



# Liberalism Versus Communitarianism in Cultural Heritage Law

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## Abstract

The aim of this study is to investigate the important role of liberal-communitarian debate in cultural heritage law and politics. Derek Gillman in the book titled “The Idea of Cultural Heritage” stressed that “During recent decades, two parallel debates have occurred with respect to public policy and heritage”, and mentioned above is the second one, which “takes place between political philosophers, especially liberal and communitarian thinkers of various shades.” The following study brings attention to the external perspective. That is, these philosophical concepts which appeared beyond legal sciences, but they have the impact on both law and almost all aspects of social life. Liberalism and communitarianism, despite their differences, are particularly useful lens through which to consider law and its functions within contemporary society. Therefore, this begs the question as to what is their approach to the cultural heritage law and practice. While much has been written about liberalism and communitarianism, their impact on cultural heritage still remains shrouded in mystery. We do accept and stress that cultural heritage law is nowadays recognised as the multilevel legal instruments for safeguarding, protection, preservation and maintenance of cultural heritage, cultural property, or even cultural rights. It is not only “multilevel”, but also “multivalued”, and for that reason many theoretical and practical problems are noticed. Liberalism versus communitarianism is one of the most significant debate. As a result, the main aim of this article is to outline the influence of liberalism and communitarianism on cultural heritage law.

**Keywords** Liberalism · Communitarianism · Cultural heritage · Hard cases · Cultural property

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## 1 Introduction: Liberalism Versus Communitarianism

The liberal-communitarian debate is one of the most significant debates in contemporary times. It has impact on different aspects of politics, economics and law. Taking this statement into consideration, the following article brings attention to the external perspective. In other words, it sets forth these philosophical concepts that appeared beyond legal sciences, but they have the impact on both law and almost all aspects of social life. Thus, a certain philosophy gives some suggestions on how to deal with economic, political and social problems. Among all philosophical concepts, liberalism and communitarianism, despite their differences, are particularly useful lens through which to consider law and its functions within contemporary society. In consequence, this begs the question as to what is their approach to the cultural heritage law and practice. While much has been written about liberalism and communitarianism, their impact on cultural heritage still remains shrouded in mystery. In order to provide some answers to this challenging problem, we analyse first the main differences between two concepts and then refer it to the cultural heritage law.

To start with, it is worth mentioning that liberalism as a political doctrine is centred around the protection of freedoms of individuals. Hence, the key-problem relating to politics concerns protection of individual rights. On the one hand, the government can be considered as a guarantee not only to protect, but also to enhance the freedom of individuals. On the other hand, the government itself could also take such actions that threaten the liberty [2].

We can distinguish five main features of the liberal philosophy that consist of rules and principles. First of all, the liberalism advocates for the principle of priority of individual rights and freedoms over the common good (the so-called *in dubio pro libertate*). This also has the impact on liberal scepticism towards any group rights or collective rights. In other words, the liberal philosophy respects much more the interest (including both rights and freedoms of the individuals) rather than the common good. Secondly, the state is responsible for ensuring not only the protection, but also the extension of citizens' rights and freedoms. Thirdly, the state is neutral in ideological, philosophical, ethical and religious matters. By way of explanation, the state should refrain from taking any actions that would interfere with these matters. Fourthly, the liberalism is a doctrine that is focused on the rights of the individual rather than duties that individual has towards the state. Finally, the liberal philosophy draws attention to the negative rights and freedoms, that is the so-called "freedom from...". Therefore, the liberalism is also sceptical about the positive rights and freedoms of citizens, which are expressed in the so-called "freedom to..." [13, pp. 116–117]. Thus, the main aim of the state should be to guarantee the protection of individual liberty. Moreover, it should be accomplished without dictating the goals and purposes for individuals. Indeed, it concerns the negative liberty [7, p. 343].

