

In 2015-2016 there was an unprecedented mass migration into Europe. Primarily the discourse that most EU nations constructed around this crisis was focused on the ‘existential threat’ that it posed to Europe, centred around Islam and integration, national identity and defence, European stability and security. In this atmosphere right-wing, anti-immigration/Muslim political parties increased in popularity; anti-immigration demonstrations became common; and attacks on refugees grew.¹ Under such a threat - both from without and within - the EU felt justified to protect and defend its borders and to ‘block the flow’ of migration. Dignity, in this instance, focused on the practice of exclusion, rather than diversity; on an inward looking and self-prioritising project of national identity; dignity here was found in maintaining the integrity of a certain notion of a homogenous image of cultural, ethnic and national sovereignty.

Yet Germany, at least in the first instance, seemed to react differently. Despite criticism from the other 27 EU member States and internal political and popular national concerns and resistance, German Chancellor, Angela Merkel, maintained an ‘open door policy’ longer than any other EU State. My interest in this paper is to explore this German position as an example of, what Levinas termed, the *Good State*. Levinas is one of most significant ethical intellectuals of our time, and extended his notions of ethical responsibility into law, politics and the State. In these arenas he demands that ethics is (ought to be) the foundation for the reasoned calculations of judicial decision making, political discourse and State action that takes account of the diversity of the other. This calculation, he surmises, is the work of justice in our societies. Here, dignity is found in the difficult, everyday work we are obliged to undertake in order to address the ethical responsibilities we have to others before ourselves, to be *response-able* to the alterity - the very diversity - of others, in the ways we apply our law, our political actions and the administration of our State.

In 2015-2016 more than 2.3 million illegal crossings were detected across European borders - a 6-fold increase in comparison with 2014, and a 17-fold increase compared to 2013.

¹ Refer to the following resources which outline a number of EU responses to the migration crisis and detail attacks on asylum seekers: The Guardian Newspaper, Online, 23 January, 2016; The Star.Com, Online, 15 February, 2016; Human Rights Watch, Online, 27 January, 2016; Human Rights First, Online, 10 November, 2015; The New York Times, Online, 13 January, 2016; The Huffington Post Australia, Online, 5 January, 2017.

This jump in numbers was mainly due to a large increase in border crossings by citizens of Syria, Afghanistan and Eritrea.² The response from most European States focused on border control and surveillance. Razor wire and barriers were constructed across the borders in Macedonia, Bulgaria and Greece, the Balkan States and into Austria, Hungary and Slovakia. States such as Denmark and Switzerland increased border patrols and enforced 'search and seize' legislation, allowing the State to search for and seize cash and valuables from arriving migrants/asylum seekers to help pay for the their own accommodation and upkeep.³ Such actions even threatened the integrity of the EU itself: many European leaders called for an end to the *Schengen zone* and refused to abide by the *Dublin Regulation*, allowing waves of migrants/asylum seekers to move forward into other EU States. And even in Britain's Brexit vote there was an explicit anti-EU campaign focused on the threat the refugee crisis posed to British security, stability and identity.

In addition to these actions, the EU also negotiated the *EU-Turkish Agreement* to, as stated by the EU Parliament, 'break the business model of smugglers and to offer migrants an alternative to putting their lives at risk'.⁴ Signed on 18th March, 2016, Turkey agreed to take steps to halt the flow of asylum seekers/refugees entering Europe from its own borders, forcibly turning back to Turkey refugee carrying boats. It also agreed to take back all future asylum seekers entering Europe from its borders. Asylum seeking applications were to be heard by Turkey itself or Greece. In return, the EU promised to pay Turkey €6 billion over three years (twice the amount the EU had originally offered) to assist Turkey with the cost of accommodating asylum seekers/refugees. The EU also agreed to reconsider visa-liberalisation for Turks entering Europe, hasten talks for Turkey's EU accession, and was willing to turn a blind-eye to the Turkish State's many breaches of human rights in the form of limits on freedom of speech and press (also in March 2016 Turkish authorities seized control of the opposition daily newspaper, *Zaman*), limits on free movement, and the crack down on political opposition

² From 2015 to the first quarter of 2016 approximately 4,000 people drowned while attempting to cross from Turkey to Europe. Within the same time frame approximately 10,000 unaccompanied refugee minors disappeared in Europe. Refer to: Australian Broadcasting Corporation News, Online, 31 January 2016; 1 February 2016.

³ Refer to Denmark's 2016 *Refugee Assets Bill* (the so-called 'jewellery laws') which amended the *Danish Aliens Act* and Switzerland's *Asylum Act 142.31* (operating since the 1990s). Note in 2016 officials in Bavaria and other southern German States also began to search for and seize assets from asylum seekers, ostensibly to enforce pre-existing German federal laws.

