



RETURNING OF CULTURAL ASSETS: A LEGAL ANALYSIS ON THE ACQUISITION OF ARTWORKS BY MASP (MUSEU DE ARTE DE SAO PAULO) IN THE POST-WAR PERIOD

ABSTRACT: This work investigates the legal situation of some pieces of art held in the São Paulo Museum of Art - MASP, studying the rules of domestic and international law. The creation of this paper intends to explain the institute of Restitution, which is not well known in Brazil, providing practical examples, normative sources and the historical context of all cases. The methodology is based on the narrative of the historical moment responsible for emerging the legal and social problem focus of this study, which is the loss of cultural property by Jews as a result of the Nazi regime; on the analysis of the Brazilian Civil Code regarding legal transactions and the causes of invalidity, the eviction and civil responsibility; on the analysis of International Conventions and Declarations concerning the protection of cultural property; and also on the study of similar cases in other countries. Finally, it intends to find the best and most appropriate legal path to take accordingly to the facts presented, providing not only justice between people, but a social and historical justice between nations.

KEYWORDS: restitution; pieces of art; MASP; nazism; human rights.

INTRODUCTION

This article is the result of a reciprocal influence of Law and the Art. More specifically, it is an analytical study of legal legislation (internal and external) on some works of art in the collection of the Museum of Art of São Paulo, MASP, which were acquired in the post-war period. Some of these objects have been targeted and are in the middle of a dispute, for the time being, extrajudicially, involving Jewish families who were victims of Nazi ideology during World War II. Furthermore, we are searching for, through this present study, to find the most fair and adequate instrumentalization of legal framework to implement the Law in these cases.

If the relationship between law and art takes place as the penetration of the legal form in art, one can also glimpse a relationship with a reverse meaning: **the penetration of the artistic form into law**. In this case, more properly, it would be appropriate to talk about two possible relationships: that of artistic form in respect with the law and the artistic form and its approach with fairness (Gladston Mamede et al., 2015, p. 24).

In the eyes of beginners or laymen, the relationship between law and art seems to be a bond of mere exteriority: the law, by its own reasons, can only give the protection of the copyright of the artwork and of the person who acquires it, that is, the owner of its rights assets. It so happens that, in addition to this externality relationship, there is an intimate and hidden connection between law and art: from the same structures come from the legal form and the way in which art is taken, historically (Gladston Mamede et al., 2015, p. 17).

Going through History, knowing the context of acquisition of the artistic collection of MASP, and understanding the national legislation, more precisely, the Brazilian Civil Code, and the international conventions and declarations that deal with the protection of the historical and cultural heritage, it becomes possible to cognise and predict what the future will bring to cultural goods, seen in this museum, and which are requested today by the heirs of this particular Jewish family. The analysis of the Brazilian diploma enriches this study only by providing an idea of the attitude accepted in Brazil in the face of events similar to those

that will be discussed here, since there is no applicability of its standards, as the institute of **prescription**¹ prevents such a feat.

By using the examination of international treaties and declarations, however, we can acquire more practical solutions and means, such as restitution, to resolve these conflicts, because those international legal norms and principles are perfectly adequate to solve the problem.

At the end, some cases, occurred in Europe, involving also the requisition and restitution of works of art by Jewish heirs, allowing a better understanding of this subject that presents itself as a novelty, at least in Brazil. Among the cases studied are: Gustave's petition to return 6 paintings by Klimt, requested by Maria Altman in Austria; the process involving the return of the work made by Gustave Courbet called "Le Grand Pont", triggered by Weinmann's heirs against Herbert Schaefer and the Yale University Art Gallery; and the case of the work of Jan Van Scorel, "Madonna and Child with Wild Roses", requested by the heirs of Gross-Eisenstadt, which claim was sent to the Municipal Council of Utrecht, Netherlands.

ABOUT MASP

MASP, the acronym adopted for Museum of Art of São Paulo, is a private museum, a non-profit institution, founded and conceived in 1947 by Assis Chateaubriand, owner of the Associated Diaries (a huge company involving newspapers and magazines). It is considered the most important museum, in terms of Western art, from all over the Southern Hemisphere. Located on the famous Avenida Paulista, it captures the attention of all for its modern and innovative construction (the building itself), work of the architect Ana Maria Bardi, wife of Pietro Maria Bardi, who played a key role in the creation of this outstanding museum.