Communitarianism, in turn, understood as a social and political philosophy, pays attention to the importance of community in different aspects that is its role in political life, in the analysis of political institutions as well as in understanding

of human identity. Communitarianism as a social-political concept appeared in the early 1980s (however some of its ideas are as old as European philosophy) and can be also identified as a critique against two other philosophical schools: contemporary liberalism and libertarianism. In the light of foregoing, liberalism has the aim to protect and enhance both individual rights and personal autonomy, whereas libertarianism, being the form of liberalism, also known as “classical liberalism”, aims at protecting individual rights by restricting governmental power. Moreover, libertarianism seeks protection for citizens’ rights to liberty and property. From the communitarian perspective, it is crucial to guarantee the protection of common good. This stance was presented especially by Charles Taylor and Michael Sandel [8].

The communitarianism advocates for principles and ideals that are opposed to the liberalism. First of all, the communitarianism postulates the principle of the priority of common good over the individual rights, namely the so-called *in dubio pro communitate*. Secondly, from the communitarian perspective, the state has an obligation to ensure the protection of common good. Thirdly, the main duty of the state is to defend those values that will contribute to the respect of both identity and integrity of the community. As a result, the state should never be neutral in any ideological, philosophical, ethical and religious disputes. Fourthly, the communitarianism advocates for the equality of the rights and freedoms of the individual towards the community. Finally, from the communitarian viewpoint, the emphasis is placed primarily on the positive rights and freedoms that is rights enjoyed by members of specific groups or communities. In other words, priority was given to group and collective rights [11, p. 123].

Overall, liberalism and communitarianism set forth different visions of the social order. Hence, from the liberals’ perspective, society could be understood as free individuals who form groups on the basis of almost complete autonomy and voluntariness. The individuals decide to form such groups for the sake of pursuing their own goals more effectively. On the contrary, from the communitarians’ perspective, society is considered as a community within which the individuals exist and only owing to this community they can achieve their goals [24, p. 539].

The above-mentioned debate is still actual and concerns the opposition between individualism and collectivism. On the one hand, liberals stress not only the importance, but also the need of establishing particular political communities for the sake of creating the appropriate conditions for individuals. On the other hand, they are sceptical whether communitarians certainly can guarantee the protection of equal rights for all citizens. This is a challenging problem and political theorists endeavour to better explain the relation between both individual and community or more broadly between universalism and particularism. “To have contemporary relevance the debate should be entered on one side by liberal cosmopolitans and on the other by liberals who focus on the crucial contribution that social practices make to the lives of autonomous individuals for whom the practices are meaningful” [9, p. 180]. The latter statement is particularly significant as a distinct attitude towards the cultural property. From this viewpoint, it is worth mentioning Kymlicka’s ‘liberal culturalist’ approach. Both David Laitin and Rob Reich made clear what should be understood as a ‘Kymlicka’s liberal culturalist’ approach saying that: “Will

Kymlicka is the foremost exponent of liberal culturalism. As a liberal, Kymlicka demands that a state guarantee the basic civil and political rights of all its citizens and he defends the value of personal autonomy. As a culturalist, Kymlicka thinks that individuals exercise freedom only through their moorings to the societal culture, and that this fact should lead liberals to take a moral interest in cultures” [9, p. 181].

## 2 Individual Rights and Common Good

First of all, it should be admitted that the debate concerning individualism and collectivism taking place in philosophy nowadays is very often considered as a debate or dispute between liberalism and communitarianism [16, p. 142]. Hence, the liberal-communitarian debate concerns the relation between individual rights and common good, or more broadly the community. This relation was discussed by Taylor and Sandel as a critique against liberal philosophy. Both philosophers criticised the work of John Rawls and also Immanuel Kant claiming that contemporary liberalism and libertarianism consider individual as a human being outside and apart from the society. On the contrary, they are of opinion that the notion of individual should be analysed from the perspective of society. In other words, the notion of individual should be embedded within this society [8]. Moreover, it should be stressed that an individual’s perspective is not only shaped, but also broadly conditioned by the culture of a society. From this point of view, it must be acknowledged that the individual belongs to many different communities (including cultural or ethnic communities) and the perspectives and values of these communities have the impact on individual identity [16, p. 147]. Communitarians thus believe that the principle of the primacy of the common good over the rights and interests of the individual derives from the social nature of human being. This entails that a person’s life outside the community, without relationships with other people, is almost impossible. Therefore, it is worth quoting the words of A. MacIntyre, who emphasizes that every human being is a member of a community, is simultaneously someone’s son or daughter, a resident of a specific city, a member of a clan, tribe or nation, and due to the fact of being born, living in a specific place or belonging to some communities, creates specific ties with the system of values and normative obligations that regulate its existence [11, p. 124].

