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 statutory law is inextricably linked to justice and must therefore satisfy the minimum requirements of justice. What applies to law, however, should also apply consistently to both the actions and inactions of institutions that perform legislative and executive functions at the national and supranational level, particularly with regard to ethical regulatory gaps, legal diversity, and legal fragmentation or atomized legal systems. The legislative and executive policy failures of constitutional states and communities of states with cross-border effects should be measured not only by the standards of international law and their own written constitutions, but also by normatively related and additionally stabilizing supra-statutory standards of justice. We are currently experiencing dramatic international developments which suggest that a 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 also practical, 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 institutions or their representatives. This also applies to the famous Radbruch formula and large parts of its older and more recent 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 national and supranational 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 of empirical or scientific facts.

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; Borowski 2019 with further references.

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 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 international 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 non-positivist 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 the legislative, but also for the executive and for social discourse. Against this background, this paper examines the following questions:

1. *How can extreme injustice by national and supranational omission be described? Could a classical, non-positivist concept such as Radbruch's formula be used in an expanded form to capture and correct such injustice in a more developed way? How could responsibility and relevant rules of attribution be conclusively justified with respect to such injustice? See in each case section B.*

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

With regard to questions 1 and 2, the following should be noted at this point: *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 which exists in the area of ethical regulatory gaps and continues to exist for the time being due to state or supranational omissions and gaps in action. 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? Here we set out to "measure the law and morality"[2] , which in the present context is characterized by the threshold of "intolerability".[3] For a normative delimitation, we need a non-positivist philosophy of law that can deal effectively with corresponding analyses of injustice on the basis of rational standards. In concrete terms, we need

2 Thus reads a contribution of the same name by Rottleuthner 2019 ("Die Vermessung von Recht und Moral").

3 Ibid., p. 267.

philosophical concepts that provide suitable ethical indicators in this respect and enable rational considerations that are as precise as possible at the rank scale level.[4] It also appears necessary to make statements about responsibilities in this regard and the question of the attribution of injustice. 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. If, nevertheless, there can be no neutral position of the philosophy of law with respect to morality, politics and law[5], this makes the demand for maximum rationality and transparency in the development and justification of its normative positions all the more significant.

This paper uses the Radbruch formula in its methodological concretization by Robert Alexy and Michael Herbert[6] as a conceptual example and starting point 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 significant difference between unjust laws and practical 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 separation of powers), 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.[7] However, the fundamental discussion of the justification and conclusiveness of Radbruch's formula, particularly with regards to the relationship between law and morality[8], is beyond the scope of this paper.

3. What minimum ethical requirements would such a normative, rational assessment imply for states, communities of states and its executive and legislative institutions (see sections C. and D.)?

As far as questions 2 and 3 are concerned, an additional thesis put forward in this paper is that the fatal, often deadly consequences of the maritime distress of migrants and anthropogenic climate change cannot be remedied by international or national statutory law alone, particularly given their sometimes incomplete normative provisions and atomized judicial competences, for instance within the European Union and its member states. Moreover, moral philosophical statements

4 See Rottleuthner 2019, pp. 257-260, p. 277.
5 Funke 2019, p. 36, following Dworking with further references.
6 See Alexy 2019, pp. 7-18, Herbert 2017, pp- 75-99.
7 See Alexy 1992, pp. 101-103.
8 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 references.

claiming that executive or 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 executive decision makers or legislators. For this reason, at the very least, a few ethical references should be provided for legislators, governments and or other responsible institutions as to *how, or with which ethical minimum requirements* they should deal with the corresponding constellations of national and supranational omissions in order to prevent the formation or continuation of extreme injustice in the area of ethical regulatory gaps. In this context, an *"ethical regulatory gap"* is understood as an unplanned regulatory loophole in international and/or national law that leads to extreme injustice alone or in combination with additional executive and legislative gaps in action at national or supranational level.[9]

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.[10] 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.[11] Nor is the law clear on the role of states and communities of states in the face of large scale provoked maritime distress.

Ethical regulatory gaps 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 domestic climate protection to national legislators. In the absence of concrete measures that are binding under international law, this already existing scope for decision-making has not yet been taken up at national level in a way that is consistent with the 1.5 °C goal.

