

ARTISTIC PAINTING IN PROTECTED URBAN PLACES IN BRAZIL: ITS LIMITS AND POSSIBILITIES

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ABSTRACT

Cities exist to make possible human coexistence and daily life sharing. As habitat, cities are the setting for various manifestations, including artistic ones, revealed by their architectural forms, lifestyles, as well as by the perception and attitudes of those who inhabit them. Some cities become monuments and parts of their territories are governed by special, more restrictive laws. A protected historical building requires a different way of exercising property rights, with specific obligations for owners and neighbours, which makes it a unique place. This article is an attempt to understand artistic manifestations, especially paintings, in protected historical buildings, with the goal of highlighting the main issues and establishing a legal outline of preservation laws. The expected result is to contribute to a better understanding of the topic through a panorama and contextualization of the discussion, as well as legislative documents and relevant bibliography, focusing on the understanding of the performance limits of the supervision by the Brazilian Public Administration of the compatibility between the preservation of cultural assets, the realization of democracy, and the exercise of cultural rights. The research methodology consisted of a literature search, through the analysis of books, scientific articles from magazines and peer-reviewed journals, as well as documental research relative to specific legislation.

KEYWORDS

Environmental Law; cultural heritage; preservation

A PINTURA ARTÍSTICA EM ESPAÇOS URBANOS TOMBADOS NO BRASIL: LIMITES E POSSIBILIDADES

RESUMO

As cidades nascem para possibilitar a convivência das pessoas e o compartilhamento de sua vida cotidiana. Como *habitat*, são palcos para manifestações as mais variadas, inclusive artísticas, reveladas por suas formas arquitetônicas, pelos estilos de vida, e pela percepção e atitudes ambientais daqueles que nelas habitam. Algumas cidades tornam-se monumentos e frações do seu espaço, passam a ser regidas por normas especiais e diferenciadas, mais restritivas. O tombamento estabelece um regime diferenciado de exercício do direito de propriedade, com obrigações para proprietários e vizinhos, que o tornam um espaço de exceção. Neste artigo discute-se como compatibilizar as manifestações artísticas, em especial a pintura em imóveis tombados, com o objetivo de pontuar as principais questões e estabelecer delineamento legal das normas de preservação sobre a matéria. O resultado esperado é contribuir para uma melhor compreensão do tema através de um panorama e da contextualização da discussão, bem como de documentos legislativos e bibliografia pertinente, com foco na compreensão dos limites para a atuação da fiscalização pela Administração Pública brasileira na compatibilização entre a preservação de bens culturais e a efetivação da democracia e exercício de direitos culturais.

A metodologia de pesquisa consistiu em pesquisa bibliográfica, realizada através da análise de livros, artigos científicos, de revista e pesquisa documental quanto à legislação específica.

PALAVRAS-CHAVE

Direito Ambiental; patrimônio cultural; preservação

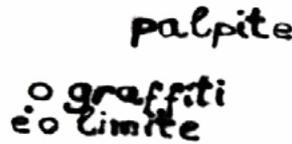


Figure 1: “Sol-te”

Source: Leminski, 2013, p. 153

INTRODUCTION

The human habitat has, among others, an aesthetic value capable of influencing the quality of life. Some cities, at different times and for different reasons, have adopted beautification strategies through the construction of pleasant public places, such as gardens and squares, of planning, and by public services such as sanitation and urban cleaning.

The State is also an important producer and promoter of Culture, creating monuments and investing resources in the acquisition and exhibition of works of art that ornament Brazilian cities. In some of them there are even laws that establish the legal obligation to provide areas with works of art, as can be seen in article 129 of Municipal Law No. 16292/97 (Recife), which provides: “any building, with an area of 1,000 m² or more (one thousand square meters), it should contain, instead of highlighting, work of art executed in sculpture, painting, mural or sculptural relief”.

Administrative standards of this nature imply several interesting reflections, for example, regarding the operational need for a legal definition of work of art, who defines the adequacy or not of the work of art submitted to the appraisal of public power, whether or not there are quality judgments about the work, the possibility of using replicas and reproductions, and even who is an artist capable of executing it¹. The simple statement of these questions points to a possible unconstitutionality of the rules that impose this type of obligation or, at the very least, a vigorous questioning as to the legality of the judgments that the Public Administration makes about artistic value.