⁴ Refer to the EU Parliament, 'EU-Turkey Statement and Action Plan,' <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>, April 2019.

and minorities such as the Kurds.⁵

The EU also agreed to accept a one-for-one exchange program, in which for each Syrian returned to Turkey from Europe, Europe would accept one Syrian refugee already held in Turkish refugee camps. The weakness of this program is that it is discriminatory - amongst the refugee population were/are not only Syrians, but also, Iraqis, Afghans, North Africans and other Middle-Eastern nationalities - and it also caps the exchange at 72,000 and is not mandatory on any EU nation to accept any of these refugees. The agreement was also silent on other potential avenues into Europe, such as across the Mediterranean from Libya and into Italy, which naturally experienced an increase in activity. This sea route is longer and more dangerous than the Aegean sea-crossing from Turkey to Greece. Unsurprisingly, while there was a 90% drop in numbers of asylum seekers coming from Turkey and into Greece, figures show that immediately after signing the *EU-Turkey Agreement*, approximately 85,000 migrants and refugees were intercepted in boats crossing the Mediterranean, departing mostly from Libya, an approximate 12% increase on the same period in 2015, with another 47,000 reaching Italy on smuggler vessels. By the end of 2016 approximately 140,000 migrants and refugees were housed in Italian shelters, a seven-fold increase on 2013 numbers. Also by the end of May 2016 approximately 3,000 known deaths had occurred on this sea route to Italy, eclipsing the known 1,855 deaths for the entire preceding year.⁶

In these reactions Europe failed - not only the migrant/refugee other - but also itself: its historical project of human dignity and democracy, both won and expressed through political liberalism and legal equality. In these reactions we see the EU nations constrict (restrict) themselves around their own anxieties and fears over the image of national sovereignty and security, consumed by concern over their own ethnic/cultural identity and integrity, threatened by the very diversity – the very otherness – of the migrant/asylum seeking other. In these instances, law

⁵ Between 1959 and 2011, Turkey was ranked number one in the number of convictions for violations of human rights by the European Court of Human Rights. Refer to the independent Turkish press agency, Bianet English, <https://bianet.org/english/human-rights/138337-turkey-ranks-first-in-violations-in-between-1959-2011>, 15 May 2012. Also refer to the 2015 human rights report authored by British lawyers Lord Woolf, Sir Edward Garnier QC, Prof Sir Jeffrey Jowell QC and Sarah Palin (The Guardian Online, 28 September 2015; USA State Department, Online, 2018 Turkey Report, 13 March 2019.

⁶ Refer to: The Express Newspaper Online, 13 August, 2016; The Telegraph Newspaper Online, 13 May, 2016.

and politics are in the service of the self, rather than the grander ideal of serving humanity, to the point that in the *EU-Turkish Agreement* the EU is at ease to contradict international and refugee law. The *Agreement* even contradicts the EU's own *Convention of Human Rights* and *Asylum Procedures Directive*: it represents a blanket, forced refoulement of refugees from Europe back to Turkey; it limits the right of those who have made it to Europe to have their refugee applications heard individually, under due processes, on their own merits and with a right of appeal; it disregards Turkey's own breaches of human rights and whether or not it is a 'designated safe country' to return refugees; it is silent on the conditions, health, wellbeing and rights of the returned refugees and whether or not Turkey could deport them to another, third country; and it gives no detail of Turkey's asylum application processes, nor timelines and standards implemented for such processes.⁷

In these responses, we see an example of what Levinas might term the *Bad State*. These are reactions of a State which closes in around itself, consumed by a self-concern for its own image of stability, security and certainty in the face of the diversity and distinction from the other. The law and legal rights, the political discourse and administration, are marshalled as a defence force, with the aim to protect the ontological integrity and meaning of national identity and State boundaries from the other. Dignity here, it is argued, is a legal right and political responsibility to promote and protect an ego-centred self-concern and autonomous self-interest of the 'common we' which both composes and is represented by the State. This is the defence of dignity - in law, politics and the State - as the (legal) right for the 'community of the sameness of us' to be as the State dictates it should be, free from the interference of, or the concern for, the diversity and alterity of the outside other.

Yet at the same time Germany's (initial) response was altogether different:⁸ in 2015 it suspended the *Dublin Regulation* to allow asylum seekers to register and be processed in

⁷ The UN and Amnesty International have also commented on these potential human rights breaches. Refer to the United Nations, Online, 11 March, 2016; Amnesty International Online, 8 March, 2016.

⁸ By 2016 German attitudes were shifting: restrictions/caps were placed on asylum seekers and Chancellor Merkel was playing a key role in the *EU-Turkey Agreement* negotiations. This backlash was also felt in the 2016 and 2017 German State and Federal elections. In the 2017 election Merkel's Christian Democratic Union (CDU) suffered a negative 8% swing (losing 55 seats in the Bundestag). At the same time the newly established far-right party, the Alternative for Germany, AfD, became the 3rd largest party in the Bundestag.

