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Cultural Heritage Policy as a Challenge to Rawlsian Liberalism?

Ruwen Fritsche
Georg-August-University Göttingen

Abstract: To answer the question whether cultural heritage policy is challenging Rawlsian Liberalism, the paper is structured in four parts. In the first part, I will present, as a paradigmatic example, an area of legislation that is specifically aimed at preserving cultural heritage – namely German cultural property law. In the second part, I will try to answer whether and under what conditions state action to promote and protect cultural heritage can be morally justified according to the Theory of Justice by John Rawls. In the third part, I will examine whether Rawls's position as worked out in the second part is consistent or even coherent with the claims of so-called political perfectionism. In the fourth and last part of the paper, I am going to analyse tentatively to what extent German cultural property law would have to be changed to be in accordance with the moral criteria of Rawls's Theory of Justice, as presented in the parts before.

Key words: ethics, cultural heritage policies, legal ethics, normative political theory, moral philosophy, law, political perfectionism, culture, Aristotelian principle, self-respect, the good, A Theory of Justice, John Rawls, Steven Wall, German cultural property law, cultural property of national significance, accessibility.

The protection of the cultural heritage of a nation, a region, or a specific group is often used as a legitimising goal for a variety of different policy frameworks. The general question I want to examine in this paper is how to justify, from an ethical[1] point of view, political action aimed at protecting cultural heritage. The inquiry is restricted in two ways. Firstly, I would like to focus on the (possible) justification by the liberal moral philosophy of John Rawls's A Theory of Justice. Secondly, I want to restrict the scope of the ethical examination in this paper to a specific area of political regulations where the motive to protect cultural heritage is especially dominant, that is German cultural property law. My aim is, therefore, to use the more abstract moral philosophy of John Rawls to make an ethical assessment of the actual design of a legal regulatory regime of cultural heritage policy and thus to bridge the gap between moral philosophy and law.

I. THE LEGAL PROTECTION OF CULTURAL HERITAGE

German cultural property law – de lege lata

In the following, I want to set forth some central legal provisions of German cultural property law to indicate how the concrete law protecting cultural heritage works. The central code for cultural property protection in Germany is the "2016 Act

1] By "ethical" I mean the critical reflection of the actually existing positive moral norms, (see: Frankena 1963, 4-5).

on the protection of cultural property" (KGSG).[2] One central legislative aim consists in the protection of "cultural property with national significance". Cultural property with national significance is not to be confused with "national cultural property" which the KGSG uses as the more general term referring to cultural property with national significance and including most publicly owned cultural property.[3] Following the aim of the KGSG to protect cultural property, the property rights in cultural property with national significance are therefore restricted.

Cultural property of national significance as a subject of the KGSG

Section 6 KGSG starts by defining what national cultural property should be:

"(1) National cultural property shall be cultural property which

1. is entered in a register of cultural property of national significance"

Thus, what is meant by cultural property of national significance within the meaning of section 6 (1) KGSG depends on the criteria for entering the register of cultural property of national significance in the sense of section 6 (1) (1) KGSG. These criteria are stated in section 7 KGSG. According to section 7, the entrance in the register shall be mandatory when the following conditions are cumulatively fulfilled:

Section 7 (1) "The supreme Land authority shall enter cultural property in a register of cultural property of national significance

1. if it is particularly significant for the *cultural heritage of Germany*, its Länder or one of its historical regions and thus *formative for Germany's cultural identity*; and

2. if its removal would be a significant *loss for Germany's cultural heritage* so that keeping it in the federal territory is of outstanding cultural public interest" (*emphasis* added by the author).

The procedure for entry into a register of cultural property of national significance is initiated by the appropriate authorities *ex officio* or upon request by the owner (see Section 14 (1) KGSG). The registration of cultural property may only proceed in consultation with an expert committee (see Section 14 (3) KGSG). This committee consists of experts, i.e. to be considered are: "persons from institutions preserving cultural property, from research, art and antiquarian book trades, and private collectors" (see Section 14 (2) (2) KGSG).

