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ANALYSIS OF THE RIGHT OVER ROOF SLAB FROM THE PERSPECTIVE OF THE INCAPACITIES

SYSTEMANÁLISE DO DIREITO REAL DE LAJE SOB A ÓTICA DAS INCAPACIDADES

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Abstract: On the one hand, the Civil Code, in its art. 1.748, IV, authorizes the sale of properties in cases where it is judicially authorized. On the other hand, art. 1.749, I, of this same legal provision, establishes the prohibition of the guardian to acquire for himself or by interposed person, by private contract, such property belonging to the minor. Among these, the problematic of this article: can the curator/tutor establish and acquire the Right over Roof Slab of his curated/tuteled? For its due satisfaction, the first topic concerns the contextualization and approach of the right over slab in the contemporary legal-legislative-social scenario, as well as its peculiarities and legal requirements for its characterization. Subsequently, the general rules of guardianship and custody are discussed with regard to the (im) possibility of sale of assets of the incapable subjects. In the end, it is possible for the guardian to establish and acquire the Right Over Roof Slab of the tuteled/curated before the characterization of the legal prohibitions imposed, since the property remains in the tuteled/curated property and such conduct does not seem to bring no patrimonial or existential damage to these subjects. However, some requirements are stipulated. The construction of the present reasoning is anchored in the dogmatic, hermeneutic-concretizing, deductive and integrated research methods.

Keywords: Right Over Roof Slab; Civil Law; Trusteeship; Tutorship; Roof Slab.

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Resumo:

De um lado, o Código Civil, em seu art. 1.748, IV, autoriza a venda de imóveis nos casos em que for autorizado judicialmente. De outro, o art. 1.749, I, deste mesmo dispositivo legal, estabelece a vedação de o tutor adquirir para si, ou por interposta pessoa, mediante contrato particular, tais bens pertencentes ao menor. Entre estes, a problemática do presente artigo: pode o curador/tutor estabelecer e adquirir Direito de Laje de seu curatelado/tutelado? Para sua devida satisfação, o primeiro tópico se incumbe da contextualização e abordagem do direito de laje no contemporâneo cenário jurídico-legislativo-social, bem como suas peculiaridades e exigências legais para sua caracterização. Posteriormente, abordam-se as regras gerais da tutela e da curatela com relação à (im)possibilidade de venda de bens dos sujeitos incapazes. Ao final, conclui-se pela possibilidade de o tutor/curador estabelecer e adquirir Direito de Laje do tutelado/curatelado ante a não caracterização das vedações legais impostas, vez que o imóvel ainda permanece em propriedade do tutelado/curatelado e tal conduta parece não trazer nenhum dano patrimonial ou existencial a esses últimos sujeitos. Contudo, estipula-se alguns requisitos. Ancora-se a construção do presente raciocínio nos métodos dogmático, hermenêutico-concretizador, dedutivo e de pesquisa integrada.

Palavras-chave: Direito Real de Laje; Direito Civil; Curatela; Tutela; Laje.

Introduction

The Brazilian right over roof slab, inspired by Spanish law, appears as a land regularization mechanism. Bill 13.465/2017 brings the requisite requirements to its stipulation, however, it is silent as to the active standing to seek the application. The present article assumes that the right over roof slab is claimed by the guardian/conservator, in his own name, of his curated/tuteled property. There is therefore no specific provision in the aforementioned legislation addressing this subject, and must resort to the other rules of the civil legal system.

On the one hand, the Civil Code, in its art. 1.748, IV, authorizes the sale of properties in cases where it is judicially authorized. On the other hand, art. 1.749, I, of this same legal provision, establishes the prohibition of the guardian to acquire for himself or by interposed person, by private contract, such property belonging to the minor. Among these, the problematic of this article: can the curator/tutor establish and acquire the Right over Roof Slab of his curated/tuteled?

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The first topic concerns the brief considerations about the right over roof slab. It is from its essential requirements to its peculiarities, similarities and differences with other institutes to which it resembles; among them the real surface right and the condominium building. Subsequently, guidelines are addressed regarding the capacity of the civil person, with the necessary changes made by the Statute of the Person with Disabilities, focusing on the negotiation plan and the reflexes in the curatela and civil guardianship. In the end, it is possible for the guardian to establish and acquire the Right Over Roof Slab of the tuteled/curated before the characterization of the legal prohibitions imposed, since the property remains in the tuteled/curated property and such conduct does not seem to bring no patrimonial or existential damage to these subjects. However, some requirements are stipulated. We anchored the construction of the present reasoning in the dogmatic, hermeneutic-concretizing, deductive and integrated research methods.