In addition to the public authorities, society and the individual also intervene aesthetically in cities, because living in them means using the common space for the exercise

¹ It should be noted that Municipal Law No. 14239/80 (Recife) provides that “only the plastic artists from Pernambuco or those living in the Metropolitan Region of Recife, previously registered with the Urbanization of Recife - URB, will be able to perform this article”.

of various freedoms, including artistic expression, in various ways: in the streets there is dance, music, theater, painting, sculpture, architecture, which give each place its peculiar way of existing.

The issue becomes more sensitive when it comes to material artistic manifestations in protected urban spaces. There are legal norms that restrict or prohibit certain forms of expression aiming at the preservation of buildings or urban groups against mutilations and mischaracterizations, as occurs with the protected instrument, but not exclusively through it.

The purpose of this article is to make a brief reflection on the limits and possibilities of artistic interventions that have areas listed as support, from a brief analysis of the legal instruments for preserving the cultural environment contrasting legal graffiti and illegal graffiti and illustrating the application of Brazilian legal norms by means of a light case study in which the creation of an artistic painting was authorized in a listed building in the city of Recife. To this end, an analysis of the applicable legislation was carried out, focusing on the discussion of public management and the criteria adopted to approve an artistic painting or classify it as illicit, and on the necessary compatibility between the preservation of cultural goods, the effectiveness of democracy and exercise of cultural rights, supported by bibliographic research, carried out through the analysis of books, scientific articles and magazines.

PROTECTED URBAN SPACES

Urban spaces can be protected by visible and invisible walls, created to delimit a more direct and systematic control perimeter, with specific purposes, such as security and the protection and promotion of urban aesthetics, or generics, such as preserving a certain worldview² materialized in the city.

The urban habitat is capable of influencing physical and mental health and inspiring feelings of affection or disgust. The individual develops an affective relationship with the territory, because of the utilities it provides (support, satisfaction of needs), for aesthetic, religious reasons. These, among other factors, lead to the individual's affection for the place as a result of sensory (touch, smell, taste, hearing and visual) and existential impressions in relation to the environment (Tuan, 1980).

The affective relationship with a territory is manifested through artistic interventions such as painting, literature, the construction of intentional or unintended monuments, material traces (for example, buildings, sambaquis, dumps) that can gain cultural value for preservation. These interventions are fundamental to mold the environment to the needs of individuals and groups, which are sufficiently attended to correspond to the concept of "quality of life", and are often manifested in legislation as rights.

² The cosmological importance of a city is inferred by the shape, orientation, hierarchical structure of the space, types of architecture and the manifestation of the social organization and beliefs of the time (Tuan, 1980, p. 189). However, this worldview is no longer as concrete as it used to be in city planning: the translation of social order into space is not self-evident, and cities are shaped and developed by convenience and economic factors.

Among these needs, the maintenance of a pleasant aesthetic has become a right in Brazilian law because the landscape can produce beneficial emotions or anxiety, fear, displeasure, with an impact on the quality of life of people, understood as the physical and spiritual well-being associated with human dignity (Sanches, 2009, p. 76), to which article 182 of the Federal Constitution of 1988 refers when dealing with urban policy³.

To guarantee this well-being, urban aesthetics are protected against pollution through various legal standards⁴, and some elements that compromise the landscape can be pointed out as examples: excessive publicity, illegal graffiti, lack of conservation of the façade of the buildings, lack afforestation, proliferation of antennas, wires, and power distribution poles, telephone cables, because such accumulation prevents or hinders perception (Sanches, 2009, p. 83).

There are several instruments used for the protection and material preservation of urban spaces, mainly due to the jurisdiction regime established in the Federal Constitution for the creation of protective norms of the natural and cultural heritage (legislative) and to execute them through administrative actions (material jurisdiction). Regarding the preservation of cultural heritage, article 23 provides for common jurisdiction between the Union, States, Federal District and Municipalities, imposing cooperation due to the importance of the theme for the community.

However, there is no general federal norm that systematizes state protection of cultural assets, providing for instruments, methodologies and procedures used in preservation, which leads to the existence of different protective legal norms, and consequently different criteria and instruments, which may not favour the joint action of the entities.

The main instrument for preserving single property or sets of properties in Brazil is declaring them protected (listed), instituted by Decree-Law No. 25/37. It is an administrative instrument, therefore it is handled mainly by the executive power, but there are legislative and judicial examples, which consist of establishing limitations to the powers inherent in the right to property (use and dispose), through obligations to do something (to preserve the cultural heritage, notify the authority in case of theft or damage), and not to do it (do not carry out physical interventions without prior state authorization). The purpose of this instrument is to prevent physical changes without management control from mischaracterizing the material object (isolated or joint property), preventing threats to its existence, the integrity and the permanence of its values for the community and whose conservation is in the public interest (Dantas, 2015, pp. 41-42).