Regulation of cultural property of national significance according to the KGSG

There are multiple legal consequences once a piece of cultural property has entered the register for the cultural property of national significance. According to section 18 in conjunction with section 83 (3) KGSG, damaging cultural property of national

2] KGSG means Kulturgüterschutzgesetz of 31. July 2016 (Federal Law Gazette I, 1914), http://www.gesetze-im-internet.de/englisch_kgsg/index.html (accessed February 1, 2020).

3] See for details: section 6 (1) (2-4) KGSG. The wider concept of national cultural property corresponds to European law terminology, see Art. 36 TFEU and Art. 2 (1) Directive 2014/60/EU.

significance (even for the property owner) is subject to criminal prosecution. Section 19 KGSG states notification requirements for cultural property of national significance in case of loss, destruction, damage, or any change to the appearance of the cultural property. The central restriction for cultural property of national significance is stated in section 21 (2) KGSG in conjunction with sections 22, 23, 83 (1) (1) KGSG which makes it a criminal offense to export cultural property of national significance, reserving the right to grant approval for export. Illegal export of cultural property of national significance could thus be punished with a fine or even imprisonment of up to five years. Finally, according to section 16 KGSG, the register of cultural property with national significance is to be published on the internet.[4]

II. THE MORAL JUSTIFICATION OF STATE ACTION TO PROMOTE AND PROTECT CULTURAL HERITAGE ACCORDING TO RAWLS'S *THEORY OF JUSTICE*

The fundamental goal to protect the German cultural heritage and the aforementioned basic means to such end via cultural property legislation is not controversial politically.[5] Nevertheless, there are debates about what exactly constitutes cultural heritage. In contrast to the political consensus with respect to protecting cultural heritage via cultural property legislation, there is an ongoing debate in moral philosophy whether and under what conditions a liberal state might engage in active cultural politics to promote the intrinsic values of a culture.[6] On a more abstract level, detached from any specific debate on legitimate cultural policies, the debate in moral philosophy revolves around the concept of political perfectionism (see for an overview of the debate Steven Wall (2017)).

In the following, I first want to present relevant ethical norms according to which we could judge whether and to what extent cultural politics could be morally justified. I want to focus on liberal theories because *prima facie* it seems to be specifically suitable for justifying the cornerstones of a western-style liberal constitutional democracy, namely human rights, democracy, separation of powers, etc.[7] A sceptical view on the legitimacy

4] See http://www.kulturgutschutz-deutschland.de/DE/3_Datenbank/LVnationalWertvollenKulturguts/lvnationalwertvollenkulturguts_node.html (accessed February 1, 2020).

5] This becomes particularly clear in the parliamentary debate in the Bundestag, where there was no party that rejected the basic aim to protect the German cultural heritage via cultural property legislation when the Cultural Property Protection Act was revised in 2016, ("Erste Beratung des von der Bundesregierung eingebrachten Entwurfs eines Gesetzes zur Neuregelung des Kulturgutschutzrechts" 2016; "Zweite Und Dritte Beratung des von der Bundesregierung eingebrachten Entwurfs eines Gesetzes zur Neuregelung des Kulturgutschutzrechts" 2016).

6] Intrinsic values of a culture mean in this context values which are not good in virtue of the fact that they are desired or enjoyed by human beings and which are also not classical liberal values like equality and freedom, i.e. non-universalistic or particularistic values.

7] Of course, I do not want to say thereby that liberal theories are the only ones that could justify the cornerstones of a western-style liberal constitutional democracy.

of cultural politics in light of liberal moral philosophies is paradigmatically expressed in the *Theory of Justice* by John Rawls, published in 1971.[8] In this paper, I would like to focus solely on Rawls's *magnum opus*, *A Theory of Justice*, as the ethical benchmark for the justification of cultural heritage policy. I first want to give a summary of Rawls's central arguments which lead to his rejection of perfectionist justifications of politics and which seems especially relevant for cultural property policies.