Brief considerations of the Right Over Roof Slab

The insertion of the Right Over Roof Slab in the contemporary legal scene occurred with the increase by Provisional Measure 759/2016. In the explanatory memorandum, the aforementioned legislation aims to meet the challenge of urbanism and contemporary urban planning law to regularize informal and irregular settlements,[3] designated by the land regularization manual such as tenements, favelas, irregular or clandestine subdivisions and degraded housing developments (BRASIL, 2010, p. 19-49) (HOSHINO; MEIRINHO, COELHO, 2017).

The aforementioned legislation is inspired by the derecho de vuelo ou sobreedificación (LÓPEZ, 2017[4]) provided for by the Spanish Mortgage Regulation as a Real Right of domain

[3] "Os assentamentos informais geralmente não têm escrituras legais formais e podem apresentar padrões de desenvolvimento irregular, falta de serviços públicos essenciais, como saneamento, e ocorrem em terrenos públicos ou ambientalmente vulneráveis. Estejam eles em terrenos públicos ou privados, os assentamentos informais cresceram progressivamente em muitos anos e vários existem há décadas" (FERNANDES, 2011, p. 2).

[4] "*Desde nuestro punto de vista, la naturaleza jurídica de los derechos de sobreedificación y subedificación presupone su constitución sobre un edificio – el cual puede encontrarse construido, en construcción, o en proyecto. No obstante, sabedores de la utilidad que puede suponer en algunos casos su constitución sobre un solar, consideramos que la misma podría admitirse cuando se den los presupuestos para la constitución de la propiedad horizontal. Dentro de tales supuestos, podría incluirse, a priori, aquel en que la constitución de los derechos de sobreedificación y subedificación se presenta como una alternativa al contrato de cambio de solar por edificación futura, pues una vez ejercitado el derecho, existirá una pluralidad de titulares, que serán a la vez cotitulares del suelo. Pensamos concretamente en el supuesto en que el propietario de un solar concede un derecho de sobreedificación o subedificación sobre el mismo a favor de un tercero que se obliga a entregar, como contraprestación, un número determinado de plantas, pisos, locales o plazas de garaje. Ejercitado el referido derecho, existirá una pluralidad de propietarios y una cotitularidad sobre el suelo. Así las cosas, parece que, aunque sea por esta vía excepcional, podría defenderse la viabilidad de la fórmula alternativa que estudiamos*" (LÓPEZ, 2017, p. 04-05).

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vocation[5], in the guidelines of art. 16.2, a and d In this legal system, this right derives from real covenants for which a different person who does not own the building in question is entitled to raise or deepen it by building new plants and making it perpetual[6] by integrating vertically the base building, without the formation of a surface right[7] (CARMONA; OLIVEIRA, 2017, p. 136).

Initially, the Brazilian provisional legislation conceived the right over roof slab as the possibility of coexistence of autonomous real estate units of distinct entitlements located in the same area, in order to allow the originating owner to surrender the surface of its ownership so that third party build unit distinct from that ceded and originally built in the soil. (BRASIL, 2016). Within its scope of application, the right over roof slab would cover both the airspace and the subsoil of public or private land. The construction, however, by logic and fidelity to the term over roof slab, should be accessed vertically.

Moreover, to characterize this right, the provisional measure established the need for functional isolation for independent access between properties. In other words, it would only be possible to characterize the right over roof slab if the holder of this right were transferred to public roads, either through easement of passage or other legally viable means to do so. (BRASIL, 2016).

Another point of prominence of the provisional measure is that it forbade the existence of successive overlays. Therefore, the right over roof slab could only be exercised once, exclusively by the owner of the base construction, since the legislation itself prohibited the new owner of the slab

"Puede tratarse también de un derecho de sobre y de subedificación, en cuyo caso el titular adquirirá una cuota en el suelo y en el resto de elementos comunes cuando realice la sobre o subedificación, incorporándose entonces como copropietario, y asumiendo entonces derecho a votar y obligación de contribuir a los gastos comunes" (PÉREZ, 2011, p. 709

[5] "*El propietario de un terreno es dueño de su superficie y de lo que está debajo de ella, y puede hacer en él las obras, plantaciones y excavaciones que le convengan, salvas las servidumbres, y con sujeción a lo dispuesto en las leyes sobre Minas y Aguas y en los reglamentos de policía."*

