of a Portuguese jurist when he is called upon to speak about legal microsystems in Brazil! The existence of microsystems in the Brazilian legal system reflects well the complexity of a system in which judges play an essential role. On the contrary, in Portugal, the principle of the separation of powers is understood in a more conservative way, so that the magistrature's creative role does not reach the same extent as in Brazil. Two very different spirits, which could not fail to reflect on a subject that is so closely linked to the "architecture" of the legal system and the form of legal thought that exists within it, and which is reflected in the legislative technique itself. In Portugal, a greater attachment to the system and the letter of the law; in Brazil, greater legal freedom, in line with the Brazilian people's way of being. In Brazil, the flexibility of the jurisprudential creation of law and the use of the microsystems technique, which are also flexible; in Portugal, the system: the Civil Code, the new branches of law, the special laws. Different terms, reflecting sister spirits, but so different!

Does this mean that, in the Portuguese legal system, the subject of legal microsystems is not a "subject", since there are no such microsystems in Portuguese law? In my opinion, the answer is certainly negative. However, such distinct "architectures" in two legal systems imply a different understanding of the problems and concepts that are directly related to such "architecture/structure". This is clearly the case with regard to legal microsystems.

It should be remembered that legal microsystems are an organized set of norms, principles, and rules intended to express logic and unity to the legal relations of certain groups, minorities, or themes, encompassing norms of substantive and procedural, public and private law. They are authentic legislative islands with their own logic. And are there microsystems or something similar in Portuguese law?

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comportamento privado projecta sobre bens jusfundamentalmente protegidos, a situação particular em que se encontra cada um dos afectados e, em especial, as consequências que a afectação das possibilidades de acesso ao bem jusfundamentalmente protegido projectam sobre as respectivas autonomia e capacidade de autodeterminação" (Jorge Reis Novais, op. cit., p. 189).

[109] Jorge Reis Novais, op. cit., p. 75.

[110] Apesar de o artigo 18.º/1 da Constituição consagrar a vinculação das entidades privadas aos direitos fundamentais, para Reis Novais isso significa para os particulares um dever geral de respeito dos direitos, liberdades e garantias que resultam desses preceitos, e não uma consagração da tese da eficácia imediata dos direitos fundamentais (op. cit., p. 252).

[111] Jorge Reis Novais, op. cit., p. 228. Neste âmbito, Reis Novais seguiu a tese de Canaris, que determina que a intervenção do juiz se deve verificar com base no princípio da proibição de défice. Nesta perspetiva, o controlo constitucional do cumprimento dos deveres de proteção é assumido como um controlo de resultado e como um controlo de mínimos. Segundo Canaris, se se partir do reconhecimento da margem de livre determinação do legislador democrático, poupam-se inevitáveis problemas e dúvidas de separação de poderes que resultam das restantes teses sobre a aplicabilidade dos direitos fundamentais nas relações entre particulares
(Jorge Reis Novais, op. cit., p. 255 e ss., em particular, pp. 262 e 266).

The Portuguese Civil Code came into force on June 1st 1967. It is therefore normal that there are sparse laws, as has occurred in Brazil with the micro-systems. It is a Code that is more than fifty years old, so it is natural that it is outdated in some areas, particularly in Family Law, where sparse laws have proliferated[112]. In reality:

1. Most of the legal union regime, of fact is outside the Civil Code, being regulated by Law nº 7, of May 11th 2001;

2. The matter of medically assisted procreation has been regulated by separate legislation since 2006 (Law nº 32, from July 26th, 2006), and the Civil Code only contains one provision on the matter (article 1.838/3), introduced in 1977;

3. The matter of civil sponsorship, more intense than the figure of guardianship, is regulated by Law No. 103 from 2009 and totally ignored by the Civil Code;

4. The general principles applicable to the condition of the child result from article 4 of the General Regime of the Civil Guardianship Process, approved by Law no. 141, from September 8th, 2015, and from article 4 of the Law for the Protection of Children and Youth at Risk, approved by Law no. 147, from September 1st, 1999;

5. The fundamental aspects of the civil protection of the child's person are not contemplated in the Civil Code, with the exception of the short provision of article 1.918. Such aspects result from the Law for the Protection of Children and Youngsters in Danger (such as the concretization of the situations of danger, contemplated in article 3)[113].

Beyond the terminological issue, I don't think we can say that the technique of legislation by means of microsystems is used in Portuguese law, i.e. the existence of laws that bring together rules from several branches of law concerning the same matter. However, there are laws, particularly in the field of Family Law, which fulfill some of the characteristics of microsystems, encompassing both procedural and substantive rules. This is the case of the Law for the Protection of Children and Young People in Danger; however this law cannot be compared to the Statute of the Child and Adolescent in Brazilian Law[114].