The primary object of justice is, according to Rawls, the basic structure of a well-ordered society (1999, 6-10). The principles of justice are, along with his contractualistic account of "justice as fairness", determined by the (potential) agreement of persons (1999, xviii). Rawls assumes this agreement to be the result of a thought experiment. The persons in the "original position" should be imagined as being behind a "veil of ignorance" behind which they agree on the basic principles of justice (1999, 11, 118-21). Rawls's reason for deploying the veil of ignorance is that the knowledge of (any) contingent societal or natural personal characteristics would motivate to seek advantages, which are based on these contingent facts. An agreement motivated in part by the different contingent personal characteristics would thus not reflect the fundamental equality of men as moral persons (1999, 11). Therefore, the persons behind the veil should be ignorant of any contingent fact about their characteristics as persons, such as their class or intelligence (1999, 11). It is important to notice that this means, for Rawls, that the persons behind the veil should also be ignorant of their specific personal conception of the good which they will pursue once the veil is lifted (1999, 11, 16-17). In the original position, persons would then, according to Rawls, agree upon two principles of justice: The first principle is that every person must have equal basic liberties and the second principle states that social and economic inequality could be justified only when they could be a) "reasonably expected to be to everyone's advantage" and b) "attached to positions and offices open to all" (1999, 53).

According to Rawls's theory of justice, political action, and thus cultural policies, could be generally justified when they are compliant with the two principles of justice (1999, 292). Apart from this positive basis for the justification of political action, Rawls says more about illegitimate forms of justifications for policies, which seems especially relevant for the question of cultural policy. A "central aim" of the *Theory of Justice* is to present a convincing alternative to the, at the time, long-dominating theory in Anglo-Saxon thought, namely Utilitarianism (1999, xi). Utilitarianism, for Rawls, is a theory

8] Since Rawls himself considered the revised edition of *A Theory of Justice* to be the improved and superior edition compared to the original one, Rawls's theory of justice is presented, in the following, as it is found in the revised 1999 edition (published in German in 1975). For a presentation of Rawls's theory of justice based on the revised edition, see also Jon Mandle (2009, ix). It is important to note that the change in Rawls's theory in his later work is also accompanied by a change in his position concerning the possible justification of so-called perfectionist policies (see Rawls 2001, 151-55; Wall 2015, 604). Of course, libertarian theories are even more sceptical about the moral legitimacy of cultural policies, e.g. (Nozick, 1974). However, the more radical assumptions of libertarian theories lead also to further problems, which would need further discussions, (see e.g. Nagel, 1975), which shall be not the subject of this paper.

that defines just institutions for society as the ones which achieve the greatest net balance of satisfaction summed over all individuals belonging to it. Besides this, Rawls contrasts his principles of justice with other alternatives, as well, one of which is perfectionism. Perfectionism is, according to Rawls, a label for a group of theories which seek to promote values of human excellence that are, in contrast to Utilitarianism, independent from personal satisfaction (1999, 21-22). Rawls differentiates two different more specific forms of perfectionism.

The first "strict" version of perfectionism describes a teleological theory that demands the maximisation of the good understood as "human excellence in art, science and culture", defining thus its sole principle for a just society (Rawls 1999, 285-86, 287). Rawls' main argument against the first version of perfectionism is that such a theory would restrict the freedom of those who do not share the perfectionist conception of the good (1999, 288). The rejection of such a version of perfectionism, which has no place for equal freedom and rights in society, seems to be uncontroversial.

The second "moderate" version of perfectionism means that the perfectionist principle (to maximise the perfectionist goods, e.g. human excellence in art, science, and culture) shall be considered as only one principle among others in determining what a state might legitimately do (1999, 286). For this moderate version of perfectionism, the perfectionist principle thus has to be balanced against other principles. The accounts which fall in this second category of perfectionist theories differ therefore to the extent to which they give weight to the perfectionist claim for excellence in art, science, or culture. An acceptable account of such a theory can thus demand state action to ensure the satisfaction of basic needs for everyone and demand, beyond this basic needs, to give expenditure to preserve perfectionist values instead of taking action to equal benefit for everybody or the least advantaged (1999, 286).[9] Rawls rejects this second version of perfectionism, just like the first, referring to the original position. Thus, for Rawls, even the second version of perfectionism means risking that, once perfectionist values are known, the principles of justice and the following legislation could be discriminatory towards those who do not share these values.[10] But Rawls does not generally forbid private cultural engagement in a society. Perfectionist values could, according to Rawls, be pursued by private associations limited only by the so-called principle of free association (1999, 289). This means that, within a society whose institutions comply with Rawls's two principles of justice, people could join associations and promote, without using the coercive power of the state, their perfectionist agenda (1999, 289). The state may act on behalf of the (perfectionist) associations only under certain restrictive