[6] "[...] não existem direitos reais em coisa alheia com o atributo da perpetuidade, pois em algum momento o titular terá que restituir os poderes dominiais ao proprietário. [...] O direito de laje é uma nova manifestação do direito de propriedade. [...] A tipificação do direito de laje - com início no artigo 1.510-A do Código Civil -, abre-se um novo capítulo na constante ressignificação do direito de propriedade brasileiro. [...] A seu turno, o direito de laje é propriedade perpétua, cujo registro no RGI ensejará uma nova matrícula, independente daquele aplicável à propriedade do solo ou de sua fração ideal" (ROSENVALD, 2017, s.p)

[7] "A nosso ver, o direito de laje se aproxima mais da enfiteuse e do condomínio por unidades independentes (edilício), embora com eles também não se confunda. Na enfiteuse não há a abertura de matrículas próprias para o domínio direto e útil, convivendo os dois direitos autônomos na mesma folha matricular. A enfiteuse, embora perpétua, cinde a propriedade em dois direitos, cujas faculdades são bastante distintas: enquanto o proprietário direto tem a nua-propriedade do bem, o enfiteuta possui um direito quase tão amplo quanto a propriedade, no qual se encontra toda a utilidade da coisa. A relação entre ambos se restringe a obrigações quase sempre de cunho pecuniário, como no pagamento do foro anual e do laudêmio nas transmissões. Há, ainda, a possibilidade de extinção da enfiteuse, com a consolidação de ambos os direitos em uma só pessoa, seja pelo resgate ou pela renúncia" (FIUZA; COUTO, 2017, p. 5).

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from establishing new rights and buildings under its roof. It is clear that this and other debates were the subject of heated doctrinal discussions.

Farias and Rosenvald (2019) welcomed the innovative aspect of MP 759/2016 regarding the mitigation of the tax burden controversy of this type of construction. The art. 1.510-A, §4, of this regulation assigned the owner of the right over roof slab the charges and taxes that affect his unit. They criticized, however, the absence of right of first refusal of the holders of the slab right in the purchase in case of sale of the autonomous units.

Albuquerque Junior (2017) was more radical. The author classified the right over roof slab as an area of real right of surface, in the form of elevation. This criticism will be drawn later and in a timely manner. However, it is anticipated that the right over roof slab has characteristics and elements that give it uniqueness and uniqueness over other real rights, especially the surface right. In the same sense, Rodrigues Júnior (2016) criticizes the legislator for the lack of technical rigor when describing the law in question, stating that the term roof slab is technical for the legal context.

Gagliano (2017) criticizes and says that the right over roof slab could have been treated within the guidelines of the real right of surface, being understood as unnecessary autonomous regulation. He also criticized the absence of a stipulation expressed by the MP on the autonomous registration of the autonomous units in relation to the base construction and the fence of successive overlays. However, he extolled that the right over roof slab emerges with an interesting social aspect, giving social visibility to the contemporary reality of the irregular settlements.

With embarrassments to the other criticisms and considerations, Bill 13.465/2017 received a large part of the requisitions made by lawyers and responsible for urbanism. The art. 1.510-A has brought a more technical definition by designating that the owner of a base construction may yield the upper or lower surface of its construction so that the slab holder maintains it as a separate and autonomous unit from that originally built on the ground.

The right over roof slab can be installed on both upper and lower surfaces, on public or private land, provided that they are vertically designed and excluding other buildings not owned by the owner of the base building (BRAZIL, 2017). The roof slab will enjoy its own registration, which will be linked to the registration of the land, in accordance with art. 176, §9, of Bill 6.015/1973 (BRAZIL, 1973), and the holder may use, enjoy and dispose of this right in accordance with art. 1510-A, §3 ° (BRAZIL, 2017).

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The tax liability will be attributed to the owner of the autonomous units. That is, each one will be responsible for the taxes corresponding to his domain, according to art. 1.510-A, §2. However, with respect to the transmission tax, this will be on the valuation of the whole property, not just the share corresponding to the ownership of the owner.

The Bill 13.465/2017 also barred the possibility of assigning an ideal fraction over the ground or proportional participation in identified areas. This is due to the terminological rigor of its ontology expressed in the roof slab. Differently from what is stipulated in the condominium building, where each condominium has an ideal fraction of the ground, in the right over roof slab the right holder will only have it in the roof slab itself (article 1.510-A, §4).

Another advance on the former provisional measure was the exclusion of successive overfishing. Now, under the terms of art. 1.510-A, §6° (BRAZIL, 2017), holders of the right over roof slab may assign the surface of their construction to establish a new right over roof slab, provided there is express authorization of the owners of the base construction and of the other slabs, and the existing building and urbanistic positions must be observed.