¹ Within criminal law, penal prescription is the extinction of the State's right to punish any conduct considered to be criminally unlawful caused by any person.

Chateaubriand, who had enormous influence on local society, received many donations (works of art) from the local noble, rich people who were willing to contribute and to be seen as patrons (social status). Chateaubriand also invited the critic and dealer – word of French origin that acquired the meaning of negotiator of works of art – Pietro Maria Bardi, who remained as director of MASP for 45 years, to select works of art in Brazil and abroad, and thus found the first museum of modern art in Brazil.

Today, this museum has more than 8,000 artifacts, including paintings, sculptures, photographs, clothing from different periods, covering European culture, African, Asian and the Americas. Its collection has works by renowned artists, as Candido Portinari, Di Cavalcanti, Anita Malfatti, Almeida Júnior and international, well known names such as Rafael, Mategna, Botticelli, Delacroix, Renoir, Monet, Cezanne, Picasso, Modigliani, Toulouse-Lautrec, Van Gogh, Matisse and Chagall.

In 1982, MASP was listed by CONDEPHAAT - Defense Council of the Historical, Archaeological, Artistic and Tourist Heritage of São Paulo – and, in 2003, by the IPHAN – National Historical and Artistic Heritage Institute.

MASP'S COLLECTION AND THE LAW

In order to answer this pertinent title above, it is necessary to return to the period of the 2nd World War, a defining moment in history, which has repercussions until nowadays. Adolf Hitler, in his ideologies, was not only interested in unify and "purify" the Aryan race and form its "vital" territory through space achievements. He also had another kind of ambition, which, for some, was superfluous, and for others, more profound and essential than any other: founding the Führermuseum in his hometown of Linz, in Austria.

In order to fulfill this desire, it was necessary to establish what kind of art was acceptable for the German purpose of greatness. Germanic art was suitable, all that did not fit into this typology should be eliminated/destroyed, the so-called "degenerate art", seen as influenced by the "perverse Jewish spirit". Such works belonged mainly to the modernist movement and were normally associated with the Jews, for having been great patrons of their contemporary artists. Directors of museums belonging to the Third Reich were forced to dispose of works of the "degenerate art", produced by the most notable painters of the

time and other artists of the past, from Vincent Van Gogh to Pablo Picasso. In one of his speeches, Hitler pronounced:

"As far as degenerate artists are concerned, I forbid them to bring to the people their experiences". "If they see blue fields, it's because they're upset, they should go to a madhouse. If you just want to see them blue, they are criminals and must be sent to prison. I will clean up the nation of their presence and I will not allow anyone to participate in their corruption. The day of punishment will come." (Excerpt from Hitler's speech in Munich, 1937, Forster; Gardner, 1987, apud O'Connor, 2013, p. 110).

Thus, those forms aesthetically marginalized by the Nazi regime or were destroyed, or were kept for appreciation, paradoxically and silently, in houses and offices of the German High Commission. But Jews didn't just have modern art in their homes, they had collections of porcelain, sculptures, paintings, clocks, among other age-old objects, many of those perfectly fitted into the stereotype of "Aryan" art. To confiscate them, Nazi authorities used arguments without any legal foundation, inventing debts and attributing taxes for big Jewish businessmen to pay. So, thousands of important works/objects were looted, having as possible destinations: the destruction, the private collection of the Nazi authorities, the Führermuseum and the auction market.

Many Jews were also obliged to sell their assets, because they did not see any plausible solution but to sell them and thus be able to raise the necessary money to leave the occupied countries, which at that time belonged to the Nazi domain. They were charged by authorities very high values to get these passes. Sometimes, authorities simply did not allow passes and sent them to concentration camps.

With the European economy in crisis in the post-war period, these works acquired by all the illicit means, involving obscure origin, were sold at auction houses and bought by art dealers and individuals of all nationalities. They were works of art difficult to evaluate, i.e., the correct and fair price. As a result, artistic collections of thousands of Jews are spread across the whole world to this very day.

And that's how Pietro Maria Bardi bought several pieces of art for this MASP museum, by travelling himself to European auctions, in the second half of the 20th century, where there

was a large offer of works of very high historical and artistic value, however for very low prices, due to the following crisis after the war. Also, as MASP was made up of many donations, not just purchases at Chateaubriand's expense and Bardi's technical eyes, there may also be works of unknown provenance, inherited or bought by wealthy Brazilian families, who later decided to donate their private collections to the museum.