Taking this into consideration, it should be stressed that each philosophical concept has to put forward its stance on how to deal with conflicts relating to individual rights and common good. It is certainly important from the perspective of the cultural heritage law. Nowadays, it must be acknowledged that cultural heritage law and particularly cultural diversity could be understood as a common good of humanity. From this perspective, the protection of cultural diversity should be guaranteed for the sake of benefits of all human beings. It is noteworthy that cultural rights belong to the human rights and every individual human being can enjoy it [19, pp. 139–174]. By way of explanation, both tangible and intangible cultural heritage are part of the shared common good and consequently everyone can benefit from it. From this viewpoint, it is worth stressing that not only individuals, but also communities are based upon cultural heritage that helps to form their identity [15, p. 3].

However, despite this general approach on individual rights and common good, there are many challenges concerning these issues in the cultural heritage law.

### 3 Liberal-Communitarian Debate in Cultural Heritage Law

Derek Gillman in the book titled “The Idea of Cultural Heritage” stressed that “During recent decades, two parallel debates have occurred with respect to public policy and heritage”, and mentioned above is the second one, which “takes place between political philosophers, especially liberal and communitarian thinkers of various shades.” The liberal-communitarian debate is very actual and important in the cultural heritage law (law in books) and practice (law in action). There are many examples where the cultural heritage law should seek the so-called “golden mean” to balance individual and collective interests. From this viewpoint, it is noteworthy to give some practical examples of this challenging problem. Before making such an analysis, it is worth recalling Kent Logan collector’s words: “Art is meant to be shared with the public, not just squirrelled away in someone’s private possession” [14, p. 60].

First of all, it should be highlighted that numerous of the greatest and famous works of art belong to the private collectors. Bearing in mind the history, the Chinese nation was able to collect art since 4000 years and art collections were also popular in Ancient Rome. However, public museums appeared in the mid-eighteenth century. It means that all art treasures upon this time were placed in private collections and thus excluded from the public. Although the royal collections were the exception from this rule providing in a certain aspect public access, the rulers considered the art as their own property. The same was with the property of the Church. Even if the times have changed, we are still facing similar problems in the cultural heritage law. On the one hand, many public museums exist worldwide and on the other, private collectors still have a crucial role in maintaining the historical art heritage and cherishing the contemporary art [14, p. 60].

Generally speaking, we have to deal with the ownership of cultural property that is all kinds of changes and transformations in the ownership right, but also the loss of this right and attempts to regain it. Therefore, we have to face the challenging problem of restricting the rights of the owner or holder of such a valuable object due to principle of the common good. This principle naturally refers to the axiological considerations that have been mentioned above. From this perspective, the trading in works of art and monuments are of great importance. Moreover, it also concerns these regulations that, due to the specific subject of trading, change the situation of art market participants. This problem can be recognised as a part of the most important contemporary dispute that is debate between liberal (or rather neoliberal) concepts and communitarian philosophy. However, it is worth adding that this debate is not about antagonisms, but rather about the discursive search for compromises in the contemporary world.

Another problem concerns the copyright law where we have to deal with the conflict of rights, and more precisely the values protected by individual rights. Remarkably, on the one hand, a work of art is a work which could be purchased as an object

of ownership right, but on the other hand, copyright regulations generally have to defend the legitimate interests of the author of the work. Furthermore, they should also restrict free access to this work by others. However, it should be stressed that the owner of the work does not have full rights to the work, due to the fact that the right to the integrity of the work is the author's personal right and thus it is inalienable right [25, p. 503].