However, there are not only rights for roof slab holders. They have the duty to avoid constructing works to damage the security, the architectural line or the aesthetic arrangement of the building, applying, where applicable, the rules of the condominium building (articles 1.510-B and C).

With regard to the necessary and indispensable expenses for the preservation and enjoyment of common parts which are useful to every building and for the payment of services of common interest, they shall be shared between the owner of the base building and the owner of the roof slab in the proportion stipulated in contract (article 1.510-C).

If there is a need to carry out urgent repairs in the building in the public areas, any owner of the right over roof slab can promote them, pursuant to art. 1.510-C, §2, which shall have the right to restitution of the amounts spent as an obligation to make, in the modes of the sole paragraph of art. 249 of the Civil Code. (BRASIL, 2017).

The indispensable need for independent access and functional isolation to characterize the right over roof slab contained in MP 759/2016 has been suppressed. The right of preference of the owners of the roof slab was increased in art. 1.510-D. in case of sale of any overlapping units, the owners of the base construction and the roof slab, in this order, will have preemptive rights under equal conditions with third parties, and must be scientific in writing, so that they manifest

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themselves within 30 days . If the sale is made without such notification, the interested holder may deposit the respective price for the party sold to a third party, and must do so within a decay period of one hundred and eighty days, counted from the date of sale.

Finally, with regard to the extinction of the right over roof slab, the legislation provided that the ruin of the base construction will imply the dismantling of this right, except if: this was established on the subsoil; or if the base construction is not rebuilt within five years from the date of the ruins.

Given the above, it is noted that the ontology of the right over roof slab is of real right of its own. Its holder will exercise it in an autonomous and perpetual form, within the legal limits, indefinitely, being possible to transmit it to the heirs. Some legal institutes resemble the right over roof slab, in particular the condominium building and the real surface right. For example. The similarities of the right over roof slab, with respect to the first, are concentrated: 1) in the existence and stipulation of exclusive property areas, through autonomous real estate units; 2) in the full and perpetual right; 3) common parts that serve the whole building (article 1.331, §2 of the Civil Code of 2002); 4) on the possibility of the owner to use, enjoy and dispose of his property (article 1.335, I of the Civil Code of 2002); 5) in the duty of conservation of the parts that serve to any building and the payment of services of common interest, proportionally established in the agreement or contract (article 1336, I, of the Civil Code of 2002); 6) in the fence of works that jeopardize the safety of the building and its aesthetic arrangement (article 1336, II and III of the Civil Code of 2002); 7) in the possibility of urgent repairs by the holder of the right concerned (article 1.341, §1 of the Civil Code of 2002); 8) and in the unanimous consent for the extension of the building (article 1.343 of the Civil Code of 2002).

The differences, however, are mainly based on: 1) in the condominium building there is a requirement for a previously designed project, and other documentation, since these are complex buildings (article 1.332 of the Civil Code of 2002 c/c Law 4291/1964) ; 2) the roof slab, in the condominium, as a rule, is a common part (art. 1.331, §5 of the Civil Code of 2002), while in the right over roof slab is for the exclusive use of the right holder; 3) the main and notable difference is perhaps this: the ownership of an ideal fraction of the land in the condominium building (art.1.331, §3 of the Civil Code of 2002), while in the right over roof slab there is no such legal situation; 4) Finally, in the condominium building, there is no preemptive right in case of sale of the property, except in the cases of garage and sale of land after the destruction of the building (articles 1.338 and 1.368, §2 of the Civil Code of 2002).

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The Right over roof slab and the condominium building

Similarities	Differences
Autonomous real estate units	Complex buildings: a previously designed project (article 1.332 of the Civil Code of 2002 c / c Law 4.291 / 1964)
Full and perpetual right	Terrace: condominium - common part (article 1.331, §5 of the Civil Code of 2002); slab - exclusive use
Existence of common parts (Article 1.331, § 2 of the Civil Code of 2002)	Ideal fraction in the soil: (article 1.331, §3 of the Civil Code of 2002) (1.510-A, §4);
Use, enjoyment and disposition of property (article 1.335, I of the Civil Code of 2002);	Extinction: ruin of the royal right over roof slab and ruin of the condominium - art. 1.357 of the Civil Code of 2002
Conservation and enjoyment of common parts (article 1.336, I, of the Civil Code of 2002)	Right of first refusal - free disposal - art. 1.331, §1 - exception: vehicle shelter (article 1.338) and sale of the land after destruction of the building (article 1.368, paragraph 2), both of the Civil Code of 2002
Fencing of works that compromise the safety of the building and its aesthetic arrangement (article 1.336, II and III of the Civil Code of 2002)	
Possibility of urgent repairs (article 1.341, §1 of the Civil Code of 2002)	
Unanimous consent for the extension of the building property (unanimity - article 1.343 of the Civil Code of 2002)	

Source: authors

Regarding real surface rights, the similarities are: 1) suspension of the effects of the accession (article 1369 of the Civil Code of 2002); 2) concession free of charge or onerous (article 1370 of the Civil Code of 2002); 3) transmissibility to third parties (articles 1372 and 1510-A, §3,

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both of the Civil Code of 2002); and 4) right of first refusal under equal conditions (article 1373 of the Civil Code of 2002).