In protected or listed areas, any artistic intervention that uses material supports, such as painting or sculpture, depends on the prior authorization of the public power, under penalty of the configuration of civil, criminal and administrative illicit, as it will

³ Article 182. "The urban development policy, carried out by the municipal government, according to general guidelines established by law, aims to order the full development of the city's social functions and guarantee the well-being of its inhabitants".

⁴ Sanches (2009, p. 80) highlights several legal provisions that can be cited as examples of landscape protection: article 3, I and III of Law No. 6938/81; Article 4, VI of Law No. 9985/2000, Law No. 4737/65 (Electoral Code, Article 243, VIII), Law No. 8078/90 (Consumer Protection Code) Article 37, §2, Law 9605/98 and Law No. 106257/2001 (Statute of the City), article 37, VII.

be seen in the next item. In order to guarantee the visibility and ambience of the listed property, the legislation provides for the delimitation of a protection area called “neighbourhood” or “surroundings”, where certain limitations are also established, for example, regarding the distance, perspective and height of buildings, as well as the ban on displaying objects.

In addition to the listing, there are other preservation instruments that limit or prohibit the execution of artistic works in real estate and joint ventures to prevent eventual de-characterization, among which certain forms of urban zoning can be mentioned, with the creation of heritage zones that have limitations provided for in the Master Plan (municipal), or even through specific norms for a typology of cultural goods, as is the case with Law No. 11483/2007 (railway assets).

It is true that the public authorities can indicate the feasibility or unfeasibility of the execution of a work of art in a given location, prohibiting or allowing under certain conditions. It is more difficult to define whether, how and when, the State can make judgments about the artistic value of certain works, including questions of subject or theme, which can mean the abuse of the power of the administrative police and /or censorship.

LISTED AREAS VERSUS FREEDOM OF ARTISTIC EXPRESSION: LEGAL GRAFFITI AND ILLEGAL GRAFFITI

Reflecting on the limits and possibilities of artistic interventions in listed buildings, considered as supports, necessarily means considering that a preservation policy is a form of discourse about the city, and also establishes a form of specific use. The city acquires values, meanings and uses that are being built and replaced over time, and the challenge is to guarantee the permanence of material traces to allow different readings.

So, it is asked: how to make compatible the protection of the listed structures as supports for artistic manifestations? If, when and how is it possible to allow changes to these supports without configuring damage and crime? What is the limit on the “prior authorization” of the government? Can it focus only on the form or content of the artistic expression? All of these questions will be the object of reflection based on the analysis of the Brazilian federal legislation on the preservation of material cultural heritage, the answers being inferred by their interpretation and according to the administrative praxis of the national preservation entity, the National Historical and Artistic Heritage Institute (IPHAN)⁵.

ARTISTIC PAINTINGS IN PROTECTED AREAS

Protecting (Listing) at the national level is the instrument that aims to preserve the physical integrity of movable and immovable property, by establishing administrative

⁵ The National Historical and Artistic Heritage Institute (IPHAN) is the governmental entity responsible for the selection of movable and immovable cultural assets, both tangible and intangible, that make up the national cultural heritage protected by the Brazilian State and are the object of public preservation policies.

limitations and obligations as to what to do and not to do, which is regulated by Decree-Law No. 25/37.

When a property is protected, the public administration may consider it in an isolated or joint way, which will enjoy a special regime for the exercise of the property right. The owner of a listed property has differentiated obligations, founded on the principle of the social function of the property, and must adopt conservation measures in favor of his property, and request authorization for any interventions:

under no circumstances can the items be destroyed, demolished or mutilated, nor, without special authorization from the National Historical and Artistic Heritage Service, be repaired, painted or restored, under penalty of a fine of fifty percent of the damage caused. Single paragraph. In the case of goods belonging to the Union, the States or the municipalities, the authority responsible for the violation of this article will personally incur the fine. (Decree-Law No. 25/37, Art. 17)

Failure to comply with the duty to previously authorize interventions or the realization of damages may give rise to administrative, civil and criminal liability, each with different legal consequences and applicable simultaneously. For example, the act of demolishing a protected property wall may constitute an administrative offense, with the imposition of a fine, the duty to repair (civil liability) and the practice of crime, as provided for in Article 62 or 63 of Law No. 9605/98.

