Introduction: Critical Approaches to Migration Law

The collection of articles in this special issue of the International Journal on Minority and Groups Rights cover various strands in the typology of reflective criticism. They concern themselves with both pragmatic and systemic responses to the law of migration. The articles aim to provide for a wider assessment and understanding of the law – be it a legal decision, a legislative or treaty provision, or practice or a policy. The schematic typology does not advocate a sharp division between systemic and scholarly reflection. Nor does it advocate segregation in scholarship. The adopted premise is that there are different ways to reflect. All of these are capable of co-existence. What must be preserved – especially against the dominant hegemonic approaches to study of law and policy where those involved ‘talk or negotiate’ with the law – as would a mere commentator or neutral collaborator – is the role of the academic scholar as a critic. Scholarly criticism can easily fall prey to the wider concerns of governmentalism which predominates in the public realm. It can also fall prey to the demands of managerialism whereby law is used to manage situations and to ‘deal’ with problems. Legal criticism has a higher function than this. It is, in a more classical sense of academic rigor, to think or study without preconceptions. The production of ‘problems’ in the law must be first analysed before consideration is given to the ‘solutions’ proposed by the law. The very logic so prevalent in migration law and policy of the pseudo-dialectic of problem-solving must be questioned. This approach is important because of the production or problematisation of the irregular migrant, the asylum seeker and the excluded migrant. This is a historical production. It contains its own complexity of causes. For those engaged in the pseudo-dialectic there has been a programmed refusal to reflect on the wider issues at stake. For such a person, there has been simply the question of ‘the problem to be solved’.

When governments talk of ‘pragmatism’ they do so in the context of first defining the problem for themselves, formulating it in such a way that allows it to police dissent, so that ‘governmental pragmatism’ becomes an inherently political production, which ultimately prioritises what is demanded by dictates of ‘administrative managerialism’. Insofar as there is an ‘ideology’ at work it is in Western democracies the ideology of ‘managerialism’. It is a discourse (logos) without ideas. Managerialism has only to do with problems to respond to, risks to be averted and dangers to be alleviated or prevented. Inevitably, the
ends and virtues of managerialism exist only in name. It is without content. It is so because it wants always to be amenable to ‘flexible and responsive’ change. That is its *raison d’etre*. Accordingly, the articles collected in this special issue amount, in the minds of the authors, to a critique that is in the form of an intervention, but one that is attentive to the production of the so-called problems, or the problematic status of subjects in question, in the first place. This is not the first time such an approach is proposed, but in the situation in which we find ourselves we hope it shall serve as a useful reminder to scholars and students alike.

Nadine El-Enany in her article “On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the Refugee” observes that we are presently witnessing both an attack on the refugee on several fronts as well as a desertion, even by those who have traditionally stood behind the refugee. There is an identifiable assault on the migrant, whatever her motivation for moving, being launched by those in power who seek both to blame the harms that result from the prescribed ‘age of austerity’ on the migrant, and to deflect attention from the material and immaterial deficiencies of neo-liberalism and capitalism, that have recently become so grossly apparent. El-Enany adopts a critical approach in analysing the practice of restriction which is produced as an accepted or indeed ‘the only’ solution, in both policy and legal scholarship, to the problematised refugee. The wall of restrictive practices that comprise the EU’s migration policy include visa requirements, safe country concepts, the operations of the European Borders Agency, as well as policies of ‘containment’ or the extra-territorialisation of protection. These practices hinder access to European territory for the refugee and pose methodological and epistemological challenges to progressively minded policy makers and researchers.

Contesting the existence of these restrictions, on moral and/or legal grounds, means crudely arguing for the outright removal of restrictions on the one hand, or accepting their presence and working instead towards incremental improvements in refugee protection in Europe. This choice creates three conditions that can result in the desertion of the refugee. Firstly, acceptance leads to the emergence of ‘legal idolisers’, on the one hand, and ‘pragmatist-realists’, on the other. The first cling to protective legal measures, while overlooking their exclusive function. The second argue that a realist approach to ‘Fortress Europe’ must be adopted to further the protection of refugees. In this way, the field becomes vulnerable to opportunistic research, which is designed to be palatable to policy-makers who are attracted to pragmatist-realist ‘responses’. This creates, thirdly, a sinking ship for those who argue for the removal of restrictions whereby contemporary academic scholarship and public debate paints critics of restrictive immigration and refugee policy as naively adopting