9] I omit unacceptable „highly perfectionist" accounts as for example to override strong claims of liberty in favour of promoting perfectionist values – Rawls gives the historic example to legitimise the ancient practice of slavery for the excellence of Greek philosophy, science and art (1999, 286).

10] In order to refute the moderate version of perfectionism, Rawls refers also to the vagueness of perfectionism in precisely determining the perfectionist values and the relation between these values (1999, 291).

conditions through the so-called "exchange branch" to overcome "problems of isolation and assurance" between the members of the association (1999, 291, 249-51).[11] That means citizens are, according to Rawls, free, through this exchange branch, to impose taxes on themselves.

According to the presented (usual) interpretation of Rawls's *Theory of Justice*, cultural policies that go beyond the coordination of collective self-taxing through the exchange branch must be measured against the two principles of justice to be morally legitimate. Rawls explicates this claim with regard to taxation: "Taxation for these purposes [subsidizing universities and institutes, or opera and the theatre] can be justified *only* as promoting directly or indirectly the social conditions that secure the equal liberties and as advancing appropriately the long-term interests of the least advantaged." (emphasis added by the author) (1999, 292)

As an alternative to this usual interpretation of Rawls, which leaves only a very limited space for perfectionist justification of political action within the framework of the two principles of justice, I would like to present a critical interpretation of Rawls's rejection of moderate political perfectionism which is not only more open to perfectionist justification of political action, it even seems to demand a perfectionist justification of action to a certain extent according to Rawls's own theory.

III. CONSISTENCY OF RAWLS'S *THEORY OF JUSTICE* REGARDING PERFECTIONISM

It seems doubtful whether the clear rejection of perfectionist justified policies in the *Theory of Justice* is coherent or at least consistent with other parts of Rawls's theory, namely the assumptions concerning the so-called "Aristotelian Principle" (1999, 372). The Aristotelian principle is formulated by Rawls as follows: "[…] other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity." [12] (1999, 374) For Rawls, the Aristotelian principle is a basic principle of motivation (1999, 373, 375) and to be the basic principle of motivation means that it "accounts for many of our major desires and explains why we prefer to do some things and not others by constantly exerting an influence over the flow of our activity." (1999, 375) Rawls illustrates the principle with the example of someone who can play both checkers and chess. In this case, the Aristotelian principle would mean, because chess is more "complicated and subtle", that the person would generally prefer playing chess

11] The main conditions to use the exchange branch is taxpayers' agreement on cost recovery through the distribution of costs among different types of taxpayers and a proven benefit for all taxpayers (1999, 249-51).

12] Rawls refers to Aristotle's statements in Nicomachean Ethics on happiness, activity, and pleasure: (Aristotle 2000, 136-42 (book 7, chapters 11-14), 183-92 (book 10, chapters 1-5)). Rawls does not adopt the principle from Aristotle in detail, since according to Rawls "[…] he [Aristotle] does not state such a principle explicitly, and some of it is at best only implied […]" (1999, 374).

(1999, 374). Rawls stresses though that the Aristotelian principle "does not assert that any *particular* kind of activity will be preferred. It says only that we prefer, other things equal, activities that depend upon a larger repertoire of realized capacities and that are more complex."[13] (emphasis mine) (1999, 377) Rawls argues that the effort of learning the more complicated activity is generally accepted, as greater satisfaction is expected from an activity using enhanced skills (1999, 376).[14] According to Rawls, the tendency to exercise one's abilities, as far as it is reasonable under consideration of the effort involved, also follows from the nature of the interests of persons and "plain facts of social interdependency" (1999, 376). Fellow human beings would support such an activity in this sense since they are "likely to support these activities as promoting the common interest and also to take pleasure in them as displays of human excellence." (1999, 376)

At this point, a crucial connection between the Aristotelian principle and the important primary good of self-esteem is revealed.[15] Before we take a closer look at this connection, it is important to remember that for Rawls a person's good is determined by his most rational long-term plan of life (1999, 79).