Destroy, disable or deteriorate:

I - property specially protected by law, administrative act or judicial decision;

II - file, registry, museum, library, art gallery, scientific installation or similar protected by law, administrative act or judicial decision:

Penalty - imprisonment, from one to three years, and fine.

Single paragraph. If the crime is unintentional, the penalty is six months to one year of detention, without prejudice to the fine. (Art. 62)

Change the aspect or structure of a building or place specially protected by law, administrative act or judicial decision, due to its landscape, ecological, touristic, artistic, historical, cultural, religious, archaeological, ethnographic or monumental value, without authorization from the competent authority or in disagreement with the one granted:

Penalty - imprisonment, from one to three years, and fine. (Art. 63)

Therefore, even to perform the simple painting of the listed property, it is necessary to have prior authorization from the preservation agencies, under penalty of configuration of civil, criminal and administrative illicit acts.

Restrictions in relation to painting are not always understood and accepted by the owners, who consider it a manifestation of their individuality and a way of valuing and

caring for the property. In addition, painting walls as a form of expression seems to be an atavistic impulse⁶, and some of these marks can be important identity elements and fundamental material traces to understand ancient and modern cultures.

To reflect on the chosen theme, let's take as an example the issue of legal graffiti and illegal graffiti because when Law No. 9605/98 was enacted, both were equated for purposes of configuring environmental crime. However, the word "graffiti" was removed from Article 66 of Law No. 9605/98 through Law No. 12408/2011 (Art. 65), having the following wording:

illegal graffiti or by other means to defile an urban building or monument:

Penalty - imprisonment, from 3 (three) months to 1 (one) year, and a fine.

§ 1 If the act is performed on a monument or a listed thing because of its artistic, archaeological or historical value, the penalty is 6 (six) months to 1 (one) year of detention and a fine.

§ 2. It is not a crime to practice legal graffiti carried out with the objective of valuing public or private assets through artistic manifestation, provided that it is consented by the owner and, when applicable, by the lessee or tenant of the private property and, in the case of public property, with the authorization of the competent body and the observance of the municipal attitudes and rules issued by the government agencies responsible for the preservation and conservation of the national historical and artistic heritage.

The distinction between legal graffiti and illegal graffiti, therefore, became legally relevant since the first form of intervention can be legally authorized and the second cannot. The important question then arises as to what is considered "graffiti" for the State that authorizes it and for those who practice it, supports that will be used. If for the legal graffiti artist/illegal graffiti artist there are distinctive marks, identities, forms of communication that consider secondary support and, as Baudrillard (1976, pp. 121-122) considers, insurgencies against the signs of the city, humanizing and enlivening it, for the State is the breaking of a neutralized and homogeneous urban aesthetic, established for the purposes of reproducing order and an economy represented in the urban space.

The legal possibility of controlling these expressions with prior state approval brings graffiti closer to decorative art, which is closely associated with the vision of the city, of art, and of the acceptable form and limits according to urban aesthetics. To this end, and only from the unilateral point of view of the State, two preliminary criteria for differentiation between legal graffiti and illegal graffiti can be adopted: authorization (from the owner and the competent bodies) and the artistic character of the intervention

By these criteria, legal graffiti would be operationally defined as artistic painting preceded by the authorization of the owner/competent authority, while illegal graffiti would be the unauthorized intervention, with or without artistic value, defined by opposition.

⁶ Rock paintings are among the most important and ancient archaeological records.

This characterization, in practice, is intrinsic to administrative performance and is reflected in the rules that allow the first and prohibit the second.

The IPHAN Ordinance No. 420/2010 establishes the authorization procedure to carry out the “insertion of artistic paintings in protected (listed) walls and façades”, establishing it as a simplified form of reform, which allows the analysis of the application without the presentation of a project, but of a mere description of the intervention, as provided in article 18, §2.

In theory, it is legally possible to do the graffiti, however, if performed without the prior authorization of the preservation agency or different from the one granted, it can be considered an environmental crime, regardless of its artistic value. In addition, the ordinance does not refer to, and does not admit, the possibility of using other materials for the realization of works of art on façades and walls, for example, covering with fabric or gluing materials.

Illegal graffiti or other forms of “soiling” are perceived as pollution, as defined by Article 3 of Law No. 6938/81, as they may represent a form of degradation of environmental quality that directly or indirectly harms health, safety and well-being of the population, creates adverse conditions to social and economic activities and/or affects the aesthetic or sanitary conditions of the environment.