To start with examples, it is worth mentioning the case of Japanese businessman, Ryoei Saito, who bought the "Portrait of Dr. Gachet" painted by Vincent van Gogh at Christie's in New York in 1990. This painting sets forth one of the two portraits of Paul-Ferdinand Gachet who was the doctor of Van Gogh. Furthermore, this oeuvre has been considered by the art world as one of the most significant masterpieces of Van Gogh prior to his death in 1890. Saito desired to be cremated with this famous painting of Van Gogh after his death. Although the art world was highly concerned with Saito's attitude and endeavoured to retrieve the Van Gogh's masterpiece, the painting has never been seen again anywhere after the death of Japanese businessman [6]. This case touches upon this challenging problem of reconciling individual rights with the common good. On the one hand, each individual has the right to buy a masterpiece of a famous painter and become the owner of such a painting. On the other, this begs the question whether such a person can destroy a work of art due to a personal willing. We do believe that in case of famous painters and masterpieces of great value there should be some legislation that guarantees the protection of work of art. These types of paintings could be easily designated as a "world treasure" and thus be protected in any circumstances. The fact that someone is rich enough to buy the masterpiece should never allow anybody to destroy any masterpiece. In other words, great paintings, even if they belong to the private collectors, they still should be protected from any danger that could destroy them.

Another example concerns the case of the 1.2 m-high Buddha statue with mummified human remains inside the relic that has been bought by Oscar van Overeem in 1996. The statue is eleventh-century relic containing the mummified remains of Zhang Gong that is the Buddhist monk living in the Song Dynasty (960–1279). This relic was stolen from the temple in Yangchun village (Fujian province in China) in the 1990s. Chinese villagers recognised the famous Buddha statue from their temple during the "Mummy World" exhibition held at the Hungarian Natural History Museum in March 2015. They endeavoured to convince Van Overeem to return the statue, but unfortunately even if the conditions agreed by the parties were met, the final negotiations failed and the case was heard by the Dutch court. The new owner, Van Overeem, said that he decided to exchange the disputed statue for several Buddhist artefacts and he does not know where the relic from Chinese temple is. Moreover, he also decided not to reveal the name of new holder. For the Chinese villagers, this statue of Buddha has a significant meaning. "Master Zhang Gong was famous as a spiritual leader, because of the help he gave to those who needed it and because of his powers of healing. Upon his death, his body was protected against rotting through herbs and other means. Thereafter, the body was protected with a layer of lacquer and covered with a layer of gold" [21]; furthermore "For villagers who live in a region that was the root of Buddhism in China, mummification has a special meaning. It implies that the body of the enlightened Buddhist monk remains part of

the human world, and can still be defiled after his death by external influences. From generation to generation, the statue is worshipped and the day of the monk's death is still marked with pious ceremonies." [20, 21]. Thus, this case confirms that Buddhist monk statue has a certain spiritual meaning for the Chinese villagers. It is not merely a work of art, but something more valuable. The question is: how to balance the right of private collector to own the work of art and dispose it (buy, sell and borrow museums etc.) and to protect the collective rights of other people? This example is very particular from one more point of view that is the specific way of thinking of Chinese people who in general give priority to the collective rights over individual rights.

Finally, it is worth mentioning the new type of cultural heritage that is the so-called street art. At the beginning graffiti was only seen as an example of vandalism relating to the certain subculture. Nonetheless, the situation has changed and street art has become a part of cultural heritage nowadays. Hence, graffiti can represent something valuable and is not merely synonym of a crime as it was in the past. From this perspective, graffiti or more broadly street art have a certain cultural significance not only due to their individualistic nature, but also due to their ability to make public spaces more interesting and even beautiful [3, p. 1]. Moreover, the street art represents at present one of the most dynamic way of expressing culture. Unfortunately, another problem concerns the form of vandalism, namely the theft by detachment. It applies to Banksy murals for instance. These types of murals are not only tourist attractions, but they are also highly appreciated by the communities. What is more, very often it has political and social significance. Remarkably, they become the object of theft due to their economic and commercial value [4].