Germany (rather than insist this occur at the first safe EU State in which they arrived). Chancellor Merkel uttered her noted phrase ‘*wir schaffen das*’ (we can do better)⁹ and together with the scenes of cheering German people welcoming new arrivals with gifts and support, migrants/asylum seekers flooded towards and into Germany. Between 2014 and 2016 Germany took in approximately 1.5 million refugees (numbers now capped at 200,000 and, in 2017, numbers decreased to approx. 186,000). Stretched to its administrative limits, the German State was assisted in the upkeep and care of such a large number of people by willing volunteers, charity organisations and local community groups and bodies.

There are perhaps a variety of reasons why the initial reactions of Chancellor Merkel and seemingly most German people appeared open and hospitable: since the end of WWII, as a response to the Holocaust, the right to asylum has been entrenched in basic German law; the expanding post-WWII German economy demanded a continuous and comprehensive guest worker program, as does the general aging of the German population; the impact of Chancellor Merkel’s pragmatic political style; and even her religious roots have been cited as playing a part (daughter to a Lutheran Pastor). In any event, what Germany showed in its initial reaction in 2015 was a pragmatic, ethical response that animated the populace, the legal system & the political administration to take account of the plight of others above the fear and anxiety held for the security of selfhood.

In these initial reactions, we can see an echo of what Levinas terms the *Good State*. For Levinas, ethics is, first-and-foremost, personal: a pre-conscious, inter-subjective, face-to-face relationship between the self and other. It is the other – the very diversity and alterity of the other against the homogeneity of the self – which animates/interpellates the self into consciousness and conscious/rational being, the very birth of the self and self-consciousness through the diversity of the other. But this moment testifies that the self must, always already, be open to another which, always already, must precede the self. The self is born in a sociality with the difference of the other and, thus, is bound by an ethical obligation to the diversity of the other. Dignity in such a pre-conscious, ethical sociality is not found in the freedom and autonomy from the other, but

⁹ Merkel first used the phrase on 31 August 2015, at a press conference following a visit to a refugee camp near Dresden where local opponents of her refugee policy booed and heckled her.

rather, in the debt of ethical responsibility towards the other who precedes the self and who hails the self into conscious being. This is freedom from a totality of self-concerned subjectivity. Here there is humility (and vulnerability) in a selfhood found standing in the face of the diversity of the other; indebtedness before conscious choices of individual freedom. The self cannot be free from the other and its responsibility to the other: prior to any conscious intent and rational motivation, there must be a pre-existing ethical openness between the self and other which moves the self towards the other and which brings the self into being when face-to-face with the alterity of the other. This inter-subjective otherness is the very soul of the subject; otherness always already pre-exists in the self, pre-forming a split subject of ethical integrity upon which a consciously intentioned and reasoned subject exists; without which the individual subject would be something other than completely human.¹⁰

But for Levinas such an ethical obligation does not stay as pre-conscious nor personal. The split-subject of ethical obligation and conscious/reasoned intention also animates law, culture, politics and the State. Here Levinas' personal responsibility for the alterity of otherness questions the very origins of law and politics itself. From an ethic which Levinas places as the first philosophy upon which all else follows, Levinas extends a primary ethical obligation and responsibility for the diversity of otherness into political, judicial and social pragmatics. Here Levinas expands the face-to-face encounter with the other to also include/represent an encounter with the multitude of the many others in our sociality of life: *la triers* – the third party. Here is the role of the State, the *Good State*: the way it wields its legal and political, social and administrative power 'ought to be' as an exercise in the service of the other through which the intentional, rational ego-self emerges. Contrasted against the liberal tradition of our contemporary notions of legal rights and political norms (focused on the self-concerning individual/individual State, as exemplified in most EU State actions around the 2015 migration crisis), and the abstract reason of legal positivism, Levinas uncompromisingly posits a law of ethical normativity, in which a good law, good politics and the good State, are valued and measured against this ethical inspiration and responsibility. In this normative legal framework, dignity is

¹⁰ Peperzak A.T. et al, *Emmanuel Levinas: Basic Philosophical Writings*; Levinas, E. *Totality and Infinity* (trans A. Lingis), Duquesne University Press, Pittsburgh, (1996); Levinas, E. *Otherwise Than Being or Beyond Essence*. (trans A. Lingis), Duquesne University Press, Pittsburgh, (1998).

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found in responsibility focused upon the right-of-the-other and *not* the rights-of-self, exercised for the diversity of the outside other, rather than enlisted in securing the sameness of the self. .

At this inter-subjective juncture between ‘self’ and ‘other,’ ‘them’ and ‘us,’ is found the State’s responsibility: the calculating, comparing and measuring of the distribution of responsibility amongst the sociality of the many. Ultimately, this is the work of justice itself – justice in service to the primary ethical obligation to the very diversity/alterity of the other before a concern for the self, through which dignity is earned. Standing alone amongst the other EU Nations, Germany’s initial reactions to the migration crisis of 2015-16 reminds us that such an ethical responsibility to the diversity of others is possible in the everyday, practical balance between concerned self-interest and care for others.

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