Nous ne sommes pas seulement responsables de ce que nous faisons, mais aussi, pour que ce que nous ne faisons pas.
Attributed to Voltaire

The task of (legal) philosophers would be ... to elaborate our (present-day) evidence of injustice argumentatively ...
Hubert Rottleuthner

A. Introduction

The present contribution is based on the legal philosophical conviction, expressed in the 20th century by Gustav Radbruch, Robert Alexy and others, that the law is inextricably linked to justice and must therefore satisfy the minimum requirements of justice. What applies to law should also apply consistently to legislation and to state and political action particularly with regard to legal loopholes or atomized legal systems. Even legislative omissions by constitutional states should, in cases of doubt, be measured not only by their own written constitutions and through the courts, but also by supra-statutory standards of justice. We are currently experiencing dramatic international developments which suggest that a renewed discursive examination of these questions of legal philosophy and the integration of their results into political and public discourse could have not only academic but possibly even existential relevance.

However, twentieth century legal philosophical discourses and concepts, which were intended to provide normative solutions to extreme injustice committed by the state, regularly focused on criminal acts rather than omissions by state representatives. This also applies to the famous Radbruch formula and large parts of its reception.[1] By contrast, in the 21st century phenomena of supranational and in some cases global relevance have emerged, which go hand in hand with other, more passive forms of state behavior. The fatal consequences of these phenomena do not seem to be caused primarily by acts, but are instead facilitated by political ignorance, a laissez-faire attitude, procrastination or even denial. This assessment applies to the current Mediterranean crisis, which is characterized by totally inadequate state and supranational assistance in relation to maritime distress involving migrants, but also

[1] Radbruch/ Litschewski Paulson/ Paulson 1946/ 2006, pp. 1-11. For the reception see Paulson 2006, pp. 17-40; Bix 2011, pp. 45–57; Muñoz 2018 pp. 455-487.

to some extent anthropogenic climate change or the hesitant response of some states to the pandemic in 2020. There have been repeated attempts in recent years to politically legitimize state passivity towards such crises, particularly at a national level, or even to obstruct civil society and political measures which aim to tackle the relevant problems.

Given the existential nature and the international scope of the relevant threats and the absence of sufficient legal regulations, it is problematic to insist on the primacy of the (statutory) law typical in constitutional states, and to reject ethical considerations on corresponding legal terrain from the outset. On the contrary, the philosophy of law could be called upon to offer normative concepts and to provide guidance for responsible politics and the public. Against this background, this paper examines the following questions:

1. *Could state and supranational failure to act on the Mediterranean crisis and anthropogenic climate change be rationally considered as extreme injustice from a legal ethical perspective (see sections B. and C.)*?

   Extremely unjust law in any constellation is worse than law which is simply incomplete or incorrect and therefore inexpedient. This also applies to extreme injustice caused by state or supranational omissions. But how can such extreme injustice by omissions, for example statutory laws which either provide insufficient climate protection or none at all in the face of anthropogenic climate change, be grasped and described in concrete normative terms and distinguished from milder forms of simply inexpedient law? For a normative delimitation, we need a philosophy of law that can deal effectively with corresponding analyses of injustice. In concrete terms, we need philosophical concepts that can function as ethical indicators. A rational analysis of injustice on an empirical basis should also offer a suitable approach to save law and its ethics from any ideology, suspicion of ideology or political appropriation.

   This paper uses the Radbruch formula in its methodological concretization by Robert Alexy and Michael Herbert as a conceptual example of a possible ethical measure. A special property of Radbruch's formula is that it draws ethical and

legal attention to a point that is sometimes suppressed or overlooked: *that there is a difference between unjust laws and conditions with which one can come to terms as a citizen and state institution (or has even to come to terms temporarily in the interest of legal certainty), and extremely unjust laws and conditions which as such are ethically and legally no longer tolerable.* In the philosophical justification and description of Radbruch's formula by Robert Alexy, it also becomes clear that it is possible to grasp this *extreme* injustice rationally. However, the fundamental discussion of the justification and conclusiveness of Radbruch's formula, particularly with regards to the relationship between law and morality[2], is beyond the scope of this paper.

2. *What minimum ethical requirements would such a normative, rational assessment imply for states and communities of states (see sections B. and C.)*?

   Philosophical statements claiming that legislative omission leads to extreme injustice might trigger or promote the necessary political impulses for action by this assessment, but do not yet provide automatic normative guidance with regard to the taking and selection of active measures, such as by political decision makers. For this reason, at the very least, a few ethical references should be provided as to how the legislator, the political decision maker or those subject to the law in question can or should deal with this lack of regulation.