For Rawls, self-esteem is "perhaps the most important primary good" (1999, 386). It consists, on the one hand, of the sense of one's own value as the secure conviction that one's life plan "is worth carrying out" (1999, 386). Secondly, self-esteem consists of confidence in one's own abilities to realise one's intentions as far as possible (1999, 386). The special position of self-esteem means that without one of these two components of self-esteem, people would not be able to realise their plans of life.[16] For Rawls, one of two essential circumstances that support the sense of one's own worth as one part of self-esteem is to have a rational plan of life that satisfies the Aristotelian principle (1999, 386). According to Rawls, activities that do not realize a plan of life in accordance with the Aristotelian principle quickly appear "dull and flat" and "give us no […] sense that they are worth doing" in terms of self-esteem (1999, 387). Persons would in principle have more confidence in their own worth if their "abilities are both fully realized and organized in ways of suitable complexity and refinement" (1999, 387).[17] Rawls argues that, in the context of the theory of justice as fairness, it is not necessary to prove the correctness of

13] Rawls also speaks of "chains" of activities, where each higher link in the chain includes the activity of the previous one and requires at least one other type of activity. In this context, Rawls says: "By itself the principle simply asserts a propensity to ascend whatever chains are chosen" (1999, 377-78).

14] However, according to Rawls, at a certain point, the motivation for individuals to develop their own skills is limited by the increasing difficulty of learning.

15] Rawls uses the terms "self-esteem" and "self-respect", at least in *A Theory of Justice*, interchangeably (1999, 386; Rivera-Castro 2015, 762).

16] Rawls describes this vividly: "Without it [self-esteem] nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and activity becomes empty and vain, and we sink into apathy and cynicism." (1999, 386).

17] Rawls refers to a psychological work of Robert W. White for the assumptions about the relationship of self-esteem to the Aristotelian principle (White 1963, chapter 7, 125-50). See reference in Rawls, *Theory of Justice* (1999, 389, n. 26).

the Aristotelian principle, although he presents various possible explanations (1999, 374-75).[18] Rawls also emphasises that the Aristotelian principle is only a "tendency and not an invariable pattern of choice, and like all tendencies it may be overridden" (1999, 376).[19] To summarise: According to Rawls, having plans in life in accordance with the Aristotelian principle is an essential circumstance for one's own self-worth as part of self-esteem which is a necessary condition to pursue one's plan in life which, in turn, constitutes a person's good. Thus, the Aristotelian principle seems to be not only an interesting assumption but of systematical importance for Rawls's theory as a whole.

In Rawls's statements on the Aristotelian principle, it is unclear whether, and if so, what normative relevance the Aristotelian principle is given within the framework of his theory of justice as fairness. On the one hand, Rawls repeatedly speaks of his theory of justice taking into account the Aristotelian principle. In this sense, Rawls says: "Since the Aristotelian Principle is a feature of human desires as they now exist, rational plans must take it into account."[20] (1999, 379) Rawls also thinks "that in the design of social institutions a large place has to be made for it [the tendency of the Aristotelian principle], otherwise human beings will find their culture and form of life dull and empty." (1999, 377) On the other hand, following from the Aristotelian principle as a tendency, this principle does not, according to Rawls, claim to apply to all people (1999, 376). Rawls illustrates this with the example of a person "whose only pleasure is to count blades of grass in various geometrically shaped areas […]. He is otherwise intelligent and actually possesses unusual skills, since he manages to survive by solving difficult mathematical problems for a fee." (1999, 379) Rawls now thinks that, assuming "his [the person who counts the blades of grass] nature is to enjoy this activity […], and that there is no feasible way to alter his condition" then "surely a rational plan for him will center around this activity" (1999, 380). Note that the Aristotelian principle would in principle require the pursuit of a different, more reasonable plan (e.g. a more in-depth study of mathematics, which would include counting as an ability). With the presented example, Rawls wants to illustrate that "the correctness of the definition of a person's good in terms of the rational plan for him does not require the truth of the