In the year 1951, Harry Fisher, owner of the Marlborough gallery, offered the MASP a collection of 73 bronzes by Edgar Degas (1834-1917), very known French painter and sculptor. After negotiation, the works arrived in Brazil in 1954. In 2013, representatives of the heirs of the German dealer Alfred Flechtheim (1878-1937), contacted MASP and the Marlborough gallery in order to get information on the provenance of five of the seventy-three dancers carved in bronze by Degas, which can be found in the São Paulo museum today. The lawyers claimed that the pieces belonged to the owner of the Jewish gallery, who left Germany as a result of the Nazi regime, leaving behind much of his collection. As the dealer didn't have children, his estate was inherited by his nephew, now legally represented by his wife and child.

Another similar case is that of the "Unequal Marriage" portrait, which, attributed to a disciple of Quentin Metsys (1466-1530) and being "part" of MASP since 1965, through donation, is also under the focus of suspicion, since 2008. According with a German law firm, representing the heirs of banker **Oscar Wassermann**, the painting should belong to the four grandchildren of the banker, as it would have been sold by Wassermann's two daughters, two years after his death, forced, in order to be able to pay the Jewish exit tax charged by the Nazi Germany. For the lawyer Henning Kahmann, according to an interview given to the brazilian newspaper "O Globo", the Jewish family is open to negotiating compensation, although ideally asking for the return of the art piece.

In view of these situations generated by the Nazi regime, an analysis is necessary, case by case, through knowledge of the rules in force in our national ordering and the human rights norms internationally established, in order to find solutions to resolve these historic conflicts.

ANALYSIS THROUGH THE BRAZILIAN CIVIL CODE

By reading article 206 of the Brazilian Civil Code, it is easy to see that Brazilian legislation, due to the statute of limitations/end of time lapse, can no longer be applied to cases that this present study deals with, since they occurred decades ago. However, knowing the doctrine and rules that apply domestically about business legal matters, their causes of invalidity, on eviction and on civil liability is important to obtain a wider view of what the Brazilian legal system defends as a whole in the face of situations similar to those presented here, in accordance, primarily, with the Brazilian Constitution of 1988.

Interestingly, the law governing legal transactions was developed thanks to the effort of the Germanic doctrine, in a relatively recent period of time. Therefore, the Brazilian Civil Code of 1899 has not yet paid due attention to this civil institute.

With the drafting of the Civil Code of 2002, this inconvenience was eliminated, by being established, in the General Part, the exhaustive content of the legal transactions. It should be noted that Contemporary Law has been adopting a conception quite different from the classic theory of the legal business. The 'will', which was the centre and the focus of every legal business, lost its absolute connotation - which was molded in the French individualism, fruit of rationalism, of the Enlightenment era -, being conditioned, gradually, by rules of public order.

The issuing agents of the 'will' started to be considered as parties or always equal, in a given legal relationship, in view of prioritizing the principles of material equality and human dignity, as formal equality was serving as an argument to justify situations of undeniable injustice.

What is intended to be demonstrated here, simply, is that the modern theory of civil law, built on a solid constitutional basis, must sign its foundations in the autonomy of the 'will' and in free initiative, without fail to observe the principles of law and morals that must guide social solidarity (Stolze; Pamplona Filho, 2013, p. 358).

When analyzing the expression of 'free will' and good faith, which is one of the assumptions of validity of the legal business, the doctrine makes us realize how null or voidable would be the acts done by the Nazis if they did them nowadays, and according

with the Brazilian law, the position here is of disapproval, in the face of situations of forced sales by Jews during their attempt to escape the Nazi regime.

As already mentioned, at the beginning of this topic, this analysis of the Nazi acts, having based on the Civil Code, can only serve to stimulate a reflection on the general understanding of the Brazilian legal system, which can only serve as a guiding light, at the time of application of the norms of international treaties, which will be the more suitable for these cases, which extrapolated the temporal contours of their epoch, producing effects to the present day. As stated by the dominant Brazilian doctrine, therefore, two principles must converge so that the expression of 'will' can be recognized as valid: the principle of private autonomy and the principle of good faith, which is what matters most for this study.

