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# Rethinking Law and New Governance in the European Union: the Case of Migration Management

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## Abstract

This article proposes a way forward in the debate about law and new governance in the contemporary European Union. Migration management is used as a prism through which we can see what is happening in a significant area of EU activity and re-evaluate new governance, both in terms of its opportunities, but also crucially, its dangers. A rethink on new governance and its application to external migration implies an alteration of the lenses by which we see migration, by uncoupling new governance from its synergy with 'good' governance and to instead consider that new governance may offer policy-makers opportunities to meet goals beyond legislative processes. The article does not argue that new governance *should* be used in migration management. Rather, by using governance as an explanatory concept and providing a critique, the contribution of the article is to highlight the potential dangers that new modes of governance may pose to transparency and legitimacy in the contemporary EU, especially if they are used to bypass legislative processes and avoid civic involvement.

## Introduction

'New governance' as a term understood to include a variety of diverse modes including coordination, target-setting, benchmarking and peer-review, has provided legal scholars with an opportunity to investigate the effects of informal mechanisms on the European integration process and their relationship with 'traditional' law. During the peak of new governance scholarship in the late 1990s and 2000s, areas of EU activity including social policy provided fertile ground for scholarship of changing legal dynamics. Seminal works such as Joanne Scott and David M. Trubek's 2002 piece 'Mind the Gap'<sup>1</sup> explored the nature and parameters of new governance,<sup>2</sup> a phenomenon which was seen as significant

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<sup>1</sup> J. Scott and D. M. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union (2002) 8(1) *European Law Journal* 1

<sup>2</sup> See, *inter alia*, G. M. Wellens and K. C. Borchardt, "Soft Law in European Community Law" (1989) 14 *European Law Review* 267; F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) 56 *Modern Law Review* 19; J. Shaw and G. Moore (eds), *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1995) and for a

enough to be viewed as a constitutional ‘challenge’<sup>3</sup> to the EU’s legal order as conventionally understood.

Intense debate followed on whether EU law-making (and our assumptions about it) was heading towards becoming obsolete via a diversification of approaches to governance in the EU including network, reflective and experimentalist streams of governance.<sup>4</sup> The external sphere of governance, including migration management, played almost no part in the debate. This article puts forward the case that new governance deserves a rethink, and that external migration management provides a convincing case study for updating our understanding of how (new) governance works in the contemporary EU.

The domination of migration ‘crisis’ in public life across the continent during 2015 demonstrates that migration management is a policy area of great significance in contemporary Europe. Beyond the discourse, responding to the challenges of external migration is attracting an increasing amount of institutional funds and resources – a trend which began several years before migration dominated headlines in 2014-15. EU legislation has been in place since the 1990s at least, but more recent emphasis is also placed on the use of ‘tools’ which suggests that there are – at the very least – non-legal measures or practices which are occurring too. However, if – as is argued here – these might be seen as akin to existing, recognised new modes of governance, there is a need to identify why they have hitherto not featured prominently in the new governance debate. In doing so, migration enables a critique of new governance by questioning some of the latter’s basic premises, in particular the possibilities of modes of new governance to increase transparency, civil society involvement and greater effectiveness.

In using the analytical lens of governance to explain migration management in this way, this article suggests a pathway out of the ‘period of confusion’ over the relationship between law and new governance that Mark Dawson identified in this journal in 2011.<sup>5</sup> The article responds to calls by Dawson and others for further analytical refinement and conceptual clarification<sup>6</sup> and to build on works that have tracked and explained the legal effects of increasingly diverse institutional practices and modes. To do so the research agenda must rely on a revised concept of new governance to capture what is happening in contemporary Europe. The agenda needs to transcend the debate about what kind of relationship law and governance have, whether the Community method is obsolete,<sup>7</sup> and what constitutes ‘civil society’ in new modes of governance.<sup>8</sup> The argument here is that migration management offers an excellent prism through which we can see what is

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comprehensive exploration of soft law, L. Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004).

<sup>3</sup> G. De Búrca, “The Constitutional Challenge of New Governance in the European Union (2003) 28(6) *European Law Review* 814.

<sup>4</sup> R. Dehousse (ed.), *The “Community Method”: Obstinate or Obsolete?* (Basingstoke: Palgrave Macmillan, 2011).

<sup>5</sup> M. Dawson, “Three Waves of New Governance in the European Union” (2011) 37(2) *European Law Review* 208.

<sup>6</sup> K. A. Armstrong, “New Governance and the European Union: An Empirical and Conceptual Critique” in G. De Búrca, C. Kilpatrick and J. Scott (eds), *Critical Legal Perspectives on Global Governance* (Oxford: Hart Publishing, 2013) p. 249.

<sup>7</sup> Dehousse, *The “Community Method”: Obstinate or Obsolete?* (2011).

<sup>8</sup> See, inter alia, P. Maignette, “European Governance and Civic Participation: Beyond Elitist Citizenship?” (2003) 51(1) *Political Studies* 144; K. Edquist, “EU social-policy governance: advocating activism or servicing states?” (2005) 13(4) *Journal of European Public Policy* 500.

happening in a significant area of EU activity and re-evaluate new governance, both in terms of its opportunities, but also crucially, its dangers.

A rethink on new governance and its application to external migration implies an alteration of the lenses by which we see migration, by uncoupling new governance from its synergy with ‘good’ governance and to instead consider that new governance may offer policy-makers opportunities to meet goals *outside* legislative processes. Just as earlier governance analysis shed light on the ‘underworld’ of regulatory practices in the comitology system,<sup>9</sup> the aim here is to explore what new governance means in an area which has not previously been under the microscope and highlight the potential dangers that new modes of governance may pose to transparency and legitimacy in the contemporary EU.

Though the article does not comprehensively analyse every instance of new governance which has emerged, it uses examples of phenomena which support the claim that there is a need for an altered understanding of it. In doing so, we may not therefore expect the ‘enthusiasm’<sup>10</sup> associated with the promises of earlier new modes of governance in terms of civic participation and what this entails in a normative sense. The article is explicit as to the downsides of new governance in terms of a lack of closeness to the individual (who may not, of course, be an EU citizen) when new modes of governance are used to both bypass legislative processes and avoid civic involvement.