18] As a possible reason for this, Rawls cites the fact that "complex activities are more enjoyable because they satisfy the desire for variety and novelty of experience, and leave room for feats of ingenuity and invention. They also evoke the pleasures of anticipation and surprise, and often the overall form of the activity, its structural development, is fascinating and beautiful. Moreover, simpler activities exclude the possibility of individual style and personal expression […]" (1999, 374-75).

19] According to Rawls, "countervailing inclinations can inhibit the development of realized capacity and the preference for more complex activities" (1999, 376). Nevertheless, the postulated tendency is "relatively strong" and cannot be counterbalanced "easily" (1999, 377).

20] Rawls means that "[t]he things that are commonly thought of as human goods should turn out to be the ends and activities that have a major place in rational plans. The [Aristotelian] principle is part of the background that regulates these judgments." (1999, 379)

Aristotelian Principle. The definition is satisfactory […], even if this principle should prove inaccurate, or fail altogether" (1999, 380).

Given the close connection to self-esteem as a primary good, it could be argued that the state should enable and promote personal development according to the Aristotelian Principle.[21] One argument in favour of such a perfectionist interpretation would be that Rawls himself draws the conclusion that the person in the grass-counting example is also following a reasonable plan, dependent on a decisive condition. The conclusion is in this sense conditioned by the fact that "there is no feasible way to alter his condition [the preferences of the person]" (1999, 380). This passage suggests that, if possible, the preferences of the person, however, should be aligned with the Aristotelian principle (Wall 2013, 581-82). Such an interpretation thus suggests that the conformity of rational life plans with the Aristotelian principle should actually be regarded as something objectively desirable (Wall 2013, 587). Apart from (probably rare) individual cases, such as the grass-counting example, it seems that, on this basis, a more general perfectionism may be justified in order to promote the realisation of individuals' abilities to pursue a rational plan of life in accordance with the Aristotelian principle. Against a broader perfectionism, it could be argued with Rawls that such perfectionist policies are not necessary, since, in a (well-ordered) society, there would be non-state groups for every reasonable life plan which would allow the members to develop their abilities according to the Aristotelian principle (Rawls 1999, 481). This suggestion can be doubted for various reasons. For example, some life plans may not be accessible to everyone, as they are more expensive to realise than others, or it may be questionable whether there is a sufficiently wide range of possibilities for everyone to realise their abilities (Wall 2013, 588-89). Even if one does not accept these objections, Rawls's main objection to perfectionism could eventually be that, by promoting some plans of rational living, it unjustifiably disadvantages others. This could again be countered by the argument that, in this way, at least no public support could be refused which would support all or many different forms of the good in life (pluralistic perfectionism) (Wall 2013, 592-93).[22] Should there be any doubts regarding the choice of forms, a fair procedure (e.g. democratic voting under fair conditions) might still be agreed upon following Rawls's own method (Wall 2013, 594). The Aristotelian principle thus seems to hint at a legitimate pluralistic form of perfectionism in Rawls's *Theory of Justice*.

21] In this sense suggestively Steven Wall (2015, 604): "But if it [the Aristotelian Principle] is accepted as true, then it implies that rational plans of life for human beings must make room for the perfectionist value of self-development." As a thesis more explicitly defended by Steven Wall (2013, 579). With the similarity to perfectionist values, I mean that a corresponding promotion resembles a typical perfectionist policy. However, it must be emphasised that the line of argumentation, presented above, does not incorporate perfectionist arguments into Rawls' theory. The argumentation, as has been shown, is based solely on Rawls' own, non-perfectionist premises.

22] Pluralistic perfectionist theories combine thus the perfectionist thesis that the state could legitimately support objective values and the thesis that there is not only one good but that there are instead many expressions of the good, (see e.g. Raz 1986, 133).