3. *Does dealing with these questions on a theoretical as well as on a practical level suggest a potential shift of emphasis in the future orientation of normative legal philosophy and especially in the application references of Radbruch's formula (see section D.)? Where should we enter uncharted legal philosophical territory in this context?*

4. *In what way could the philosophy of law also have a political impact in relation to the humanitarian challenges addressed here (see section D.)?*

[2] See Alexy 2011, pp. 72-106; Bix 2011, pp. 45-57; Buchholz-Schuster 1998, pp. 123-138; Hart 1958, pp. 593-629; Herbert 2017, pp. 59-74, with further reference.

As far as questions 1 and 2 are concerned, the additional thesis put forward in this paper is that the fatal, often deadly consequences of the maritime distress of refugees and anthropogenic climate change cannot be remedied by international or national (statutory) law alone, particularly given their sometimes contradictory normative provisions and atomized judicial competences. Rather, the relevant law has ethical loopholes at various levels, leading to the question of how the decision-makers of previously hesitant or inactive states and communities of states should make decisions and act against this background. In this context, an "ethical loophole" is understood as an unplanned regulatory loophole in international and/ or national law which, combined with continuing state or supranational omission, leads to very serious injustice.[3]

International maritime law, for example, includes an obligation to rescue people in distress at sea guaranteed by treaty and customary international law, but cannot adequately cover situations in which thousands of people are deliberately sent into distress at sea. It is true that the obligation under maritime law to rescue people from an acute emergency at sea clearly works in favor of the rescue of people regardless of their origin, migration status or negligence in the emergency situation. However, it remains unclear who has the responsibility or the right to rescue people, or where the rescued persons should subsequently be taken.[4] Nor is the law clear on the role of states and communities of states in the face of large scale provoked maritime distress. Loopholes in the law also exist in a similar form in the area of climate protection. In this area, international law defines goals, such as limiting global warming to 1.5°C compared to pre-industrial levels. However, it leaves decisions about the design and implementation of climate protection to national legislators. These decisions are then either not expediently made, insufficiently implemented or even rejected at the national level, due to the absence of concrete, international and legally binding measures.

Some simplifications are unavoidable in the context of a single legal philosophical approach to these highly complex, also sometimes interdisciplinary topics. State failures to respond to distress in the Mediterranean and anthropogenic climate

[3] Cf. for ethical loopholes by legislative omission Herbert 2017, pp. 84-86, pp. 155-206.
[4] See Matz-Lück 2018.

change are therefore examined in separate sections (B. and C.) for the sake of clarity, even though they are interconnected in several important ways.[5] Within the limitations of a single legal philosophical paper, it is neither possible nor methodologically meaningful to strive for a "complete" normative evaluation of all potentially relevant causal factors, such as individual decisions or social structures concerning distress at sea with reference to migration on the one hand and anthropogenic climate change on the other hand. Instead, this paper focuses on critically questioning state and supranational passivity towards these two major challenges from a legal ethical perspective and aims to do so as rationally and transparently as possible without claiming to be complete. This focus should not be taken as a legal philosophical relativization of other causal factors, such as social impact and personal responsibility.

This paper should, therefore, be seen as a stimulus for further discussion in philosophy of law rather than as a conclusive, normative analysis, and should certainly not be taken as a patent solution. There is no doubt that there are multiple causal factors which contribute to distress on the high seas and climate change, with multiple actors responsible for the human suffering caused. However, state omissions, both on a national and international level, play just as important a role, sufficient to warrant a legal ethical examination.

B. The EU and the Death on the Mediterranean

I. Description of the Problem

The picture of the dead Syrian boy Aylan Kurdi washed up on the beach near Bodrum has been imprinted on the collective European memory since 2015. Like his brother Galip and his mother, he drowned in the Mediterranean Sea in an unsuccessful attempt to reach Greece. It is difficult to ascertain the exact number of refugees that have died in recent years near Europe's external sea borders. According to a UNHCR report in 2018 on average six people drowned every day in their attempt to cross the maritime borders of Europe.[6] Despite such a high number

[5] See German Environment Agency 2020; Werz/ Hoffman 2017, pp. 270-273 with further reference.
[6] See UNHCR 2019.

of deaths, Europe has not yet found the unity, strength or political will to prevent such manifestations of collective omission: there are no institutionalized civilian rescue operations, no cooperation with disaster management NGOs and no intra-European distribution mechanisms. The outlook has been generally quite depressing after the EU shut down Operation Sophia in the spring of 2019, an operation which was originally intended to target smugglers. One premise of this paper is that Europe will only find a way out of the present situation if it can more clearly recognize and define the conflict between law and morality, which contributes to the high number of deaths in the Mediterranean.