With the twin aims of using governance as an explanatory concept, and providing a critique, the article proceeds as follows: the first part discusses the appropriateness of the language of governance as an explanatory concept, and explores why it has hitherto not been applied to migration. It makes the case that governance can be used as a means to explain what is happening in this significant area. The article then moves on to critique the new modes of governance by identifying how the parameters of the debate can be shifted. The article concludes by calling for the debate on new modes of governance to rely less on civil society participation as a core element, and to pay closer attention to how the new modes of governance may work against the EU’s own stated values (including the Rule of Law). This implies a shift in our view of ‘governance’ and its positive underpinnings.

## **Explaining EU external migration management through ‘governance’**

### ***The emergence of ‘governance’ in (EU) legal scholarship***

The language of governance suits, to use Rhodes’ definition ‘a change in the meaning of government, referring to a new process of governing; or a changed condition of ordered rule; or the new method by which society is governed’.<sup>11</sup> As the EU itself represents such

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<sup>9</sup> M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge: Cambridge University Press, 2011).

<sup>10</sup> T. Idema and R. D. Keleman, “New Modes of Governance, the Open Method of Coordination and Other Fashionable Red Herring” (2006) 7(1) *Perspectives on European Politics and Society* 108, 108.

<sup>11</sup> R. A. W. Rhodes, “The New Governance: Governing with Government” (1996) 44(4) *Political Studies* 652.

a change, governance quickly gained currency in study of the EU.<sup>12</sup> Legal scholars began to look beyond traditional paradigms of ‘integration through law’ towards new institutional phenomena and pose interesting questions about whether the Community method was the only, or most appropriate, means to fulfil objectives.<sup>13</sup> Using governance language helped overcome debates about the distinction between law and policy, or ‘hard’ and ‘soft’ EU law, whilst at the same time posing as many questions as it resolved due to the malleable nature of ‘governance’ and what it entails. As Armstrong has noted, emphasis on classifying tools such as post-legislative guidance,<sup>14</sup> guidelines<sup>15</sup> and so on as ‘hard’ or ‘soft’ risks being highly reductive and ignoring pluralisation of governance forms.<sup>16</sup> If everything which is not categorised as legally binding is treated as ‘soft’ law, then the latter becomes a burgeoning category that cannot capture important variations.<sup>17</sup> Certain ‘new’ governance modes include benchmarking, peer-review and mainstreaming are difficult to accommodate in a hard/soft dichotomy since they may exert pressures on actors to act in certain ways, without recourse to formal enforcement.<sup>18</sup>

Trubek and Trubek argue against dismissing new modes of governance due to their supposed unenforceability. They post instead that they may ‘work to bring about change’<sup>19</sup> as a result of processes including: shaming, diffusion through mimesis or discourse, deliberation, learning, and networks.<sup>20</sup> Law as traditionally conceived does not always necessarily change behaviour and even the relationship between the courts and new modes of governance is not now understood to be as far apart as once thought.<sup>21</sup> These varied means by which change can occur demonstrate that new modes of

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<sup>12</sup> This primarily refers to its English-language use. Its translation and degree of acceptance in other European languages has varied. In French, ‘gouvernance’ is defined as a ‘Terme de prestige aujourd’hui en faveur ... véhiculant un concept anglo-saxon’ (G. Cornu, *Vocabulaire juridique*, 2<sup>nd</sup> edn (Paris: PUF, 2009)). I am grateful to Isabelle Rueda for discussions on this point.

<sup>13</sup> C. Möllers, “European Governance: Meaning and Value of a Concept” (2006) 43 *Common Market Law Review* 313.

<sup>14</sup> J. Scott, “In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law” (2011) 48 *Common Market Law Review* 329.

<sup>15</sup> S. Vaughan, “Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies” (2015) *Cambridge Yearbook of European Legal Studies* (early view) DOI: <http://dx.doi.org/10.1017/cel.2015.3>

<sup>16</sup> K. A. Armstrong, “The Character of EU Law and Governance: From ‘Community Method’ to New Modes of Governance” (2011) 64 *Current Legal Problems* 179, p. 206.

<sup>17</sup> Armstrong, “The Character of EU Law and Governance: From ‘Community Method’ to New Modes of Governance” (2011) 64 *Current Legal Problems* 179, p. 208.

<sup>18</sup> Senden’s definition of soft law is as follows: ‘rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects’. Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004) p. 3.

<sup>19</sup> D. M. Trubek and L. G. Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination” (2005) 11(3) *European Law Journal* 343, p. 356.

<sup>20</sup> Trubek and Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination” (2005) 11(3) *European Law Journal* 343, p. 356.

<sup>21</sup> See, in particular, J. Scott and S. Sturm, ‘Courts as catalysts: Rethinking the judicial role in new governance’ (2007) 13 *Columbia Journal of European Law* 565, E. Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Abingdon: Routledge, 2015) and for the case of social welfare, T. K. Hervey, “Adjudicating in the Shadow of the Informal Settlement?: The Court of Justice of the European Union, ‘New Governance’ and Social Welfare” (2010) 63 *Current Legal Problems* 92.

governance employ a multitude of arms at their disposal which may seek to fulfil goals in a less direct, more abstract way and through multi-level institutional frameworks.<sup>22</sup>

Much of the emphasis placed on new governance has been its capacity for effectiveness in meeting goals. But difficulties of measuring effectiveness are inherent when the modes of governance under the microscope are less tangible. Rather, new governance is more *responsive* to changing contexts and preferences than the *regularity* of law.<sup>23</sup> Furthermore, as new governance scholarship has come to recognise, the modes rarely exist in isolation from 'traditional' law in the form of Regulations and Directives, which also helps to explain the difficulties in delimiting them and subjecting them to analysis. As such, new governance incorporates the idea that variety is essential and, by consequence, an approach which attempts to limit or 'concretise' modes runs the risk of failing to capture the holistic nature of governance.<sup>24</sup> For example, mutual peer-review is unlikely to be effective as a one-off but embedded as part of the 'architecture' of a system of governance and used in collaboration with learning strategies, possibly through a network. Constructivist approaches which account for new governance as a social interaction creating shared social understandings have been instructive here.<sup>25</sup> The mutually constitutive nature of law and governance has the potential to lead to rethinking of basic premises and normative presuppositions of law, legal form and legal function, and hence an interpretative evolution and a new and richer understanding of law and European integration.<sup>26</sup>

All this is to say that ignoring new modes of governance is as futile as attempting to explain the workings of a policy area without reference to existing 'hard' law. Distinguishing the different policy dimensions reveals that new governance debates have

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<sup>22</sup> L. Hooghe and G. Marks, *Multi-level Governance and European Integration* (Oxford: Rowman and Littlefield, 2001); I. Bache and M. Flinders (eds), *Multi-level Governance* (Oxford: Oxford University Press, 2004); S. Piattoni, *The Theory of Multi-level Governance: Conceptual, Empirical, and Normative Challenges* (Oxford: Oxford University Press, 2010); P. Stephenson, "Twenty years of multi-level governance: 'Where Does It Come From? What Is It? Where Is It Going?'" (2013) 20(6) *Journal of European Public Policy* 817.