IV. CHALLENGES FOR THE LEGAL PROTECTION OF CULTURAL HERITAGE ACCORDING TO THE *THEORY OF JUSTICE*

The legitimate aims of cultural property law

As we have seen, according to the usual interpretation of Rawls's *Theory of Justice,* only those cultural policies could be justified which are in compliance with the two principles of justice. Could the protection of cultural heritage, without referring to perfectionist reasons, therefore be a legitimate aim for any concrete policy regime in accordance with the two principles of justice? The question is, therefore, whether there is an argumentative path that justifies political action to protect cultural heritage on the legitimising basis of the two principles of justice. Tentatively, I want to sketch out two ways of interpreting the protection of cultural heritage in accordance with the two principles of justice.

For the first argument, which is proposed in its abstract form in a range of different theories[23], it is important to remember that, for Rawls, the possibility to choose freely between final ends is a necessary condition for any free person in the sense of the first principle of justice (Rawls 1999, 475-76). If the forms of the final ends and their different values are provided by a complex culture, it could be assumed that a diverse culture is needed to have the different options of the good life in the first place. Cultural heritage might be thus one way of giving a more differentiated meaning to forms of culture and thus to forms of the final ends in life. Cultural heritage policies in this sense might be, on a fundamental level, a necessary part of protecting the cultural condition to choose between final ends. And as you need a culture which provides values and options and so allows the free choice which is necessary for the first principle of justice, it might seem plausible and legitimate to protect and promote cultural heritage, e.g. via cultural property law, as a part of this cultural condition of free choice between final ends.

Second, you might argue that cultural heritage forms part of a cultural identity that, in turn, forms a common identity as an important part of the foundation for solidarity between citizens (at least) in the non-ideal theory.[24] To integrate this argument back into the Rawlsian framework, you could assume that society needs some degree of solidarity among their members to ensure that everybody, and especially the least advantaged, could benefit in the sense of the second principle of justice – Rawls seems to say as much himself,

23] Will Kymlicka argues similarly regarding liberal culturalism in general (2003, 84-93) Yael Tamir and David Miller present a similar argumentation about (liberal) nationalism: (Tamir 1993, 33, 36; Miller 1995, 86, 146-47) Joseph Raz articulated such an argument more specifically concerning liberal multiculturalism (1996, 176 ff.). Addressing the question, whether the liberal state should support the arts, Ronald Dworkin develops also an argument of that kind (1985, 229-33).

24] David Miller famously put forward such an argument regarding nationality (1995, 93-96, 2000, 27). One has to keep in mind that Rawls states in the *Theory of Justice* that in the ideal theory everybody would share the same theory of justice as fairness (as a partly comprehensive doctrine) (1999, 434-41; In his later work, Rawls changed his mind on this point, see 2005, xvii).

but refers to it as "the principle of fraternity" (1999, 90-91). And one way of promoting a culture that fosters solidarity between citizens might be securing and promoting a uniting national cultural heritage, e.g. via cultural property law.

As we have also seen, the usual interpretation of the rejection of perfectionist justified policies seems little compelling, especially when it comes to the Aristotelian principle. When following the more perfectionist argumentation, cultural heritage protection might be a legitimate policy aim as it might offer access to potentially more complex cultural traditions in the sense of the Aristotelian principle. Through such a reading, policies for the protection and promotion of cultural heritage might become an important instrument under Rawls's theory as far as they foster the fundamental value of self-esteem.

The legitimate means of cultural property law

Following Rawls's *Theory of Justice,* there seem to exist different ways of giving cultural heritage a legitimate policy objective. The question of the specific German cultural property law now may pivot to the modalities in which the law approaches the protection of cultural heritage, and whether and to what extent the regulatory regime corresponds with the ways of ethical justification that have been stated above.