The divergences are also clear, concentrating on: 1) while the right over roof slab is perpetual, the surface is resolvable, extinguished in the improvement of the term; 2) in the real right of surface exists the possibility of extinction of the right by virtue of its adverse use to the originally designed destination (article 1.374 of the Civil Code of 2002), in the right the right over roof slab there is no such situation that, in case of damages or misfortunes, should be settled by the right of neighborhood; 3) in the tax liability of the real surface right, the landowner is responsible for the charges and taxes of all construction (article 1.371 of the Civil Code of 2002), while in the right over roof slab each owner will be responsible for its autonomous real estate unit ; 4) in case of transferability, as already discussed, the tax in the real right of surface will be on only the corresponding portion of the property, while in the right over roof slab will fall on the whole unit built; 5) Finally, while in the right over roof slab there is the possibility of building successive overlays, such conduct is prohibited in the real right of surface (article 1.510-A, §6).

The Right over roof slab and the real surface right

Similarities	Differences
Suspension of the effects of the accession (article 1.369 of the Civil Code of 2002)	Resolvable property
Free or onerous concession (article 1.370 of the Civil Code of 2002)	Extinction in advance for different purposes for which it was granted (article 1.374 of the Civil Code of 2002)
Transmissibility to third parties (Articles 1.372 and 1.510-A, §3, both of the Civil Code of 2002)	Tax liability: superficial - charges and taxes (article 1.371 of the Civil Code of 2002)
Right of first refusal under equal conditions (article 1.373 of the Civil Code of 2002)	Possibility of registration of surface right over ideal fraction of the land
	Transmission tax: of all or part of the property ?
	Successive overlapping: discipline expressed in the real right of slab (article 1.510-A, §6 °)

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Now, the following hypothesis is figured: X is curated/tuteled of Y. X has real estate on his property. Y, intends to establish the right over roof slab, in its own name, on the properties of X. In this case, the legal prohibition of art. 1.749, I, of the Civil Code? This questioning will be answered from the point of view of incapacities theory.

The Right over roof slab and the incapacities system

With the advent of Law 13.146/2015, known as the Disabled Persons Statute, some substantial changes were made in matters related to the theory of disabilities originally provided for in the Civil Code of 2002.

Until the entry into force of said legislation, they were considered totally incapable: 1) children under sixteen; 2) those who, because of illness or mental deficiency, do not have the necessary discernment for the practice of acts of civil life; and 3) those who, for transitory reasons, can not express their will. On the other hand, they were considered relatively incapable: 1) those over sixteen and under eighteen; 2) habitual drunks, addicts in toxic, and those who, because of mental deficiency, have reduced discrimination; 3) the exceptional ones, without complete mental development; 4) and the prodigals.

With the respective changes, in the contemporary scenario, only the under sixteen years are considered absolutely incapable. On the other hand, the relatively incompetent are: 1) those over sixteen and under eighteen; 2) habitual drunks and toxic addicts; 3) those who, because of transient or permanent cause, can not express their will; and 4) the prodigals.

These changes were inspired by the New York Convention, approved by Decree 186/2008 by the National Congress, which conferred it constitutional norm status. This was due to the social progression with regard to the acceptance and consideration of the disabled as a person in the contemporary scenario. It is frightening to say that, however, this behavior was not seen until such a short time.

Initially, the prescience model disciplined the relation of persons with disabilities from antiquity to modern times based on two elementary premises: the ontology of disability was metaphysical, coming from a religious or supernatural conception; and people affected by this disease were dispensable for society (CUETOZ GONZALES, 2013).