<sup>23</sup> N. Walker and G. De Búrca, "Narrowing the Gap? Law and New Approaches to Governance in the European Union" (2007) 13 *Columbia Journal of European Law* 519, p. 521.

<sup>24</sup> C. F. Sabel and J. Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" (2008) 14(3) *European Law Journal* 271, p. 305; B. Eberlein and D. Kerwer, "New Governance in the European Union: A Theoretical Perspective" (2004) 42(1) *JCMS: Journal of Common Market Studies* 121.

<sup>25</sup> G. Shaffer and M. A. Pollack, "Hard and Soft Law", in J. L. Dunoff and M. A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012), p. 199. Less on court-based setting and more on how 'law operates normatively as part of an interactional process over time' (p. 199). 'On a constructivist analysis, soft law is presented and understood less as a tool for directly constraining behaviour than as a transformative tool capable of changing behaviour' (G. De Búrca and J. Scott, "Introduction", in De Búrca and Scott (eds) *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006), p. 6.

<sup>26</sup> Trubek and Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination" (2005) 11(3) *European Law Journal* 343, p. 365; L. Trubek, "New Governance Practices in US Health Care", in G. De Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006), p. 267; Armstrong, "New Governance and the European Union: An Empirical and Conceptual Critique" in G. De Búrca, C. Kilpatrick and J. Scott (eds), *Critical Legal Perspectives on Global Governance* (Oxford: Hart Publishing, 2013) p. 261.

orientated towards ‘Social Europe’ policy areas including employment policy, income distribution, social protection, education, regional cohesion, poverty and social inclusion.<sup>27</sup> The Lisbon European Council (2000) called for the strategic adoption of existing instruments and strategies as part of a new mode called the Open Method of Coordination (OMC).<sup>28</sup> As its name suggests, the focus was on *coordination*, rather than express *integration* or *harmonisation*, since EU competences were more limited in law-making for ‘Social Europe’. The large amount of literature devoted to the OMC and social Europe have led to a series of assumptions about the kinds of areas that are either suitable for new modes of governance, or visible within them, within the same instrument.<sup>29</sup> Both the literature and the EU institutions themselves have highlighted the advantages that the new modes enjoy, which lend themselves more obviously than migration to citizen participation and ideas about the common ‘good’, even though the origins of new governance can be traced further back to economic and monetary coordination (which did not have a direct civil society focus).<sup>30</sup> The Commission’s White Paper on Governance (2001) considered, in a rather abstract way, the appropriateness of existing methods of integration, in particular in areas of EU activity where legislation has been both extensive and more limited.<sup>31</sup> The White Paper itself spurred a great deal of commentary, much of it critical of the central role the Commission gave itself in both the traditional, ‘Community method’ and new modes of governance.<sup>32</sup> Thus, the underpinnings of new governance have been about successful integration and coordination in citizen-focussed areas and hence ‘good’ or ‘better’ governance. Even without the use of the contested prefix ‘new’<sup>33</sup> the connotations of ‘governance’ are overwhelmingly positive in Europe and elsewhere.<sup>34</sup> The Commission’s own use of

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<sup>27</sup> A. Héritier, “New Modes of Governance in Europe: Policy-making without Legislating?” (2001) *Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter*, No. 2001/14, p. 5.

<sup>28</sup> D. Wincott, ‘Beyond Social Regulation? New Instruments and/or a New Agenda for Social Policy at Lisbon?’ (2003) 81(3) *Public Administration* 533, p. 535.

<sup>29</sup> Environmental regulation is a good example of this: A. Jordan, R. K. W. Wurzel and A. Zito, “The rise of “new” policy instruments in comparative perspective: has governance eclipsed government?” (2005) 52(3) *Political Studies* 477. Similarly, the Directives on Parental Leave and Part-time Work which combine binding standards with recommendations: G. Falkner, O. Treib, M. Hartlapp and S. Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005).

<sup>30</sup> D. Hodson and I. Maher, “The open method as a new mode of governance: the case of soft economic policy co-ordination” (2001) 39(4) *JCMS: Journal of Common Market Studies* 719.

<sup>31</sup> European Commission, “White Paper on Governance” COM(2001) 428. Despite being light on the role to be played by new modes of governance in the EU architecture, the paper generated a huge amount of interest and critique, in particular over its treatment of new governance being essentially a variant on the traditional, ‘Community’ method.

<sup>32</sup> D. Wincott, “Looking forward or harking back? The Commission and the reform of Governance in the European Union” (2001) 39(5) *JCMS: Journal of Common Market Studies* 897.

<sup>33</sup> Treib et al. avoid the use of ‘new’ and ‘old’ because of the differences in temporal perspective, and also because what is ‘new’ in one policy area in the EU might not be so in others: O. Treib, H. Bähr and G. Falkner, “Modes of Governance: Towards a Conceptual Clarification” (2007) 14 *Journal of European Public Policy* 1.

<sup>34</sup> See, for example, on the US experience, O. Lobel, “The Renew Deal: The Fall of Regulation and the Rise of governance in Contemporary Legal Thought” (2004) 89 *Minnesota Law Review* 324; B. Karkkainen, “‘New Governance’ in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping” (2004) *Minnesota Law Review* 471; D. NeJaime, “When New Governance Fails” (2009) 70(2) *Ohio State Law Journal* 323 and contributors to G. De Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006).

'European governance' in its documentation is construed in a way that implies an open and inclusive structure.<sup>35</sup>

### ***Explaining the lack of 'governance' in EU migration management***

New governance is generally discussed in more recent areas of EU activity; where Member States are 'sovereignty conscious' (rendering integration/cooperation more difficult); where legislation is limited because it is not seen as the most suitable means to pursue coordination/integration; where multiple actors are involved (beyond the EU institutions and Member State governments, such as agencies)<sup>36</sup> to meet goals and where civil society has a significant involvement. External migration management shares some, but not all, of these features.