On the one hand we were recently witnessing the influence of national law, which criminalizes illegal migration and corresponding aid and which in its interpretive practice can lead to the impairment of private maritime rescue. At the European level the limited rescue capacities in the Mediterranean Sea were accompanied by a decision to suspend the "Sophia" mission. On the other hand, such state and supranational handling of maritime distress is in normative contrast to the moral and customary obligation to rescue people in distress. According to a legal analysis by the German Bundestag in 2017, this obligation is deeply anchored as an expression of humanity in the centuries-old, maritime tradition - and is also considered an unwritten customary international law.[7] In this case there is already a serious contradiction between law and morality, which will be discussed in more depth over the course of this paper. There are also numerous historical examples which demonstrate that individuals and collectives in a society, whether public or private, tend to repress the awareness of injustice and only face up to moral awareness in cases of extreme injustice, where moral and humanitarian catastrophes have already occurred. In those cases, the scale of human rights violations is difficult to comprehend, let alone address, within the framework of individual criminal law.

This raises the question of whether we can rely on journalism and the popular media to accurately convey the development of humanitarian and moral miseries, taking place in the Mediterranean. It is arguably problematic for professional legal philosophy to remain silent in this context. In cases where legal and public statements often lead to contradictory results, political institutions and decision

[7] Deutscher Bundestag, 2017.

makers need clear and reliable normative guidelines with a sound ethical basis. The individual criminal responsibility of political decision makers is barely identifiable in this context. Given the events in the Mediterranean, a legal philosophical assessment of passive state behavior is arguably all the more important, as the refugees travelling to the Mediterranean do not have a voice. The impact of acts of civil disobedience of private NGOs is negligible, and the level of rescue activity by the EU is currently low. Despite free movement within the EU, there is no consensus in moral judgment by European societies or politicians, let alone a decisive turn for the better. On the contrary, inaction is sometimes accompanied by legal measures, such as the seizure of rescue ships and prosecution.

Against this background I will examine the question of whether it is rationally justifiable from a legal ethical perspective to classify the current state and supranational omission within the EU regarding the implementation of effective sea rescue in the Mediterranean and, a fortiori, the targeted obstruction of non-state sea rescue as extreme injustice.

II. Radbruch's Formula: An Historical Application Example

At this point, it could also be useful for non-German participants in the relevant discourse on legal philosophy to look at the legal ethical assessment of the real and political conditions on the former inner-German border, which was developed after 1990. The following remarks on the application of Radbruch's formula are to be understood as a methodological illustration, but not as a moral theoretical equation of the conditions at the former inner-German border with neglected rescue at sea. Although no one in the early years of the former GDR announced the intention to build a wall to stop the flow of refugees from East to West ("Niemand hat die Absicht, eine Mauer zu errichten"),[8] the wall became a deadly reality for several decades and served to prevent economic bleeding and destabilization. Christine and Bodo Müller have described the inner-German sea border of that period in detail:[9] in the 28 years following the wall's construction, more than 5600 people made often life-threatening

[8] "No one intends to build a wall," said the GDR leader and party leader Walter Ulbricht on June 15, 1961. Dokumente zur Deutschlandpolitik IV/6 (1961), 925, retrieved from http://www.chronik-der-mauer.de/material/178773/internationale-pressekonferenz-des-staatsrats-vorsitzenden-der-ddr-walter-ulbricht-in-ost-berlin-15-juni-1961. Barely two months later, Berlin was divided.
[9] Müller, 2017.

attempts to escape over the Baltic Sea with various, sometimes small, makeshift vessels in search of a better life.

These escape attempts from the GDR are comparable in their life-threatening risks to today's attempts by refugees to cross the Mediterranean (or other waters close to Europe). Even if in this context a complete moral theoretical equation to the toleration of deadly sea emergencies is out of the question, an ethical evaluation of the effective behavior of state or supranational institutions towards undesired border crossings seems to make sense for both constellations, even if for different reasons. The legal and legal political objectives differ because, unlike after the demise of the former GDR, the relevant ethical analysis today is not primarily concerned with supporting past-related decision-making in the context of criminal proceedings, but with providing future-related ethical orientation for social and political actors. Under no circumstances, however, should the exploration of possible similarities in the structure of injustice be confused with complete moral equivalence.