From the pro-heritage standpoints, Banksy's works should be protected because the street art represents the "community asset". Hence, due to this reason they should be preserved in situ. Sometimes, Banksy's works ("Spy Booth" for example) are described as a "nation treasure" in media and thus should receive the appropriate protection being the common good of entire nation [10, p. 33]. This pro-heritage viewpoint confirms that: "A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society" [17, p. 377], and furthermore "There are two elements in an edifice, its utility and its beauty. Its utility belongs to its owner, its beauty to everyone. Thus to destroy it is to exceed the right of ownership" [17, p. 377; cf. 14, p. 48].

It is also worth adding that "Public art is a part of our public history, part of our evolving culture and our collective memory. It reflects and reveals our society and adds meaning to our cities. As artists respond to our times, they reflect their inner vision to the outside world, and they create a chronicle of our public experience" [1; cf. 17, p. 380]. Therefore, the public art can have such a significant meaning to the community that, in consequence, it can change into the cultural heritage of this community. There are different factors that help to create the so-called "community's cultural heritage". We can distinguish among them: age, fame, significant event or popularity. The first one—age—refers to adequate time of displaying the public art that has already become a landmark. Another factor is fame of the artwork or artist who has become renowned or famous. On this basis, both the public art and

the community to which it belongs attach prestige and notoriety. It also occasionally occurs that the public art has been displayed in a film, song, movie or site of historical or memorable event, thus this art became popular due to significant event. Finally, the public art become the part of community's cultural heritage by reason of its popularity. It means that the community highly appreciates the public art that is seen as a source of community pride [17, pp. 380–381]. Therefore, “When a piece of public art comes to embody a community's identity and culture, when it becomes a landmark or identifying symbol of a community, when it comes to define a community's social relationships, sustain the community's social rules, or strengthen the community's social values, it transcends being just a piece of art and becomes part of a community's heritage” [17, p. 383].

#### 4 Last but Not Least: Hard Cases in Cultural Heritage Law

Overall, it should be pointed out that the liberal-communitarian debate is not only based on the extremely opposite positions. Therefore, this debate does not have the aim to implement exclusively one concept. Furthermore, it is not only about the diversity of liberal views or the heterogeneity of views within the representatives of communitarian philosophy. This dispute arises in both modern democratic countries, but also in the supranational and international environment. This debate is discursive which means that not all ideas and principles proclaimed by the liberals or communitarians are absolute. By way of explanation, neither the principle of the priority of individual rights nor the principle of the common good has the absolute value [24, p. 550; 12, p. 146]. Hence, both liberals and communitarians are conscious that in certain circumstances there is a disproportion between the good of the individual and the common good. This disproportion may be significant that it becomes justified to reverse the order of values preferred by liberals and communitarians. In consequence, each situation requires weighing of the arguments in favour of the individual good or the common good. Nonetheless, inasmuch as there is not an excessive disproportion between the individual and common good, it is possible and justified to opt for the rules that express the preferred order of values (namely liberal or communitarian). It can therefore be said, following Robert Alexy, that liberalism postulates *prima facie* the primacy of individual freedom over the common good (the so-called *in dubio pro libertate*), whereas communitarianism accepts *prima facie* the primacy of the common over the rights of the individual (the so-called *in dubio pro communitate*) [11, pp. 128–129].

Generally speaking, both liberals and communitarians acknowledge the necessity of challenging their extreme views. Therefore, one must note that there is a scale at which two extremes of liberalism and communitarianism are found. In other words, the liberal-communitarian debate indicates where on this scale, between these two extremes, we should find ourselves. It seems obvious that we should “search for different shades of gray”. In case of weighing of these two arguments, ideas and principles presented by liberals and communitarians should be considered as a starting point. The need of balancing these two concepts assumes that the liberals postulate the priority of individual rights and freedoms over the common good. The



communitarians, in turn, are in favour of the priority of the common good over the rights of the individual. It is also worth mentioning Lech Morawski who notices that: “The idea of a compromise between the ideals of communitarianism and liberal-democratic principles is therefore not only possible but also necessary” [24, p. 550; cf. 12, p. 146].

It must be acknowledged that protection of cultural heritage is included in international regulations and implies multifarious relationships. Hence, we have to deal with different level of interests between actors. In consequence, it is necessary to indicate different dimensions such as global, national, local, public as well as non-governmental. Taking this into consideration, it is noteworthy that cultural heritage concerns both interests: public and private. Moreover, these interests frequently oppose each other, for instance in terms of safeguarding cultural property, the way of controlling the circulation or trade of cultural objects etc. [5, pp. 6–7].