External migration management is indeed a newer area of EU competence, having developed incrementally since the 1990s. Since the free movement of workers is one of the 'four freedoms' of the Single Market, internal migration has always been a part of the European integration process, but a focus on external migration emerged as a logical consequence of moves towards abolishing internal borders as well as an increase in the numbers of migrants to the EU in the early 1990s.<sup>37</sup> Although provisions on the rights of third country nationals (TCNs) can be found in, for example, external agreements between the EU and third countries dating back to the 1970s,<sup>38</sup> only in the Treaty of Amsterdam did the EU institutions gain more extensive competences.

Migration is an area close to the heart of sovereignty debates.<sup>39</sup> This can be seen by its place high on the domestic agendas of many Member States, and also because some aspects of migration (particularly irregular migration) have been increasingly framed as problem for Europe to 'solve'. EU competences are part of the aims to ensure an Area of Freedom, Security and Justice (AFSJ) in the EU though this aim is neither as coherent as – for example – the 1992 Single Market project in terms of *finalité* of policy, nor institutional coherence.<sup>40</sup> The removal of the pillar structure placed the Treaty provisions on AFSJ within the same framework as the former first, Community pillar.<sup>41</sup> However, although the general aims of the Treaty are an 'ever closer Union' the language of Title V

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<sup>35</sup> C. Shore, "European Governance' or Governmentality? The European Commission and the Future of Democratic Government" (2011) 17(3) *European Law Journal* 287, p. 301.

<sup>36</sup> Vos, "Reforming the European Commission: What Role for EU Agencies?" (2000) 37 *Common Market Law Review* 1113.

<sup>37</sup> This article concerns only the management of migration from outside the EU. Migration within the EU – i.e. free movement of EU citizens – is not considered, since the legal dispositions are fundamentally different.

<sup>38</sup> For example, the Association Agreement between the EEC and Turkey, Additional Protocol, Arts 36-40.

<sup>39</sup> J. Monar in Sabel, and Zeitlin (eds) *Experimentalist Governance in the European Union: Towards a New Architecture* (2010) Oxford: Oxford University Press, p. 239; S. Lavenex and W. Wallace, in H. Wallace, W. Wallace and M. A. Pollack (eds) *Policy-making in the European Union*, 5 edn (Oxford: Oxford University Press, 2005)

<sup>40</sup> N. Walker, "In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey", in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: Oxford University Press, 2004), p. 5.

<sup>41</sup> Compare special provisions (Articles 23-41 TEU) for the Common Foreign and Security Policy (CFSP). See Cardwell, P.J. "On Ring-Fencing the Common Foreign and Security Policy in the Legal Order of the European Union" (2013) 64 *Northern Ireland Legal Quarterly* 443.



speaks of ‘cooperation’ and ‘common policies’ rather than integration. In addition, Denmark, Ireland and the United Kingdom have opt-outs from parts of the Treaty<sup>42</sup> and the Treaty text is more explicit in terms of the competences Member States retain in this area than in many other parts of the Treaty. This is significant for the discussion here because of the paradoxical nature of migration management within the Treaty arrangements: it sits at the top of the EU’s working agenda but is not found within the ‘core’ of integration.

Despite this synergy between external migration management and other areas where new governance has been recognised, attention needs to be paid as to why it does not ‘fit’ within the other assumptions or paradigms about new governance. There are four hypotheses why this might be the case.<sup>43</sup> First, there is an expectation that migration is an area where ‘hard’ law can be assumed to occupy the field, leaving little or no room for new modes of governance. Second, that there has been no express use of new modes of governance in migration, given the lack of OMC in this area. Third, that migration is externally, rather than internally, focussed and thus in the domain of external relations/foreign policy, where governance is less frequently employed as a term. Fourth, there is no civil society or participatory element in migration, in contrast to other areas in social policy. In making the case that governance is appropriate here, these hypotheses need to be explored in more detail. The purpose is not to identify every possible instance of new governance in migration, but rather to use examples to challenge our existing understanding of what new governance is, and does.

### ***‘Hard’ law and external migration***

Since migration is extensively regulated at national level, it is assumed that uploading migration to the European level makes ‘law’ the expected tool for harmonisation or even coordination. The Treaty articles foresee common immigration policies for both regular and irregular migration, permanent or temporary and for purposes of work, visiting, family reunification and so on. Treaty articles point to a ‘common policy on asylum, immigration and external border control’,<sup>44</sup> a ‘common policy on asylum, subsidiary protection and temporary protection’,<sup>45</sup> ‘the gradual introduction of an integrated management system for external borders’<sup>46</sup>, ‘the common policy on visas and other short-stay residence permits’,<sup>47</sup> a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings<sup>48</sup> which will be

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<sup>42</sup> Protocols 21 and 22 attached to the TFEU. See S. Peers, “In a World of Their Own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon” (2008-9) 10 *Cambridge Yearbook of European Legal Studies* 383.

<sup>43</sup> Notable exceptions include J. Monar, “Modes of EU governance in the justice and home affairs domain: specific factors, types, evolution trends and evaluation”, in U. Diedrichs, W. Reiners and W. Wessels (eds) *The Dynamics of Change in EU Governance: Studies in EU Reform and Enlargement* (Cheltenham: Edward Elgar Publishing, 2011), p. 180 and E. Tulmets, “Experimentalist Governance in Justice and Home Affairs”, in Sabel, and Zeitlin (eds) *Experimentalist Governance in the European Union: Towards a New Architecture* (2010) Oxford: Oxford University Press

<sup>44</sup> Article 67(2) TFEU.

<sup>45</sup> Article 78(1) TFEU.

<sup>46</sup> Article 77(1)(c) TFEU.

<sup>47</sup> Article 77(2)(a) TFEU.