The idea of defilement observes the purely aesthetic aspect of the unauthorized intervention from the unilateral point of view of the public administration, with no rule of thumb analysing the communicative value, which in certain political contexts cannot be ignored by the public authorities, nor in the public interest in its maintenance. These distinctive marks tattooed in the territory contribute to confer identity and can be perceived as cultural heritage, or be denied and erased when considered a violation of the aesthetic standard and as a form of pollution.

The case of the Municipality of São Paulo, which, under a program called “Cidade Linda” (Beautiful City), promoted damage to the legal graffiti that made up the urban aesthetic, removing them under the argument that many of them were damaged and graffiti (painted over), is quite illustrative⁷. Such attitude motivated the filing of two popular actions against the Municipality of São Paulo and its Mayor (actions nº 1004533-30.2017.8.26.0053 and 1003969-51.2017.8.26.0053), both sentenced in 2019 to the payment of indemnity fixed in R\$ 782,300.00 (seven hundred and eighty-two thousand three hundred *reais*) to be reverted to the Paulistano Cultural and Environmental Patrimony Protection Fund (FUNCAP).

The sentence is not yet definitive, and it can be reformed by the Court of Justice on appeal, but it is already an interesting legal document due to the type of discussion it raises, especially regarding the characterization of urban art as an intangible heritage (form of expression) to be protected by the public authorities that, in this case, in addition to the omission of the duty to preserve them, still did damage⁸.

⁷ See <https://www.conjur.com.br/dl/doria-prefeitura-condenados-remocao.pdf>

⁸ The referred sentence is available at <https://www.conjur.com.br/dl/doria-prefeitura-condenados-remocao.pdf>

In spite of refusing a cultural value to the graffiti itself, since the sentence highlights its ephemerality and the absence of intent to be listed, there is no legal impossibility in considering a certain work as subject to specific preservation, including with regard to its materiality. There is nothing to prevent a particular painting – classified as graffiti or not – from being listed, including by values other than the artistic, such as the historical and landscape.

LEGAL REQUIREMENTS FOR AUTHORIZATION

It is the authorization factor that will differentiate legal graffiti from illegal graffiti for the purpose of configuring its legality. However, if the artistic value is at the basis of the distinction between what is legal graffiti and illegal graffiti, the relevant and worrying doubt considering the authoritarian tradition in Brazil, is whether it is possible to discuss artistic merit, the theme of intervention and, in terms of Law No. 9605/98, if the painting “valued” the listed property.

The law is full of indeterminate notions that must be technically defined in each case. Prior authorization is important because it prevents damage from occurring, and ensures that the listed immovable asset (which is a cultural asset) prevails over painting, which is a mere accessory.

Establishing general decision-making parameters that can protect the listed property and, at the same time, guaranteeing freedom of artistic expression through authorized graffiti is not an easy task. The content of the authorization act by the competent authorities should aim at protecting the property (support) and urban aesthetics, establishing conditions for the form of intervention, which will be defined on a case-by-case basis, however based on general criteria as we suggest from applicable legal rules.

As for the place of implantation: property listed, whether isolated or together in sets, the place of construction of a monument is an indicator of the worldview. When it becomes a symbol, it is a repository of meanings which emerge from the profound experiences accumulated over time (Tuan, 1980, p. 169).

There is a reason, a value for which the property was considered a cultural asset for the purposes of isolated or joint listing. So, the systematic of the legal preservation of cultural heritage requires that the analysis of the viability of artistic painting on a façade or wall must take its own support as the main one, the work of art being accessory and, therefore, secondary.

According to this criterion, inferred from the applicable legal norms, the authorization to make paintings in properties listed in isolation will tend to be stricter than for those that are part of a set, being certain that in any case it can be prohibited if there is technical justification, as well as it should observe the situation of the support itself in relation to the protected set of properties.

As for the characteristics of the work, in the case of artistic painting, especially in terms of dimensions, scale relative to the listed property and the form of implantation in the support and the color or color palette.

As for the material (permissible types of paint), since the use of an inappropriate paint can cause damage, and make its removal difficult or excessively expensive.

As for the length of stay, as the public authority must condition the authorization to the removal of the painting. The question of permanence is obviously linked to the reversibility of the intervention, that is, depending on the material used, whether it will be possible to revert support to the previous state (*status quo ante*);

As for artistic value, as noted, the public authorities must avoid making quality judgments about the artistic merit of the work, under penalty of making eventual approval subject to the subjectivity and preferences of those who analyse the application.

