Editorial

Critical Reflections on Refugee Law

Refugee law is anchored in a belief in status. It is reflective of the idea that individuals and groups can be identified as falling within a carefully defined legal construct, and that can be an instrumental basis for offering tangible security to certain human persons. The suggestion remains that a determined focus on human rights and human dignity will not be sufficient to secure the guarantees that a surrogate category of protection can offer. Refugee law thus endorses the notion that there are vulnerable and marginalised groups who require specialised forms of protection and that the abstract category of humanity alone is not enough. This group-based approach lends weight to the contention that, at present, human rights norms in isolation can be an inadequate way of offering security and safety to persons in distress and need. Why is this relevant? The steady advance of the international human rights movement has led to many normative gains, much institutional design and a more profound recognition and acceptance of the centrality of human dignity. This is matched not only with an atomistic focus on the rights of individuals, but a more sophisticated analysis of the significance of complex forms of belonging and community. Membership can often be the determining factor in how a person perceives themselves, and the treatment she can expect globally and locally. The cosmopolitanism of the rights regime stands with the reality of our situated selves to endorse a paradigm that attempts - not always successfully or convincingly - to speak to both universalism and particularity.

The intention in this special issue is to locate refugee law within this minority and group rights framework by reflecting on critical questions around legal construction, current asylum paradigms, the responsibilities of refugees and asylum seekers, inclusion and exclusion, and what refugee protection might mean now. Our intention is to bring together a range of critical perspectives on refugee law with the ambition of provoking a new conversation that is oriented towards group-based understandings. Jean-François Durieux thus asks the pressing question of why ‘refugee’ continues to exist as a normative category. How might we explain the ‘refugee privilege’? As Durieux underlines, the history of refugee law discourse is marked by ongoing (often agonised) reflection on the rationale for special forms of protection. He concludes that the 1951 Convention offers a firm
basis for explaining why this is merited, and therefore can be defended on a consistent and coherent basis. In particular, he focuses on its promotion of admission and assimilation/integration, the notion of the refugee as a ‘privileged alien’, and the role of discrimination to our conception of persecution. He argues that three paradigms are currently at work: admission, rescue and non-return. Grasping how these paradigms interact is key to offering a new perspective on the current questions facing refugee law, and Durieux is especially concerned to open the conversation fully to the ‘voice of the global south’. This article asks for consideration not of how we define but why we define ‘refugee status’ at all and the normative basis for continuing to do so.

Patricia Tuitt provides a sustained critique of the European Union’s (EU) self-perception and construction of its own intrinsic safety, on the basis of a rejection of the idea of the declaratory nature of refugee status. In a careful dissection of aspects of the United Nations High Commissioner for Refugees (UNHCR) Handbook, for example, Tuitt draws us close to the production of meaning within refugee law. This insistence on acknowledging the materiality of legal meaning, and thus its constructed and contested nature, is timely in a context where international legal categories can hold little more than a ghostly presence. Drawing on the work of Carl Schmitt, she has the EU project firmly in mind and the emergence of ‘European public law’. As with Durieux, attention is drawn to status, the creation of ‘legal fictions’ and the way law moulds our field of vision. For Tuitt, it is the law that makes the group, and what the production of this legally bounded category involves needs to be acknowledged and confronted.

Satvinder Juss follows with a group-based approach to ask whether modern refugee law can best be conceptualised through the lens of ‘post-colonialism’. The historical era of European empires, which began with 1492 and its overwhelming range, extent and duration, transformed the world. Although there has in recent years been a rising interest in postcolonial literature and criticism, the study of law has largely escaped this critique. Juss argues that within the EU the Dublin II Regulation system is best understood as ‘post-colonial refugee law’; dealing as it does, with the ‘post-colonial refugee’. Its avowed basis lies in international cooperation, which has long been recognised as a necessary prerequisite for the satisfactory solution to the plight of refugees – as explained in the Preamble to the 1951 Refugee Convention. However, its actual implementation remains one of the most controversial issues in refugee protection. For this reason, Juss argues that although in an ideal world people should be able to get the protection they need in any country, the reality as shown by the European Court of Justice’s recent rulings is far from this. For this reason, there needs to be a common European asylum system that does not just ensure countries reach minimum standards, but ensures people can access fair, humane and effective asylum systems in whichever European country they apply for asylum in.