<sup>48</sup> Article 79(1) TFEU.

achieved, *inter alia*, through the ordinary legislative procedure, administrative cooperation between the Member States,<sup>49</sup> and agreements with third countries.<sup>50</sup>

A reading of the relevant Treaty articles suggests that many of the goals *could* be met by legislation which harmonises national legislation. It is logical to think that clear rules rather than flexibility are needed to ensure uniformity in who is able to migrate, who is not and what happens to those who in an irregular state. Even in coordination between systems as foreseen by the Treaty, such as agreeing the conditions for resident permits for third country nationals, the uniformity provided by clear legal provisions would appear to be the most appropriate means to the end. The interaction with international law insofar as it pertains to refugees and asylum seekers in particular suggests that there is little room for manoeuvre and make use of the flexibility of modes of new governance. This view of what law *should* be accomplishing to meet the Treaty goals means that there is no 'gap' to be filled by new governance or 'shadow' of legislation to step in if alternative means are not found. Although both lie close to the core of state sovereignty, unlike social policy, where the view is that this type of law is not best placed to achieve goals, in migration we expect law to do just that.

Guided by the Tampere (1999), Hague (2004) and Stockholm (2009) programmes which are agreed by the Council and set the multi-annual working agenda, and a Global Approach to Migration and Mobility (GAMM) (2005)<sup>51</sup> EU legislation has furthered some of the goals of the Treaty. A raft of legislative proposals emerged after the entry into force of the Treaty of Amsterdam. Much attention has been paid to these legal measures prompted by the Treaty of Amsterdam,<sup>52</sup> including studies of the Long-Term Residents Directive<sup>53</sup>, Family Reunification Directive<sup>54</sup>, Qualification Directive<sup>55</sup> and Returns Directive.<sup>56</sup> Some of these directives have more recently been recast, though their overall content remains largely the same from the time of their enactment.

Although some have noted that the development of European migration policy in the decade following the entry into force of the Treaty of Amsterdam is 'remarkable',<sup>57</sup> it is telling however that EU legislation on external migration is often limited to 'minimum standards' legislation and the directives mentioned above were only agreed after long

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<sup>49</sup> Article 74 TFEU

<sup>50</sup> Article 79 (3) TFEU

<sup>51</sup> The GAMM was originally the Global Approach to Migration and adopted in 2005, but was broadened to include 'Mobility' in 2011: COM(2011) 743.

<sup>52</sup> S. Peers, "Building Fortress Europe: The Development of EU Migration Law" (1998) 35 *Common Market Law Review* 1235; A. Baldaccini and H. Toner, "From Amsterdam and Tampere to the Hague", in A. Baldaccini, E. Guild and H. Toner (eds) *Whose Freedom, Security and Justice?* (Oxford: Hart Publishing, 2007); A. Luedtke, "Uncovering European Union Immigration Legislation: Policy Dynamics and Outcomes" (2009) 49(2) *International Migration* 1.

<sup>53</sup> D. Acosta, "Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership" (2014) 21(2) *European Law Journal* 200.

<sup>54</sup> K. Groenendijk, "Family Reunification as a Right under Community Law" (2006) 8 *European Journal of Migration and Law* 215.

<sup>55</sup> J. McAdam, "The European Qualification Directive: The Creation of a Subsidiary Protection Regime" (2005) 7 *International Journal of Refugee Law* 461.

<sup>56</sup> A. Baldaccini, "The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive" (2009) 11(1) *European Journal of Migration and Law* 1; C. Severino, *La transposition de la 'directive retour'* (Brussels: Bruylant, 2015)

<sup>57</sup> G. Menz, "The promise of the principal-agent approach for studying EU migration policy: The case of external migration control" (2015) 13 *Comparative European Politics* 307, p. 309.

processes of watering down in the Council. We are certainly very far from seeing the comprehensive EU-wide approach that it suggested by the text of Treaty. This is particularly the case for regular ('legal') migration, where only very limited measures have emerged.<sup>58</sup> In particular, the 'Blue Card' directive<sup>59</sup> was hailed as a potentially significant means to attract highly-skilled migrants to the EU, as well as means of demonstrating that EU legislation on regular migration is possible. However, the Directive has not been successful because it sits alongside (and not instead of) national schemes which are more attractive to potential migrants. The interpretation of optional elements by Member States appears to seek to deter applications under the Directive.<sup>60</sup> The problem is not therefore the lack of Treaty-based competences upon which the Commission may propose legislation, but the problems experienced in the passage of legislation which has resulted in numerous proposals remaining at the draft stage, and legislation which is passed not fulfilling its basic aims.

In recent years the Commission has put forward only very few concrete legislative proposals and even when migration is seen as a 'crisis', the response has not been a legislative one – which contrasts with the 'rush to amend treaty texts and adopt muscular legislation' to deal with economic crises.<sup>61</sup> Looking to the future, the Commission aspires to eventually put in place a common Asylum Code, the mutual recognition of asylum decisions, a European Coastguard and a new model of legal migration.<sup>62</sup> However, in the absence of concrete proposals or a timetable, it seems that EU legislation is only likely to be forthcoming when it concerns recasting directives,<sup>63</sup> relatively small sectors or dimensions of migration, such as recent proposals for facilitating entry procedures for non-EU students and researchers,<sup>64</sup> or will concern minimum requirements to which only the Member States need subscribe. As a result, there is certainly a wide gap between

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<sup>58</sup> Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343; Directive 2014/36 of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94; Directive 2014/66 of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157.

<sup>59</sup> For example, the 'Blue Card' directive: Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155.

<sup>60</sup> S. Peers, "The Blue Card Directive on highly-skilled workers: why isn't it working, and how can it be fixed?" (June 4, 2014) eulawanalysis.blogspot.co.uk, <http://eulawanalysis.blogspot.co.uk/2014/06/the-blue-card-directive-on-highly.html> [Accessed 30 April 2015]. The Commission notes that only 16000 Blue Cards were issued in the first two years, with 13000 from a single Member State: European Commission, "A European Agenda on Migration" COM(2015) 240 final, p. 15.

<sup>61</sup> Armstrong, "New Governance and the European Union: An Empirical and Conceptual Critique" in De Búrca, Kilpatrick and Scott (eds), *Critical Legal Perspectives on Global Governance* (Oxford: Hart Publishing, 2013) p. 267.

<sup>62</sup> European Commission, "A European Agenda on Migration", p. 17.

<sup>63</sup> For example, Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337.

<sup>64</sup> Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast) [2013] COM/2013/0151 final.

what the Treaty articles suggest EU migration legal frameworks should look like and what they actually do based on the relevant regulations and directives.