However, there will be limited situations in which the proposed painting can impair the reading and the aesthetics of the monument, becoming a devaluation that would justify the prohibition on carrying it out, provided that the respective administrative act is duly motivated and based on the rules of preservation.

Regarding the theme of the work, administrative judgment on the content or theme of the work can be as problematic as the decision on its artistic value. When commissioned or sponsored by the government, it is clear that, as a contractor, you can establish in advance what the work of art will be about, but not in the exercise of administrative police power.

The proposal of the work may prove incompatible with the dignity or aura of the monument, or make reference to symbols that are prohibited by law, for example, the propagation of the swastika as a form of apology to Nazism, as established by Law No. 7716/89, with the wording of Law No. 9459/97 (Art. 20):

practice, induce or incite discrimination or prejudice of race, colour, ethnicity, religion or national origin.

Penalty: imprisonment from one to three years and a fine.

§1º To manufacture, commercialize, distribute or convey symbols, emblems, ornaments, badges or advertising that use the swastika or gamma cross, for the purpose of spreading Nazism.

Penalty: imprisonment for two to five years and a fine.

By virtue of the principle of legality, the government could not approve the use of illegal images, or that in any way damage the buildings listed, so it is also up to it to act to remove them, adopting administrative and judicial measures.

The general criteria suggested above to authorize or not an artistic painting on listed goods must be technically motivated, in addition to observing the principles of proportionality and reasonableness, as determined by Law No. 9784/99.

Finally, Law No. 9605/98 considers that legal graffiti can positively impact the aesthetics of monuments and thus contribute to improving people's lives and giving places an identity. There are many examples of cities that invested in legal graffiti as a beautification and identification strategy, such as Valparaíso (Chile), which is considered a World

Heritage Site (Unesco, 2009, p. 696), and where graffiti was promoted by government actions⁹.

Artistic interventions, in themselves, can become cultural assets to be preserved, depending on the form and intensity of people's appropriation and affection. Therefore, when it comes to graffiti, the solution is case by case, and lies in the balance between the exercise of the State's supervisory power to enable preservation and the individual right to artistic expression, and its compatibility with the diffuse right to urban aesthetics, which it must be available to all, and must be protected by all (Santos, 2001, p. 943).

As for the position relative to the protected set of properties, since the landscape is one of the environmental elements to be protected against the negative impact of the interventions, including considering the possible relationship with other paintings and graffiti already executed in the area.

Although it is evident, but due to its relevance, it must be cited to conclude the question of the criteria constructed from the interpretation of legal norms, it is observed that the analysis of the graffiti project must fall on the work itself, without taking into account the subjective aspects in relation to the author.

THE PROBLEM OF THE SURROUNDINGS

The surroundings are a protection perimeter of the area or property listed, which has not been recognized as having a specific cultural value, which is why the properties located there are not considered "specially protected by administrative act" for the purposes of configuring environmental crime or damage. However, although it is not considered an urban space protected by this point of view, it does not mean that anything can be done in it, precisely because of its proximity (neighbourhood) and potential interference:

without prior authorization from the National Historical and Artistic Heritage Service, it will not be possible, in the vicinity of the listed thing, to make a construction that prevents or reduces its visibility, nor to place advertisements or posters on it, under the risk of being ordered to destroy the work or remove the object, imposing in this case a fine of fifty percent of the value of the same object. (Art. 18 of Decree-Law No 25/37)

The surroundings or neighbourhood is the surrounding area of the listed single property or set whose purpose is to protect visibility, and its delimitation is a decision that reflects a specific time, but which covers and illustrates different temporalities (Art. 18 of Decree-Law No 25/37). It consists of buildings that have been arranged in a spatial arrangement that has become an element of ambience (Baudrillard, 2006, p. 37) as a protective enclosure, but also has the function of providing information about the nature, meaning and history of the listed property (Motta & Thompson, 2010, p. 22), helping to tell the story of the place.

⁹ See <https://www.cultura.gob.cl/eventos-actividades/el-arte-urbano-se-extiende-por-los-muros-de-la-region-de-valparaiso/>

The protection afforded by (not to) the surroundings has technically evolved to protect values other than visibility, such as ambience, harmony, coherence, homogeneity, scale and, in some cases, even the compatibility and respectability of the listed monument (Motta & Thompson, 2010, p. 35)¹⁰. This expansion made it possible to cover other hypotheses of violation that were not originally explicit in Decree-Law No. 25/37: “to make construction that prevents or reduces visibility” or “to place advertisements or posters” – consecrating the broad concept of visibility (comprehensive environment), mainly through jurisprudential rules.