It seems that philosophy of law is particularly useful tool for lawyers when they encounter any hard case. That is a legal problem concerning a conflict of law with itself or more broadly with any other normative systems and other aspects relating to the social reality [22, p. 263]. Remarkably, we can deal with hard cases in both process of applying the law and its interpretation as well as during its creation, validity, and compliance. From this viewpoint, a hard case exists while multiple possible solutions could be applied on the basis of rationality and fairness [22, p. 269]. In other words, we are dealing with hard cases when there is no “one right answer” in legal case. In consequence, it is necessary to constantly “consider the principles” in order to give priority to one of them depending on a specific case. This entails that in a different factual situation, an utterly different decision may turn out to be appropriate. It occurs when we have to consider the same values and principles with a different factual situation, thus different results could be achieved [24, p. 550].

This situation concerns also cultural heritage law where it becomes necessary to consider the individual interest with the common interest. It is also possible that the conflict of interests applies to the collision of various public interests. It can occur for example when it comes to the choice between the protection of cultural property and the security of the state or citizens, or important public investment. Even if in case of cultural property division of roles seems to be stable: that is the individual interest is realised by the owner or holder of cultural property. The common interest, in turn, is realised by the conservation officer. There is still a need of discursive search for compromise solutions that would take into account the individual interest insofar as possible, but also would simultaneously guarantee the protection of the social interest [23, pp. 77–78].

Apart from the hard cases concerning liberal-communitarian debate in cultural heritage law, the clash of communitarianism understood as two opposing groups arises. The case of Aalst Carnival that has been removed from the Representative List of the Intangible Cultural Heritage of Humanity reflects it. Aalst Carnival was initially inscribed on the Representative List of the Intangible Cultural Heritage of Humanity in 2010. In the course of this carnival, Prince Carnival became symbolically mayor by receiving the key to the city. Furthermore, some informal groups joining the festivities provided mocking interpretations regarding both local and world events arising during the past year. The carnival concerned the 600-year-old

ritual being a collective effort of all social classes as well as a symbol of the Belgian town's identity. "Since its inscription, the Aalst carnival has on several occasions displayed messages, images and representations that can be considered within and outside of the community as encouraging stereotypes, mocking certain groups and insulting the memories of painful historical experiences including genocide, slavery and racial segregation. These acts, whether or not intentional, contradict the requirements of mutual respect among communities, groups and individuals"; furthermore "Offensive representations have been used on several occasions during the Aalst carnival since its inscription on the Representative List. The inscription does not appear to have encouraged dialogue among communities and has even fostered mistrust between and among communities" [18]. Taking this into account, the Aalst Carnival has been removed from the Representative List of the Intangible Cultural Heritage of Humanity in 2019. By virtue of violation of UNESCO's founding principles such as dignity, equality and mutual respect among peoples that are reflected in the preamble of the UNESCO's Constitution, as well as the requirements of mutual respect among communities, groups and individuals provided by the Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter referred to as UNESCO's Convention) [18]. Thus, this case touches upon the challenging problem of reconciling the freedom of speech, freedom of artistic and satire expression with the political correctness and respect for minorities groups. Besides, pursuant to the purposes of the UNESCO's Convention, the intangible cultural heritage should be compatible with existing international human rights instruments. We are of opinion that in such sensitive cases many different common interests have to be taken in consideration, because they can be opposite to each other.

To sum up, there are many hard cases in the cultural heritage law. It seems particularly important to weight arguments of all parties and to seek for the so-called "golden mean" in each case. The liberal-communitarian debate is still actual and confirms that there is no one solution in any case, and it concerns also cultural heritage law. On the one hand, we have to deal with the collector rights to own work of art (private owners' rights). On the other hand, the masterpieces of famous artists should be considered as a "common good" of mankind. If we allow the owner to dispose its rights in an absolute way, the works of art will become the "Holy Grail" that everyone heard about them, but nobody has seen them.

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