As already stated, the lack of legislative proposals might seem counter-intuitive, as migration occupies a higher place on the EU's agenda than ever before. But it is also demonstrated by the appointment in 2014 of the first Commissioner with a specific portfolio for migration, and a very considerable budget of 1.8 billion euros<sup>65</sup> to fund asylum, migration, integration and security programmes. Indeed, the Stockholm Programme identified numerous areas where legislation would seem to be appropriate but did not explicitly state that proposals would be made. Instead, there are references to using 'all available tools' to manage migration. Likewise, the Commission's most recent workplan on migration<sup>66</sup> contains hardly any proposals aside from gap-filling existing legislation.

The Commission's 'European Agenda on Migration' was published in May 2015 in the wake of an increasing number of deaths of migrants in the Mediterranean.<sup>67</sup> It calls for 'core measures', again using 'all policies and tools at our disposal'.<sup>68</sup> Explicit measures to be achieved through new legislation are scarce and – given the generally lukewarm reception of the Commission's Agenda in many of the Member States – unlikely to be enacted quickly, if at all. New proposed legislation includes a mandatory and automatically-triggered relocation system for refugees and asylum seekers across the Member States in the case of future mass influxes.<sup>69</sup> Otherwise, the only mentions of EU legislation in the Agenda is to better enforce existing measures, such as the Employers Sanctions Directive<sup>70</sup> and the Returns Directive,<sup>71</sup> and 'coherent implementation' of the Common European Asylum System. Therefore, EU legislation is very far from occupying the field of migration management and leaving little or no room for other modes. Rather, and despite the Commission's strong belief in the Community method as the cornerstone of integration,<sup>72</sup> the references to 'all available tools' reveals that there are other ways in which goals could be met beyond legislation and thus returning us to Scott and Trubek's 'gap' which could be filled by new modes of governance.

### ***The Lack of OMC in Migration Management***

Returning to the second hypothesis as to why migration has been absent from governance debate, it is indeed the case that there have been no uses of OMC in migration management, and the only proposal to use OMC in migration was dropped.<sup>73</sup>

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<sup>65</sup> European Commission, "Investing in an open and secure Europe: €1.8 billion to fund Asylum, Migration, Integration and Security" (2015) Press release, March 25, 2015, [http://europa.eu/rapid/press-release\\_IP-15-4662\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4662_en.htm) [accessed April 30, 2015].

<sup>66</sup> European Commission, "An Open and Secure Europe: Making it Happen" COM(2014) 154 and European Commission, "Commission Work Programme 2015" COM(2014) 910.

<sup>67</sup> European Commission, "A European Agenda on Migration" COM(2015) 240 final.

<sup>68</sup> European Commission, "A European Agenda on Migration", p. 2.

<sup>69</sup> European Commission, "A European Agenda on Migration", p. 4.

<sup>70</sup> Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168.

<sup>71</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348.

<sup>72</sup> European Commission, "White Paper on Governance" COM(2001) 428.

<sup>73</sup> V. Hatzopoulos, "Why the Open Method of Coordination is Bad for You: A Letter to the EU" (2007) 13 *European Law Journal* 309, p. 323.

This is in spite of the trajectory of OMC in the institutional history of the EU which has seen it become an established mode of governance in areas associated with national sovereignty.<sup>74</sup> Given the way in which the debate of new governance crystallised around the OMC as the archetype of the new modes, there would seem to be little empirical connection between migration management and new governance, setting them apart.

However, the Stockholm Programme and European Agenda on Migration – though not proposing any use of the OMC directly – do reveal a great deal of initiatives which are very familiar in the new governance debate. For example, in the Stockholm Programme, the Council calls for the extension of voluntary mobility partnerships between the EU Member States and third states.<sup>75</sup> In the Agenda, the Commission has proposed a ‘Return Handbook’ which ‘will support Member States with common guidelines, best practice and recommendations’ in the return of migrants to their home countries.<sup>76</sup> The Commission commits itself to giving ‘guidance to improve standards on reception conditions and asylum procedures to provide Member States with well-defined and simple quality indicators’<sup>77</sup> and there is also a reference to increasing trust amongst national officials through the building of networks.<sup>78</sup>

On regular migration, the Agenda talks about ‘a permanent dialogue and peer evaluation at European level on issues such as labour market gaps, regularisation and integration’.<sup>79</sup> Going back slightly further, the European Migration Network, which brings together experts from the Member States to share information with a view to supporting policy-making, has existed in its current form since 2008. This type of information sharing and social learning between actors is within the scope of new governance, especially (as one would expect) network governance approaches.<sup>80</sup> Taken together, the diversity of the ways in which the institutions foresee the furthering of the treaty goals provides evidence that the language of governance is as appropriate here as in other, more familiar areas, despite the lack of the OMC.

### ***New Governance as applicable only to ‘internal’ areas***

The third hypothesis, that new governance is only concerned with ‘internal’ policies, is also not supported by evidence of what is happening in external migration management. As stated above, migration falls within the Treaty competences associated with the AFSJ – the ‘area’ here referred to being within the EU’s border – despite its *external* focus and interaction with international levels of governance.<sup>81</sup> Areas which are externally-focussed

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<sup>74</sup> L. Tholoniati, “The Career of the Open Method of Coordination: Lessons from a ‘Soft’ EU Instrument” (2010) 33(1) *West European Politics* 93.

<sup>75</sup> European Council, “The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens” [2010] C115/01. See also R. Parkes, “EU Mobility Partnerships: A Model of Policy Coordination?” (2009) 11 *European Journal of Migration and Law* 327.

<sup>76</sup> European Commission, “A European Agenda on Migration”, p. 10.

<sup>77</sup> European Commission, “A European Agenda on Migration”, p. 12.

<sup>78</sup> European Commission, “A European Agenda on Migration”, p. 12.

<sup>79</sup> European Commission, “A European Agenda on Migration”, p. 15.

<sup>80</sup> A. Geddes, “Temporary and Circular Migration in the Construction of European Migration Governance” (2015) *Cambridge Review of International Affairs* (early view) DOI: 10.1080/09557571.2015.1018135.

<sup>81</sup> A. Weinar, “EU Cooperation Challenges in External Migration Policy” (2011) *EU-US Immigration Systems Reports 2011-12*, Robert Schuman Centre for Advanced Studies, European University Institute, Florence.

have not been expressly linked with the new modes, though a significant strand of literature has developed the notion of external governance, in particular towards neighbouring states.<sup>82</sup> Nevertheless, in external relations, state-based diplomacy appears to leave little room for other actors, including those at the sub-national level, with the exception of international organisations or modes which rely on peer-review, benchmarking and so on.