Visibility and ambience are not restricted to the most immediate physical aspect of the listed property, and its violation refers to direct aspects such as “removing the view from the listed thing, changing the surrounding environment, the difference in architectural style, altimetry, volumetry, integration and framing”, and everything that affects the harmony between the good and the context, as highlighted by Miranda (2014, p. 114), also encompassing the creation of voids through demolition, which require the prior manifestation of the preservation (Miranda, 2014, p. 131). Indirect aspects can also constitute damage to visibility and ambience, even greater evidence of a building, for example, due to an eye-catching painting, which will divert the focus from the listed property¹¹.

Applying these ideas to the specific theme, it is concluded that graffiti in the surroundings of protected areas also requires the prior authorization of the preservation agencies because it is possible that there is negative interference in the visibility and ambience of the protected area. The criteria are similar to those proposed for the listed areas, but less rigorous, and without reference to maintaining the integrity of the support: as to the shape of the painting, especially as to the dimensions, scale relative to the property or set that is protected; as to the colour or colour palette, length of stay, theme of the work and environmental impact.

For the surrounding area, the observations already made for the protected area are worth considering the need for technical motivation for the authorization or non-execution of artistic painting.

BRIEF CASE STUDY: AN ARTISTIC PAINTING IN A LISTED BUILDING IN THE NEIGHBOURHOOD OF RECIFE

There is not a frequent request for the realization of artistic paintings in protected buildings, and there is no consensus in the technical preservation bodies, neither on their viability nor on the possible criteria for authorizations. As already explained in the previous items, the Brazilian preservation laws cover indeterminate legal notions that

¹⁰ Motta and Thompson (2010, p. 58) highlight that the IPHAN, in a certain period of the preservation policy, understood the environment as a “form of preservation without tipping over”, which led to the idea of overturning of sets.

¹¹ Check the judgment in Special Appeal No. 1,127,633. Case 2009/0136547-0, second chamber of the Superior Court of Justice (Superior Tribunal de Justiça).

must be technically defined by specific and case-by-case analysis, although they may start from general concepts.

To illustrate an authorization procedure, administrative process No. 01498.000555/2018-15¹² was analysed, which deals with the request for the realization of artistic painting in a property belonging to the listed building in Bairro do Recife, by IPHAN Superintendence in Pernambuco.

The request was analysed through Technical Opinion 95/2018¹³, obtaining the following conclusions and requirements:

- adopt a background panel in a uniform and neutral color (concrete, beige, white);
- preserve the free edges, maintaining 40% of the neutral background without artistic painting;
- if possible, take advantage of the elements on the façade (example: stone borders), in the artistic conception.

After analysing the outline submitted, it appears that the proposed drawings detach from the edges and are not concentrated along the façade. However, it is recommended that the neutral background be monochromatic and without textures, serving as a backdrop for the painted images. It is also noteworthy that there are stonework fences that are taped to the side façade of the property that could be incorporated into artistic painting, promoting a greater appreciation of the architectural characteristics of the property.

The administrative discretion in this case took into consideration the criteria related to the location of the site (property listed as a whole and its specific situation) and the characteristics of the painting (dimensions, scale relative to the property listed, form of implantation in the support and colors).

There was no explicit statement, in this case, about the type of paint admissible, length of stay or the artistic or thematic value of the work, although the sketch of the paintings was submitted to IPHAN's analysis, as can be seen from administrative process no. 01498.000846/2018-03¹⁴.

The base for the execution was the wall of a parking lot, in a narrow street, therefore, the potential for the painting to interfere in the protected set was minimized, as can be seen before and after the intervention.