Such a model could be divided into two submodels. The first, of eugenics, is directed towards the idealization of the well-born. Anyone who did not conform to the terms and standards

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of the time was considered a burden to society, justifying even their infanticide in their existential social connotation. The second is that of marginalization, under which the disabled person should be excluded from society, to avoid conflicts and maintain social peace. (PALACIOS, 2007, p. 14) (LIMA; VIEIRA; SILVA, 2017, p. 21)

At the beginning of the 20th century, there was an improvement in the tolerance of people with disabilities. Of dispensable they began to be rehabilitated. It's the rehabilitation model. Here, such subjects are considered unnecessary while not "healed" or "rehabilitated for social life". It starts from the notion that society is homogeneous, in which each subject in it must meet the legitimate expectations of the social context. While not cured, the handicapped would be an obstacle to the improvement and fulfillment of these expectations. This model did not offer solutions to those people who could not rehabilitate, as well as removed the responsibility of the society to foment the exclusive treatment of these entities. For this and other reasons it has become obsolete and fragile. (LIMA; VIEIRA; SILVA, 2017, p. 22).

In the mid-1960s and 1970s, social movements ruled by people with disabilities gained ground in the USA and the UK (BARIFFI, 2014). Starting from the conception that "The life of a person with disability has the same meaning as the life of a person without disability" (VICTORIA MALDONADO, 2013, p. 1105), the social model arises, characterizing disability no longer as an individual attribute , as the rehabilitation model called it, but a complex social phenomenon, with several repercussions, many of them being provoked by the society itself (LIMA, VIEIRA, SILVA, 2017, p. 21). “En esta línea, las personas con discapacidad remarcan que ellas tienen mucho que aportar a la sociedad, pero para ello deben ser aceptadas tal y cual son, ya que su contribución se encuentra supeditada y asimismo muy relacionada con la inclusión y la aceptación de la diferencia” (VICTORIA MALDONADO, 2013, p. 1105).

At this point, the approach to rights and the disabled person itself is humanistic. It is presumed that the concept of disability is linked to the idea that there are obstacles that prevent the exercise of fundamental rights, such as equality and freedom, making it impossible to effectively integrate these subjects in a social context. (LIMA; VIEIRA; SILVA, 2017, p. 21). And it is in this context that the Brazilian legislation intends to insert the disabled person in the social and legal plane.

According to art. 6 of Law 13.146/2015, disability does not affect a person's full civil capacity. This succinct wording brings an extensive hermeneutic modification burden into the

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system of legal business and civil capacity. Here, there are three divergent positions with distinct practical results.

The first, formulated by Gagliano and Pamplona Filho (2016, p. 147), argues that it is impossible for the mentally handicapped to be considered incapable, "inasmuch as arts. 6 and 84 of the same decree, make it clear that disability does not affect a person's full civil capacity ".

The second, defended by Tartuce (2016, 134), assumes that only those persons with disabilities affected by transient or permanent causes that make it impossible to express their will, as stated in art. 4, III, of the Civil Code.

The third, proposed by Farias and Rosenvald (2016, pp. 336) adopts the criterion of weighted will, under which the judge must verify in the concrete case if the person with deficiency to be curated has the necessary discernment for the practice of the acts of the civil life.[8]

In any hypothesis adopted, there will be practical distinctions to be endowed with respect to the subjective criterion listed in art. 104 of the Civil Code. That is to say, plans to analyze the existence, validity and effectiveness, for the validity of the legal business is necessary that the agent who manifests the will to negotiate is capable. If this thinking is inserted in the first line, people with disabilities are fully capable of practicing business acts. In the same sense, the second is included, except for the situation of temporary or permanent cause that prevents it from expressing its will, element constituting the plan of existence of the legal business. In the third, only persons with disabilities who have specific discernment for the practice of acts of civil life are entitled to carry out legal business. In our view, it seems that the latter brings more solid arguments for its applicability.

When the trusteeship is decreed, it will only affect the acts related to the patrimonial and negotiation rights (article 85, Law 13.146/2015). This means that with regard to existential issues, the person with a disability may decide autonomously. However, one should not ignore the provisions regarding guardianship and curatorship of the Civil Code, 1.728-1.783. As provided in art. 1.774 of this legal provision, the trusteeship applies to the normative provisions of tutorship. That is, the norms related to the equity disposition are common in both institutes, being regulated by the arts. 1.747-1.749 of the Civil Code. This fact is of special interest, since it is a matter of substantial differentiation between the trusteeship of the Civil Code and the Statute of the Person

[8] For more (SÁ; MOUREIRA, 2011)

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with Disabilities. While the former extends to both patrimonial and existential issues, the latter is limited to patrimonial characters only. These, however, object of the present study.

Although the art. 1.748, IV, allow the sale of curated/tuteled real estate, judicial authorization is required for both. It is emphasized: it is not prohibited, but there is a plus for its effective concretization. However, art. 1.749, I, of the same rules discipline the guardian/curator prohibition to acquire for himself, through private contract, movable or immovable property belonging to the minor. The initial questioning is again made: Can the curator/tutor establish and acquire the Right over Roof Slab of his curated / tuteled?