Furthermore, as part of the AFSJ, at an EU institutional level migration is not fully part of the EU's external relations machinery but does operate within a domain where, for example, dialogue with civil society can occur.<sup>83</sup> In addition, the extent of the emphasis on non-binding agreements, dialogue with third countries and international organisations without legally enforceable texts demonstrates that governance is appropriate here. As I have argued elsewhere, the use of 'migration profiles', 'migration missions', 'cooperation platforms on migration and development' and 'mobility partnerships' figure strongly in the Stockholm Programme as the available tools in migration management.<sup>84</sup> The Commission refers to them as 'innovative and sophisticated tools'. They certainly fulfil most of the criteria for being new modes of governance in that they are flexible, non-binding and frequently refer to joint responsibility with the third country, usually on the basis of conditionality, especially for those third states in the EU's neighbourhood who have aspirations of full membership or at the very least, closer association.

### ***The lack of 'civil society' in migration management***

Fourth, and crucially, there is little discernible civil society or participatory focus in migration management. The Treaty articles do speak in terms of, for example, 'fair treatment' which places the individual squarely within the frame, but migration does not fit the 'Social Europe' agenda nor lend itself to citizen or civil society involvement or participation. With the exception of policies facilitating the integration of migrants already in the EU,<sup>85</sup> or the revisions to the Blue Card Directive (which, as a Directive, is not a new mode) it is difficult to imagine how (potential) migrants from outside the Union could be incorporated in a participatory new governance framework. This is especially the case for goals which attempt to prevent, for example, irregular migrants from entering the Union. Where individuals are involved in processes, then we would expect an individual to challenge a particular decision in court where EU migration law is involved. In this respect, there are sharp differences between management migration and social policy and social exclusion and the 'bottom up' approaches which have provided a basis for new governance analysis. It should be noted that the Stockholm Programme refers to 'open, transparent and regular dialogue with representative associations and civil society', though not in any specific areas. The European Agenda on Migration refers in the introduction to civil society 'working together' alongside the Member States, EU institutions, international organisations and third countries to 'make a common

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<sup>82</sup> For example, S. Lavenex and F. Schimmelfennig, "EU rules beyond EU borders: theorizing external governance in European politics" (2009) 16(6) *Journal of European Public Policy* 791.

<sup>83</sup> European Council, "The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens" [2010] C115/01, p. 7.

<sup>84</sup> P. J. Cardwell, "New Modes of Governance in the External Dimension of EU Migration Policy" (2013) 51(6) *International Migration* 54

<sup>85</sup> European Commission, "Handbook on Integration for Policy-makers and Practitioners", 3<sup>rd</sup> edn (2010). European Commission, Brussels, [http://ec.europa.eu/dgs/home-affairs/e-library/docs/handbook\\_integration/docl\\_12892\\_168517401\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/handbook_integration/docl_12892_168517401_en.pdf) [accessed 30 April 2015].

European migration policy a reality' but gives no further details on how this could be achieved. The European Integration Forum, coordinated by the Commission and the European Economic and Social Committee, organised 11 civil society meetings between 2009 and 2014 but the focus was on the integration of existing migrants in the EU.<sup>86</sup> Its successor, the European Migration Forum, has a wider remit as a platform to engage with civil society organisations on regular migration (including the Blue Card directive) and migrants' needs but has only met once to date, in January 2015.<sup>87</sup>

This section has demonstrated that it is appropriate to use governance to explain what is happening in migration management, and that many of the tools and practices which are developing in this significant area share characteristics with recognised new modes of governance and the policy areas which they are recognised as operating within. The stumbling block, however, remains the lack of substantive involvement of civil society. The following section makes the case that new modes of governance need not rely *only* on civil society participation as a crucial factor for their identification, but doing so requires a critique of our ways of thinking about governance and its attributes more generally.

## **Refiguring the approach to new governance**

The critique of our understanding of new governance here based on the case of migration management rests of two related points. First, that although new modes of governance emerged as a means to fulfil 'a vision of a more open and flexible architecture for democracy and constitutional order',<sup>88</sup> there is a need to shift our understanding to include within the scope of analysis modes which do not necessary fulfil aims of openness and democracy. Second, that if participation primarily by civil society is a necessary condition of identifying modes of governance, then this leads us away from seeing (and understanding) the role played by modes which nevertheless share many of the aspects which we are familiar with.

### ***The Participatory Condition***

Some strands of governance literature, for instance reflexive governance, place public benefit and citizen participation at the core. The importance of public interest therefore implies 'social dialogue at different levels'<sup>89</sup> and optimal outcomes are defined in terms of

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<sup>86</sup> See, for example, European Commission/European Economic and Social Committee "11<sup>th</sup> meeting of the European Integration Forum: Summary Report" (2014) April 3, 2014, [http://www.eesc.europa.eu/resources/docs/european-integration-forum-11\\_report.pdf](http://www.eesc.europa.eu/resources/docs/european-integration-forum-11_report.pdf) [accessed April 30, 2015].

<sup>87</sup> In Janua

<sup>88</sup> Scott and Trubek, "Mid the Gap: Law and New Approaches to Governance in the European Union (2002) 8(1) *European Law Journal* 1, p. 18.

<sup>89</sup> O. De Schutter, "The Democratic Experimentalist Approach to Governance: Protecting Social Rights in the European Union", in De Schutter and Lenoble (eds) *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart Publishing, 2010) p. xxix.

public interest and citizen benefits.<sup>90</sup> Other strands hint at the problems with highlighting civil society. For instance, network governance does not prioritise the possibilities for civil society involvement, though it does recognise a legitimacy problem given the lack of involvement of Parliaments and Courts in networks which involve national actors and the EU agencies which have proliferated in recent years.<sup>91</sup> Nevertheless, as De Visser posits, affected interests should be involved in the operationalization of new modes.<sup>92</sup> However, social learning within networks would require the interests of those affected to be present, which would likely be difficult, especially in the case of irregular migration.<sup>93</sup> The identification of and focus on the OMC as the most readily visible example of the new modes of governance<sup>94</sup> has made it sometimes difficult to distinguish between OMC and other modes. Therefore, since OMC is a relatively constitutionalised mode, which does expressly rely on participation, this is taken to be the case also for all other new modes of governance.