¹² This document can be accessed through the public consultation of the electronic information system of IPHAN (SEI IPHAN), through the information of its number, through the address https://sei.iphan.gov.br/sei/modulos/search/md_pesq_processo_pesearch.php?acao_externa=protocol_research&acao_origem_externa=protocol_research&id_or_gao_acesso_externo=0

¹³ This document can be accessed through the public consultation of the electronic information system of IPHAN (SEI IPHAN), through the information of its number, through the address https://sei.iphan.gov.br/sei/modulos/search/md_pesq_processo_pesearch.php?acao_externa=protocol_research&acao_origem_externa=protocol_research&id_or_gao_acesso_externo=0

¹⁴ This document can be accessed through the public consultation of the electronic information system of IPHAN (SEI IPHAN), through the information of its number, through the address https://sei.iphan.gov.br/sei/modulos/search/md_pesq_processo_pesearch.php?acao_externa=protocol_research&acao_origem_externa=protocol_research&id_or_gao_acesso_externo=0

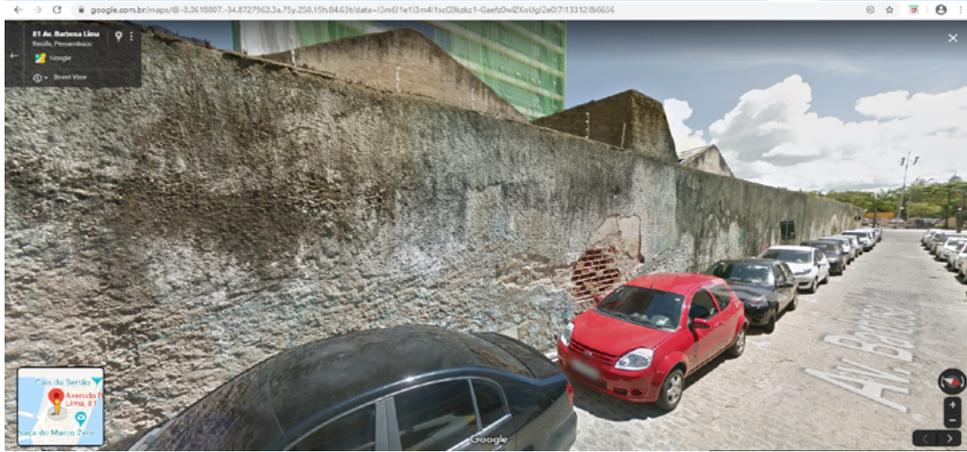


Figure 2: Barbosa Lima St., n. 81. Protected set in Bairro do Recife

Source: Google Maps (06/04/2020)



Figure 3: Rua Barbosa Lima St., n. 81. Protected set in Bairro do Recife, after the intervention (9/9/2018). Detail with approximation

Credits: Fabiana Dantas

The theme of the illustrations is compatible with the cultural character of the protected set, implying neither devaluation nor damage to the support, concluding that the painting cited meets in general terms the recommendations of the government.



Figure 4: Rua Barbosa Lima St., n. 81. Protected set in Bairro do Recife, after the intervention (9/9/2018)

Credits: Marcelo Müller

It is important to highlight that the granting of prior authorization does not exempt the author from being held responsible if he executes it in nonconformity, and obliges the competent authorities to verify its adequacy through subsequent inspection.

CONCLUSION

Brazilian environmental legislation permits the execution of artistic paintings in listed buildings, provided that they have been previously authorized by the owner and the public authorities, and that configure the improvement of environmental quality.

The analysis carried out by the public administration to grant this authorization are discretionary, based on legal norms that have indeterminate legal notions, which will be applied according to the vision of the city, art, communication, legal graffiti, illegal graffiti, beauty in force in the state organization, and criteria technicians that will be built through administrative practice.

In this article, we sought to highlight some technical criteria inferred from the interpretation of the laws of preservation of the Brazilian cultural heritage and its application, pointing out as general conditions for the execution of graffiti in listed buildings the concrete aspects of the material support that will undergo the intervention, as well as its context, in order to subsidize the practice of administrative acts.

As an illustration, a brief case study on the authorization of an artistic painting was carried out on a listed property in Recife, where criteria were highlighted regarding the location of the installation (the property listed as a whole and its specific situation) and the characteristics of the painting (dimensions, scale relative to the listed property, form of implantation in the support and colours).

Although there was no specific analysis regarding the artistic merit of the paintings, nor their theme, there is an intention to embellish and promote local cultural events that certainly influenced the administrative judgment positively.

The paintings executed may not correspond to the established concept of “graffiti” in the artistic community, nor do they share their original contesting function, but they are thus considered for the purposes of application of Brazilian legislation by the public administration.

In any case, it is worth mentioning that the protection of the cultural environment is a duty of all – State, society and individuals – as established in article 225 of the 1988 Federal Constitution, and the objective of any intervention in a protected property must guarantee the conservation and enhancement.

Translation: Flávia Dantas de Mendonça Braga

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BIOGRAPHICAL NOTE

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