Good faith is established as the ethical precept that informs the valid business 'will'. It's necessary to understand that, in addition to the notion of subjective good faith, which is related to the psychological state of the agent, attention should be paid to objective good faith, which is established through an average ethical standard of mutual trust in a relationship, as well. As informs here Bruno Lewick:

In addition to analyzing a possible subjective bad faith in acting, investigation tainted with difficulties and uncertainties, it is necessary to consider a general level of performance, attributable to average men, which can be summarized in the following question: what would the family man (*pater familiae*) do, when facing a situation in appreciation? What would be his expectations and attitudes, considering the legal, historical and cultural valuation of his time and his community? (apud Stolze; Pamplona Filho, 2013, p. 382).

Chapter IV of the Brazilian Civil Code of 2002 brings the defects (errors, mistakes) of the legal business, which, to be identified in real cases, entail the annulment of those acts, reaching the terms of the existence of the legal transaction itself.

One of these vices is called "Error or Ignorance", whose understanding is extracted from the diploma itself: "Art. 138. Legal transactions are voidable, when declarations of will emanate from a substantial error that could be perceived by a person of normal diligence, in view of the circumstances of the business" (Brazil, Civil Code Brazilian, 2002).

Pablo Stolze and Rodolfo Pamplona Filho, following the work of the Italian teacher Roberto Ruggiero, elaborated a scheme of the different types of errors: **error in negotio, error in corpore, error in substantia and error in persona.**

The error in substantia would be what characterizes the defect of the legal business performed between Pietro Maria Bardi and Assis Chateaubriand and the sellers of the works of art in Europe. This type of error is what deals with the essence of a given object or of its main properties. It is the error that affects the qualities. This being applicable, hypothetically, only if knowledge is not proven by the purchasers of the works, at the time, from the obscure origin of the goods for sale. The purchasers must prove that they were unaware of the obscure provenance.

Art. 151. Coercion, to vitiate the declaration of will, must be such that instills in the patient a well-founded fear of imminent and considerable damage to their person, his family, or his property.

[...]

Art. 156. The state of danger is configured when someone, pressed from the need to save him/herself, or his/her family members, from serious harm, known to the other party, assumes an excessively onerous obligation.

[...]

Art. 157. Injury occurs when a person, under urgent need, or due to inexperience, is obliged to provide something manifestly disproportionate to the value of the opposite service (Brazil, Civil Code Brazilian, 2002).

When observing the defects of the legal business arising from coercion, the state of danger and injury (articles 151 to 157 of CC/02), it is also clearly perceived the possible connection to the facts that occurred under the Nazi regime, as Jewish families had to sell their property, in order to escape the persecutions that they ravaged in the entire territory held by the Fuhrer and threatening their lives. For a better frame of each situation in one of these nullability hypotheses, it is necessary to have a better detailing of the specific cases, because as we read the articles, there is the possibility of subsuming the facts to any of them.

Eviction is another legal institute, accepted by the Brazilian Civil Code, quite pertinent to this study. It is a figure that refers to the idea of loss and that protection against its effects is presented as a contractual guarantee of onerous contracts, valuing the repair of the situation, making it the pre status quo. Pablo Stolze Gagliano and Rodolfo Pamplona Filho conceptualize it as follows:

The eviction in the loss, by the acquirer (evicto), of possession or ownership of the transferred thing, by virtue of a court decision or administrative act that recognized the previous right of a third party, called the evictor (Stolze; Pamplona Filho, 2014, p. 243).

It is noted that its legal provision is the result of the need to protect the purchaser of good faith (evicto) in an eventual sale of a thing not belonging to the alienator.

Art. 447. In onerous contracts, the alienator is responsible for eviction. This guarantee remains even if the purchase was made at public auction.

[...]

Art. 450. Unless otherwise stipulated, evicto is entitled, in addition to full refund of the price or amounts paid:

I - the indemnification of the fruits that it has been obliged to return;

II - indemnity for the expenses of the contracts and for the losses that directly result from eviction;

III - at court costs and attorney's fees for him/herself constituted.

Single paragraph. The price, whether total or partial eviction, will be the value of the thing, at the time it happened, and proportional to the embezzlement suffered, in the case of partial eviction.

[...]

Art. 457. The acquirer cannot demand eviction, if he/she knew that the thing was alien or litigious (Brazil, Brazilian Civil Code, 2002).

Of course, once again, the Brazilian civil diploma presents itself with a strong connection to the principle of active good faith, an understanding that is extracted from article 457, above transcribed.