It is important to recognize that all the presented approaches on how cultural property protection can comply with the two principles of justice have one thing in common. They all would probably attribute a greater communicative effect to a cultural object that is well preserved and accessible to the public than to an object that is poorly preserved and/or not accessible to the public. Accessibility would mean the physical and cognitive accessibility of cultural property for all members of society. The difference between the usual interpretation of the stronger rejection of political perfectionism on the one hand, and the perfectionist reading of Rawls on the other, probably lay in the qualitative requirements. That is to say, the question of a qualitative criterion for the worthiness of the protection of objects. This question would likely be much narrower and exclusive in the view of the usual interpretations. When cultural property would thus be protected and promoted in accordance with the non-perfectionist interpretations presented above, the aim of regulating cultural property would be primarily either a) to enable free decisions about the good in the sense of individual autonomy and/or b) to create solidarity in the sense of Rawlsian fraternity. On the other hand, it would be the declared goal of a perfectionist interpretation of Rawls to promote pluralistic perfectionism and, thus, not to go beyond the qualitative requirements of the Aristotelian principle when determining what kind of cultural property should be protected and promoted. In this sense, the interpretations of Rawls referred to in this paper would thus stipulate different qualitative requirements for cultural property to be protected.

The criterion of "Germany's cultural heritage" in section 7 (1) KGSG seems to be closely connected to the aim of establishing the basis for common solidarity. The criterion, conversely, appears to be more distant to the pluralistic protection of various

forms of the good which in turn comply with the Aristotelian principle. Only the expert committees appear to be open for the protection of pluralistic perfectionism, on the institutional level, presenting a kind of pluralism regarding the cultural sector. Finally, looking at the common claim of all the possible Rawls interpretations presented, namely the claim for accessibility of cultural objects, it can first be noted that the prohibition on damaging cultural property of national significance (section 18 in conjunction with section 83 (3) KGSG) introduced in 2016 and the notification requirements for cultural property of national significance in case of loss, destruction, etc. in section 19 KGSG serve to preserve the cultural objects.[25] Insofar as all the variants presented have in common that they would argue for accessibility of cultural property, it is questionable to what extent the *Cultural Property Protection Act* corresponds to this requirement. The central position taken by the regulatory form of export restriction tends to raise doubts, since the destination of an object on a territory of a state alone does not guarantee equal accessibility of the object to the citizens. The reform of the KGSG 2016 has improved access to cultural property only to the extent that international loan circuit has been facilitated (see *Entwurf eines Gesetzes zur Neuregelung des Kulturgutschutzrechts*, Deutscher Bundestag 2016, 3, 46). Why does access not play a more central role in the act? The central reason for the reluctance of the legislature to regulate access to cultural objects is probably not to be found on the level of content-related arguments – it is rather to be found on the meta-level of legislative competence. Hence, regarding the protection of cultural property, the Federal Government has a restricted competence to "safeguarding German cultural assets against removal from the country" (Art. 73 (1) (5a) GG.[26] The Federal Government does not have the legislative capacity to comprehensively regulate anything regarding objects of national significance (Uhle 2009). This does not mean, of course, that its regulation is not possible, but simply that the regulation of access lies in the legislative capacity of the Länder (federal states). So, the challenge posed by the presented interpretations of Rawls would be better addressed to the Länder to enable the accessibility of cultural property.

V. CONCLUSION

It has been shown that cultural heritage policies may indeed pose a challenge to Rawlsian Liberalism. The various ways in which Rawlsian Liberalism reacts to this challenge can lead to productive reflections on Rawls's theory regarding perfectionism and on the law as it stands – for example, on the central role of the criterion of accessibility in the legal regulation of cultural heritage protection. Even though space does not permit a sufficient answer to any question regarding the relationship between moral philosophy

25] Before 2016, there was no legal prohibition of damage outside the criminal offence of general property damage, which meant that the owner of the protected cultural property was not allowed to export it but did not have to fear legal consequences if he destroyed the work.

26] GG means Basic Law for the Federal Republic of Germany (Grundgesetz), see https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0338 (accessed 1. February 2020).

and the legal protection of cultural heritage, I hope I have offered a glimpse at the highly controversial field of whether and how to legitimise cultural policies and especially policies concerning the protection of cultural heritage, such as cultural property law.

ruwen.fritsche@jura.uni-goettingen.de

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