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[112] Sobre este ponto, cfr. o texto muitíssimo esclarecedor de Jorge Duarte Pinheiro, "Atualidade e pertinência do Código Civil em matéria de família e sucessões", in Edição Comemorativa do Cinquentenário do Código Civil, Lisboa, Universidade Católica Editora, 2017, pp. 579-592. Segundo este autor, tarda o terceiro Código Civil português, pelo que, entretanto, deveriam ser aprovados códigos autónomos, um sobre família e crianças e outro sobre efeitos patrimoniais por morte (cfr. "Atualidade e pertinência do Código Civil em matéria de família e sucessões", p. 579).

[113] Sobre estes aspetos, cfr. Jorge Duarte Pinheiro, "Atualidade e pertinência do Código Civil em matéria de família e sucessões", pp. 584-588.

[114] 114 No direito brasileiro, o Estatuto (microssistema) da Criança e do Adolescente (Lei nº 8069, de 13 de julho de 1990) regula as seguintes matérias: a) direitos fundamentais (direito à vida e à saúde; direito à liberdade, ao respeito e à dignidade; direito à convivência familiar e comunitária); b) família natural; c) família substituta; d) guarda; e) tutela; f) adoção; g) direito à educação, à cultura, ao esporte e ao lazer; h) direito à profissionalização e à proteção no trabalho; i) prevenção geral e especial (informação, cultura, lazer, esportes e espetáculos; produtos e serviços; autorização para viajar); j) política de atendimento; l) medidas de proteção (gerais e específicas); m) prática de ato infracional (direitos individuais, garantias processuais, medidas sócio-educativas); o) medidas pertinentes aos pais ou responsável; p) conselho tutelar; r) acesso à justiça (justiça da infância e da juventude, juiz, serviços auxiliares, procedimentos, perda e suspensão do poder familiar, destituição da tutela, colocação em família substituta, apuração de ato infracional atribuído a adolescente, apuração de infração administrativa às normas de proteção à criança e ao adolescente, habilitação de pretendentes à adoção, etc.); s) Crimes e infrações administrativas. Pelo contrário, em Portugal, a Lei de Proteção de Crianças e Jovens em Perigo (Lei nº 147/99, de 1º de setembro) tem uma abrangência de matérias muito menor. Centra-se exclusivamente

In the view of some Portuguese authors, new branches of law that encompass matters of public law and private law also arise. Thus, there are those who defend the autonomy of Children's Law[115], as well as Air Law[116]. However, these are not pacific opinions in our doctrine, perhaps because, unlike in Brazil, Portuguese jurists, being attached to the system, tend to clearly separate the branches of law into branches of public law and branches of private law. This is why Menezes Cordeiro states that Consumer Law is not a new branch of law, because this legal sector lacks unity, considering that it encompasses rules: on the formation of contracts, advertising, civil liability, technical rules on the treatment and presentation of certain products, procedural rules, sanctioning rules and administrative rules[117]. In Portuguese law there is a Consumer Protection Law (Law no. 24, from July 31st, 1996), but it does not have the same scope of issues that we see

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na situação das crianças em perigo, definindo: as situações de perigo que legitimam a intervenção; os princípios que subjazem a tal intervenção; as entidades que realizam tal intervenção (como as Comissões de Proteção de Crianças e Jovens, cujo funcionamento é aqui regulado); as medidas de promoção dos direitos e de proteção; o procedimento urgente; o processo nas comissões de proteção de crianças e jovens; e o processo judicial de promoção e proteção. De fora ficam matérias que são reguladas no direito brasileiro pelo Estatuto da Criança e do Adolescente tais como: guarda, tutela, adoção, estatuto do menor infrator, infrações administrativas e direitos fundamentais das crianças e dos jovens.
Isto mostra-nos a diferença entre o direito brasileiro e o direito português em matéria de microssistemas.
Tenha-se presente que, em Portugal, Clara Sottomayor, na sequência das ideias defendidas por António Menezes Cordeiro, entende que seria muito útil a compilação de um Código das Crianças, que contribuiria para facilitar o trabalho dos juristas, perante o estado atual de dispersão das fontes, e facilitaria a autonomização do Direito das Crianças (cfr. "O Direito das Crianças, um novo ramo do direito", in Temas de Direito das Crianças, Coimbra, Almedina, 2014, pp. 21-64, em particular, p. 49).

[115] Visto um ramo do direito como um conjunto de normas jurídicas que regulamentam uma determinada secção ou fatia da realidade social, o Direito das Crianças surge numa área em que se interpenetram vários ramos de direito público e privado. É o caso do Direito da Família, do Direito Internacional Público e do Direito Comunitário, do Direito Constitucional, do Direito Penal e Processual Penal, do Direito do Trabalho, do Direito Fiscal e do Direito da Segurança Social. Para Clara Sottomayor, trata-se de um novo ramo do direito em formação (op. cit., p. 45).