At least 174 men, women and children died in their attempt to escape from the GDR over the Baltic Sea, and a further 4,500 people were captured and spent years in prison. The fact that these events were accompanied at the time by land-based, armed border guards represents a legal and moral link to the so-called “Mauerschützenprozesse” (wall shooter trials) of the 1990s, which were sometimes dismissed as political “Siegerjustiz” (victor’s justice) after the fall of the GDR. These trials hinged juridically and morally on the question of whether the border regulations enforced by the former GDR continued to apply beyond its existence, or whether they should be regarded as an “extreme injustice” which, even in the days of the GDR, could not be regarded as valid justification for shooting at refugees.

The German Federal Constitutional Court and the German Federal Court of Justice solved this legal methodological and normative problem in the spirit of the second option.[10] However, the issue was disputed, as is often the case when there is a conflict between law and morality. In 1993, the lawyer and philosopher Robert Alexy

[10] See e.g. Bundesgerichtshof (BGH), BGHSt 41, 101; Bundesverfassungsgericht (BVerfG), Beschluss des Zweiten Senats vom 24. Oktober 1996 - 2 BvR 1851/94 -, Para. 1-163. Retrieved from http://www.bverfg.de/e/rs19961024_2bvr185194.html.

argued that moral judgments concerning cases of extreme injustice are subject to rational and cognitive debate[11]. According to Alexy, the rule that injustice is more clearly recognizable the more extreme it is, is limited both by the rule of moral blindness and the possibility of moral error. However, extreme injustice at the inner German border resulted structurally from an ominous combination, in which various factors came together:

> *… If all the factors are considered together: your whole life, the only one you have got, is not yours to lead as you please, protest is impossible, escape is forbidden, and anyone who fights back will be shot, there can then be no doubt that what occurred was an extreme injustice and should be judged as such.*[12]

A similar legal ethical approach can be found in a relevant resolution of the Federal Constitutional Court of October 24, 1996. The Second Senate essentially adopted a link between the criteria of Radbruch's formula and human rights protected by international law.[13]

The analyses of extreme injustice at the inner-German border by German courts and Robert Alexy are based to a large extent on the Radbruch formula, a legal philosophical concept which denies the validity of statutory laws in rare and exceptional cases of extreme, unbearable injustice:

> *The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law", must yield to justice. … Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law. For law, including positive law, cannot*

[11] Alexy 1993, p. 23.
[12] Ibid., p. 29, translation by myself.
[13] BVerfG, Beschluss des Zweiten Senats vom 24. Oktober 1996, - 2 BvR 1851/94 -, Para. 143, 144. Retrieved from http://www.bverfg.de/e/rs19961024_2bvr185194.html.

be otherwise defined than as a system and an institution whose very meaning is to serve justice. …[14]

The formula and its reference to supra-statutory law have been extensively analyzed and sometimes criticized from a positivist perspective over the past few decades, both in Germany and in the Anglo-American legal philosophical community, for example by B.H. Bix, H.L.A. Hart and S.L. Paulson.[15] However, the following can be concluded as a result of relevant reviews:

1. Radbruch's formula calls for a minimum connection between law and justice.

2. Human rights, or constitutional basic rights, are the essential benchmark set by Radbruch's formula.[16]

3. The obvious possibility of a rational and cognitive debate concerning *extreme injustice* is wholly unconnected to the often-lamented difficulty of agreeing on concepts and ideas of justice.

4. Radbruch’s formula should not be confused with natural law, which is susceptible to ideology. On the contrary, the formula represents the legal ethical consequence of a normative, political concept which we would today refer to as “value pluralism”. If human rights are not effectively protected from extreme injustice, value pluralism is not possible.

5. Even if Radbruch‘s formula was indeed intended by its creator to be applied to correcting statutory lawlessness, it contains a request to examine the criteria for determining extreme state injustice. What this means is that the normative examination of state behavior (the analysis and description of possible extreme

[14] Translation according to Radbruch/ Litschewski Paulson/ Paulson 1946/ 2006, p. 7.
[15] See n. 1, 2. Naturally, the reception in German was more extensive. According to Dreier, for example, 99 German-language articles on "Law and Morality" were published between 1970 and 1989; see Dreier 1991, p. 55 with further reference. Quite a few of these works also included a methodological "critique of critique" of Hart and his positivist reception. In more recent times, Mertens, among others, has also been critical of Hart's separation thesis; see Mertens 2002, pp. 186-205.
[16] See Alexy 2017, pp. 31-47; Herbert 2017, pp. 75-81, with further references.