Let's go back to the constitution of the right over roof slab. Firstly, there is no sale or sale of the entire property, only the roof slab. The curated or tuteled will keep it in their possession, and it is not plausible and correct to state that there is transfer of properties to the tutor/curator. When this designates the slab belonging to its curated or tuteled as real right, the property of the base construction is not transferred. For this reason does not apply the art. 1.749, I of the Civil Code.

This, however, does not mean that the tutor/curator can establish and acquire for free the right over roof slab. As there is a judicial proceeding ordering trusteeship and tutorship, with due legal obligations and possibilities for the acts to be practiced by the parties, the interested party must file an application, in the same file, to request authorization from the judge responsible for the case. The magistrate should analyze the application with its due justifications and parameters, among which we have listed some: 1) nonexistence of damages to curated/tuteled; 2) that this property is not the only one in its patrimony (of the curated/tuteled); 3) that there is an effective need of the applicant, documented; 4) that is done in an expensive way, to avoid the framing in the legal fence expressed in art. 1749, III; and (5) that all fees, taxes and charges necessary and indispensable to the stipulation of this right shall be paid by the applicant.

Therefore, the answer is positive for the initially stipulated questioning, provided that at least the above assumptions are followed. Depending on the factual situation, the judge responsible for the case may establish other reasonable criteria based on the effective interest of the represented, so that there is no personal and existential damages in their personal sphere.

Final considerations

The article intends to anticipate the hypothesis in which a tutor or curator can establish the right over roof slab, in its own name, of property of its represented. To construct this reasoning, we initially contextualize the right over roof slab in the legal and social scenarios.

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With regard to the former, this right presents uniqueness and uniqueness in relation to its fellow men. Regarding the condominium building, the biggest difference is the possibility of establishing ideal fractions of the soil in this institute, while in the right over roof slab there is an express prohibition on this behavior. Regarding surface right, the main difference lies in the resolvable character of this right, whereas in the right over roof slab it will be perpetual.

In the social aspect, the right over roof slab appears as an instrument of real estate regularization, to bring to legality those people who have irregular properties in public records, especially the Brazilian favelas. In a few years, the right over roof slab may become one of the real rights most used because of the countless urban possibilities for its effective establishment. And, for this reason, covering many legal situations, we hypothesize a legal situation and we confront it with the legal prohibitions foreseen in the arts. 1.747-1.749 of the Civil Code.

The problem consisted of the following questioning: Can the curator / tutor establish and acquire the Right over Roof Slab of his curated / tuteled? We have shown that the fence does not reach this legal relationship, since it does not occur the sale of the property in itself, remaining well in the property of the represented. However, the claimant may not claim this claim unconditionally. Some criteria and objective assumptions must be verified for their due grant, of which: 1) nonexistence of damages to curated / tuteled; 2) that this property is not the only one in its patrimony (of the curated / tuteled); 3) that there is an effective need of the applicant, documented; 4) that is done in an expensive way, to avoid the framing in the legal fence expressed in art. 1749, III; and (5) that all fees, taxes and charges necessary and indispensable to the stipulation of this right shall be paid by the applicant.

The article does not intend to exhaust the subject, but only to initiate new discussions. Because it is a new right, the right over roof slab will bring numerous other considerations about its effective practical applicability. We list only one and offer an answer that we find reasonable in relation to the studies carried out so far. It will now be up to the other scholars the criticisms and embargoes necessary to the proposed here.

References

ALBUQUERQUE JÚNIOR, Roberto Paulino de. **O direito de laje não é um novo direito real, mas um direito de superfície,** 2017. Disponível em: <http://www.conjur.com.br/2017-jan-02/direito-laje-nao-direito-real-direitosuperficie>. Acesso em: 20 jan. 2019.

vol. 12, nº 1. ISSN 2317-7721
DOI: 10.12957/rdc.2020.39607

BARIFFI, Francisco José. **El régimen jurídico internacional de la capacidad jurídica de las personas con discapacidad.** Madrid: Ediciones Cinca, 2014

BRASIL. **Exposição de Motivos 00020/2016 MCidades MP CCPR**. Brasília, DF, 21 dez. 2016. Disponível em: <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/Exm/Exm-MP%20759-16.pdf>. Acesso em: 20 jan. 2019.

BRASIL. Lei 13.465 de 11 de julho de 2017. Brasília, DF, 11 de jul. 2017. Disponível em: <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13465.htm>. Acesso em: 20 jan. 2019.