Some simplifications are unavoidable in the context of a single legal philosophical approach to these highly complex and interdisciplinary topics. State failures to respond to distress in the Mediterranean and anthropogenic climate change are therefore examined in separate sections (C. and D.) for the sake of clarity, even though they are interconnected in several important ways.[12] Within the limitations of a single legal philosophical paper, it is neither possible nor methodologically

9 Cf. concerning ethical loopholes caused by purely legislative omissions at the national level Herbert 2017, pp. 84-86, 155-206, as well as here under Section B. III. 1.

10 Matz-Lück 2018.

11 Ibid.

12 See Bundesumweltamt 2020; Werz/Hoffman 2017, pp. 270-273, with further references.

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.

4. *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? Where should we enter uncharted legal philosophical territory in this context (see section E. I.)?*

5. *In what way could a philosophy of law that is at once rational and normative also have an impact not only institutionally but also politically in relation to the humanitarian challenges addressed here (see section E. II.)?*

After all this, the present study - also with a view to questions 4 and 5 - is to be understood as a legal-philosophical impulse for discussion and not as a conclusive, normative analysis or even as a source of patent solutions. There can be no doubt that a multitude of causal factors and actors - not only in the governmental or political-institutional sector - contribute to distress situations on the high seas, but also to climate change and the resulting suffering. In the field of philosophical discourses on climate justice, a differentiation between first- and second-order responsibilities has emerged in this respect in recent years.[13] However, national and supranational omissions in the field of corresponding second-order political-institutional responsibilities, both at the national and international level, play a sufficiently significant role per se to adopt an analytical legal-ethical perspective towards them. This will be attempted in the context of the present study.

Two further potential misunderstandings should be prevented at this point by way of introduction:

13 First-order responsibility in this context involves either (a) mitigating climate change or facilitating adaptation, or (b) bearing the costs of mitigation or adaptation, or both. A second-order responsibility means responsibility to take action to ensure that others meet their first-order (climate) responsibilities. Second-order negative responsibilities might be not thwarting or undermining climate change initiatives. See Caney 2020, para. 5.3, with further references.

The legal philosophical recourse to supra-statutary principles for the purpose of normative criticism is not automatically synonymous with simple moralism. The history of its origin, historical cases of application, and also the conclusive conceptual embedding of Radbruch's formula sufficiently prove this point. Nevertheless, the normative critical and orientational function of non-positivist concepts such as Radbruch's formula, which is significant especially in times of political system changes, is repeatedly overlooked and confronted with uncritical accusations of ideology or moralism.[14] In fact, however, it is ideally about a potential gain in judicial, legislative or executive decision-making and legitimation rationality. The intended rationality manifests itself in the respective occasion, but also in the conceptual approach of relevant concepts of legal philosophy and contributions to legitimacy.[15] As far as the occasion is concerned, the non-positivist orientation of the present study is based on the author's perception that national and international law, as well as national and supranational policies, have so far proven insufficiently capable of preventing serious human rights violations in certain factual contexts (flight and climate change). Conceptually, the use of Radbruch's formula is intended to ensure that the methodological epistemological foundations, value-theoretical properties of the theory of justice are used, but also that its elementary concepts are transparent and familiar. This includes a compactness in the history of ideas, traceability and discursive controllability within the professional community and at the same time saves from overelaborate explanations of the theoretical foundation.

On the other hand, contemporary philosophy and its branches are sometimes ascribed the modest function of being essentially limited, as a specialized discipline, to the observation of the world and other sciences, instead of pointing out paths, into the future.[16] But why actually is this? Should this necessarily apply to decisions that are literally a matter of life and death? No elected politician, social actor, judge, nor legislator would be forced to follow a legal-philosophical orientation guide, no matter how rational it may be (the same applies also in relation to lobbyist or populist demands). If philosophy is love of wisdom and, in our time, also rationality, this does not automatically make it wise or rational, but neither does it make it factually binding. This should be reassuring enough to allow practical application of philosophy and its branches from time to time. Rather, philosophical silence in the face of the existential questions of our time appears to be disconcerting.

14 See. Buchholz-Schuster 1998, pp. 32-34, pp. 330-334.
15 Ibid. pp. 32-34.
16 See Assheuer 2014, pp. 14-15.