[116] O Direito Aéreo é constituído pelo conjunto de regras que disciplinam a atividade aeronáutica. Embora seja discutível a autonomia do Direito Aéreo e a sua consequente classificação como ramo do direito, para aqueles que a defendem, este divide-se em direito público e direito privado. Em algumas matérias a autoridade administrativa com atribuições no domínio da aviação integra a relação jurídica e aí exerce competências públicas de autoridade que lhe estão por lei cometidas. Tudo isto é Direito Público Aéreo. Este reporta-se a: aspetos relativos à navegação aérea, safetyand security, atos de interferência ilícita na aviação, estatuto do comandante, aeroportos (infraestutura aeroportuária), aeronaves (nacionalidade, registo, areo navegabilidade, etc.), facilitação (conjunto de medidas que visam desembaraçar a aeronave, tripulantes, passageiros e a carga aérea) e regras de mercado/concorrência. O Direito Privado Aéreo reporta-se às normas que têm por objeto relações jurídicas entre particulares, encontrando-se estes em posição de igualdade jurídica formal (v.g. contrato de transporte aéreo, responsabilidade civil do transportador aéreo, constituição de garantias, ónus ou direitos sobre aeronaves, normas substantivas de arresto preventivo de aeronaves, etc.). Mesmo no Direito Privado Aéreo, a fonte das normas pode ser uma fonte de Direito Internacional Público (v.g. a Convenção para a Unificação de Certas Regras Relativas ao Transporte Aéreo Internacional, Montreal, 28 de maio de 1999) [cfr. Carlos Neves Almeida, "Linhas gerais da evolução do Direito Aéreo", in Dário Moura Vicente (coordenador), Estudos de Direito Aéreo, Coimbra, Coimbra Editora (grupo WoltersKluwer). 2012, pp. 11-93, em particular, pp. 8-21].

[117] António Menezes Cordeiro, Tratado de Direito Civil português, I – Parte Geral, Tomo I, p. 209. No entanto, o mesmo ilustre civilista parece aceitar que o Direito do Ambiente constitui uma disciplina autónoma, embora afirme, igualmente, que "o desafio reside em passar de um Direito do ambiente sistemático, isto é, apenas assente numa recolha de normas relativas ao ambiente, para um Direito do ambiente dogmático: um Direito do ambiente ordenado, com princípios e linha de aplicação" (cfr. Tratado de Direito Civil português, I – Parte Geral, tomo I, p. 226).

in the Brazilian Consumer Protection Code (Law no. 8.078, from September 11th, 1990), which becomes clear by observing the issues that are dealt with by each of the diplomas[118].

9 CONCLUSION

Two different brothers; two contrasting legal orders. Two ways of thinking about the legal system and of conceiving, within it, the role of the Constitution.

Two ways of looking at the principle of the separation of powers and the creative role of the magistrates. Different, but complementary, ways of being and of legislating! Across the Atlantic, the certainty and security of the system! Beyond the Atlantic, the flexibility and "equity" of microsystems!

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[118] O Código de Defesa do Consumidor (Brasil) com 119 artigos regula matérias tão amplas quanto: direitos do consumidor; política nacional de relações de consumo; qualidade de produtos e serviços (ex: proteção à saúde e segurança); prevenção e reparação dos danos (ex: responsabilidade por vício do produto e do serviço); práticas comerciais (ex: publicidade); proteção contratual (ex: cláusulas abusivas, contratos de adesão); sanções administrativas; infrações penais; defesa do consumidor em juízo; sistema nacional de defesa do consumidor; e convenção coletiva de consumo. Pelo contrário, a Lei de Defesa do Consumidor (Portugal), com 25 artigos apenas, regula os direitos do consumidor (segundo o artigo 3º, estes englobam o direito a: qualidade dos bens e serviços; proteção da saúde e da segurança física; formação e à educação para o consumo; informação para o consumo; proteção dos interesses económicos; prevenção e à reparação dos danos patrimoniais ou não patrimoniais que resultem da ofensa de interesses ou de direito individuais homogéneos, coletivos ou difusos; à proteção jurídica e a uma justiça acessível e pronta; e à participação, por via representativa, na definição legal ou administrativa dos seus direitos e interesses). A mesma lei reporta-se ainda ao caráter injuntivo dos direitos dos consumidores e às instituições de promoção e tutela dos direitos dos consumidores. No entanto, não é esta lei que regula, por exemplo, aspetos relacionados com a publicidade, sanções administrativas, infrações penais e aspetos processuais. Apesar de o microssistema de proteção ao consumidor no Brasil não se esgotar no Código de Defesa do Consumidor, existe uma diferença substancial entre este e a Lei de Defesa do Consumidor portuguesa.

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