CARMONA, Paulo A. C; OLIVEIRA, Fernanda L. Aspectos Urbanísticos, Civis e Registrais do Direito Real de Laje. **Revista Brasileira de Políticas Públicas**. V. 7, No. 2, p. 133. Brasília, ago. 2017.

CUETOS Gonzalez, Glenda. **Discriminacion de las personas con enfermedad mental.** 2013. 104f. Dissertação (Mestrado) – Programa de Pós-Graduação em Proteção Jurídica das pessoas e grupos vulneráveis. Faculdade de Direito de Oviedo, Oviedo, 2013, p. 21-22.

FARIAS, Cristiano Chaves de; ROSENVALD, Nelson. **Curso de direito civil**: reais. 15. ed. Salvador: JusPodvum, 2019. v. 5.

FIUZA, César A. C.; COUTO, Marcelo de R. C. M. Ensaio sobre o direito real de laje como previsto na Lei 13.465/2017. **Civilistica.com**. Rio de Janeiro, a. 6, n. 2, 2017. Disponível em: <http://civilistica.com/ensaio-sobre-o-direito-real-de-laje/>. Acesso em: 20 jan. 2019.

GAGLIANO, Pablo S**. Direito real de laje**: primeiras impressões, 2017. Disponível em: <https://jus.com.br/artigos/ 54931/direito-real-de-laje-primeiras-impressoes>. Acesso em: 20 jan. 2019.

GAGLIANO, Pablo Stolze; PAMPLONA FILHO, Rodolfo. **Novo curso de direito civil**: Parte Geral. V. 1. 18. ed. rev., ampl. e atual., São Paulo: Editora Saraiva, 2016.

LIMA, Taisa Maria Macena de; VIEIRA, Marcelo de Mello; SILVA, Beatriz de Almeida Borges e. Reflexões sobre as pessoas com deficiência e sobre os impactos da Lei nº 13.146/2015 no estudo dos planos do negócio jurídico. **Revista Brasileira de Direito Civil – RBDCilvil**, Belo Horizonte, v. 14, p. 17-39, out./dez. 2017.

vol. 12, nº 1. ISSN 2317-7721
DOI: 10.12957/rdc.2020.39607

LÓPEZ, Felisa-María Corvo. **Los derechos de sobreedificación y subedificación como alternativa al cambio de solar por edificación futura**, p.01-05. Disponível em: <www.uma.es/media/files/CORVO_LOPEZ_1.pdf>. Acesso em: 20 jan. 2019.

MARQUESI, Roberto Wagner. Desvendando o direito de laje. **Civilistica.com.** Rio de Janeiro, a. 7, n. 1, 2018. Disponível em: <http://civilistica.com/desvendando-o-direito-de-laje/>. Acesso em: 20 jan. 2019.

MELLO, Marcos Bernardes de. Teoria do fato jurídico: Plano da existência. 17. ed., São Paulo: Saraiva, 2011.

PÉREZ, María Teresa Alonso. **La sobreedificación y la subedificación en la propiedad horizontal (Estudio de Derecho comparado hispano-francés).** Disponível em: <https://www.boe.es/publicaciones/anuarios_derecho/abrir_pdf.php?id=ANU-C-2005-20069100764>. Acesso em: 20 jan. 2019..

PALACIOS, Agustina; BARIFFI, Francisco José. **La discapacidad como una cuestión de derechos humanos.** Madrid: Ediciones Cinca, 2007, p. 14.

RODRIGUES JR, Otavio Luiz. **Um ano longo demais e seus impactos no Direito Civil Contemporâneo,** 2016. Disponível em: <http://www.conjur.com.br/2016-dez-26/retrospectiva-2016-ano-longo-impactos-direitocivil- contemporaneo>. Acesso em: 20 jan. 2019.

ROSENVALD, Nelson. **O direito real de laje como nova manifestação de propriedade**. Disponível em: www.nelsonrosenvald.info. Acesso em: 20 jan. 2019.

SÁ, Maria de Fátima Freire de; MOUREIRA, Diogo Luna. **A capacidade dos incapazes: saúde mental e uma releitura da teoria das incapacidades no direito privado.** Rio de Janeiro: Lumes Juris, 2011.

TARTUCE, Flávio. **Direito civil:** lei de introdução e parte geral. 12. ed. rev., atual. e ampl. Rio de Janeiro: Editora Forense, 2016.

VICTORIA MALDONADO, Jorge A.. El modelo social de la discapacidad: una cuestión de derechos humanos. **Boletín Mexicano de Derecho Comparado**. Ano XLVI, n. 138, set./dez. de 2013, p. 1.093-1.109).

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