There is a danger, however, of conceptual stretching and by removing civil society participation as a necessary underpinning of their *raison d'être*, we stand to lose the ways in which new governance approaches to the EU have helped our understanding. But this critique speaks to the link between democracy and the participatory aspects of new governance making a 'better' and more legitimate EU for its citizens as just one aspect of what we should look for. If we change the parameters and also look for participation by other actors, then the language of governance becomes less bound with notions of 'good' governance. This not to say that civil society is not already involved in migration policy or that there is lack of interest amongst civil society in migration issues. The previous section identified some forms where involvement has occurred, and there is certainly no shortage of regional, national and Europe-wide civil society organisations concerned with migration issues. It is argued here that some of the most significant aspects of migration policy incorporate aspects of participation, but not necessarily of civil society.

Take for example the Pilot Project on Return to Pakistan and Bangladesh agreed by the Council in June 2014.<sup>95</sup> This project will 'mobilise all adequate means in the framework of the more for more principle',<sup>96</sup> to 'stimulate' third countries to improve the return rate of nationals found to be in an irregular state. The European Agenda states that this is an 'important practical demonstration of the way forward' in returning migrants. It can be understood as a new mode of governance, since it is flexible, Member States can opt to

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<sup>90</sup> De Schutter, "The Democratic Experimentalist Approach to Governance: Protecting Social Rights in the European Union", in De Schutter and Lenoble (eds) *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart Publishing, 2010) p. 119.

<sup>91</sup> E. Vos, "Reforming the European Commission: What Role for EU Agencies?" (2000) 37 *Common Market Law Review* 1113; A. Wonka and B. Rittberger, "Credibility, Complexity and Uncertainty: Explaining the Institutional Independence of 29 EU Agencies" (2010) 33(4) *West European Politics* 730.

<sup>92</sup> De Visser, *Network-based Governance in EC Law* (Oxford: Hart Publishing, 2009), p. 393.

<sup>93</sup> T. Dedeurwaerdere, "The Contribution of Network Governance in Overcoming Frame Conflicts: Enabling Social Learning and Building Reflexive Abilities in Biodiversity Governance", in De Schutter, O. and Lenoble, J. (eds) *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (2010) Oxford: Hart, p. 186.

<sup>94</sup> See also, S. Borrás and K. Jacobsson, "The Open Method of Coordination and New Governance Patterns in the EU" (2004) 11(2) *Journal of European Public Policy* 185.

<sup>95</sup> Council Conclusions on EU Return Policy adopted at the Justice and Home Affairs Council meeting of 5-6 June 2014.

<sup>96</sup> Council Conclusions on EU Return Policy, 5-6 June 2014, p. 4.



participate or not, it relies on information-sharing and best practice, and there is participation by other actors, namely the third states. But whilst this might be an effective means to fulfil migration management goals, it is far from our understanding of ‘good’ governance. Given the risks associated with the lack of public participation (and hence a degree of oversight as to what is happening) or the scrutiny provided by legislative processes in such a measure, there is a need to ensure that analytical frameworks are capable of capturing what is happening. Whilst it might be argued that new modes of governance should be reserved for areas which are associated with public ‘good’, the critique here is that we either create a new conceptual framework for non-civil society related modes, or we adapt what we have already.

The argument here is that creating a completely new framework would be futile, since – as per the example above – there is already much common ground with existing ways of understanding new modes of governance. Further evidence to support this is that the new modes of governance in Social Europe do not fully fulfil their mission of civil participation<sup>97</sup> and that there is less of a conceptual leap to considering modes which do not rely on this criterion. In recent years, rather than see new modes brought to the fore with their potential for legitimising Europe for the benefit of its citizens, we have instead witnessed a return to more traditional forms of legitimation, such as the greater involvement of national Parliaments in the scrutiny process of EU law,<sup>98</sup> and the creation of ‘citizens’ initiatives’.<sup>99</sup> As such, new modes of governance could be seen as red herrings insofar as they represent an unnecessary distraction from traditional law and popular involvement in democratic, Parliamentary-based processes.<sup>100</sup> Whilst considering whether new modes of governance as we think of them are in part responsible for failing to better connect citizens and the institutions is an interesting question, it is beyond the scope of this article.<sup>101</sup> What is argued here is that by uncoupling civil society participation from existing ideas about new modes of governance and what they do the debate can move forwards, and without necessarily prejudicing the continued use of new modes in Social Europe or other areas. In doing so, we can see the risks that avoiding both the use of the Community method and using modes which do not allow for legal enforceability by individuals or public input into their formulation is problematic.

The focus is on processes but, equally importantly, on the actors involved in these processes. Returning to Scott and Trubek’s view: shaming, diffusion through mimesis or discourse, deliberation, learning and networks can all be present in migration management. For actors, if the citizen participation and the problematic concept of what constitutes ‘civil society’ and how it plays a role in the modes is uncoupled, then the potential for approaching migration management via new governance become much

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<sup>97</sup> S. Smismans, “New Modes of Governance and the Participation Myth” (2008) 315(5) *West European Politics* 874.

<sup>98</sup> The so-called ‘yellow card’ process: Article 12 TEU, Protocol No. 1 on the Role of National Parliaments in the European Union and Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality. See also F. Fabbrini and K. Granat, “Yellow Card, But No Foul’: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike” (2013) 50 *Common Market Law Review* 115.

<sup>99</sup> Article 11(4) TEU, Article 24 TFEU and Regulation (EU) No 211/2011 on the citizens' initiative.

<sup>100</sup> Idema and Keleman, “New Modes of Governance, the Open Method of Coordination and Other Fashionable Red Herring” (2006) 7(1) *Perspectives on European Politics and Society* 108, p. 115.

<sup>101</sup> See instead, for example, L. Cram, “The Importance of the Temporal Dimension: New Modes of Governance as a Tool of Government” (2011) 18(5) *Journal of European Public Policy* 636.

clearer. This is not to say that the participation aspect of new governance is irrelevant in migration management, but rather that notion of *who* participants needs to be broadened.

The challenge therefore is to establish if the participation aspect can simply replace civil society with third countries or private actors, or indeed if this is even necessary at all. This line of argument runs against De Búrca and Scott's assertion that new modes of governance encourage the involvement of interested stakeholders, rather than representatives, though would still point to their criteria of accommodation and promotion of diversity, the importance of personality and revisability and policy learning. Rather, the emphasis is placed thus on executive power and dominance,<sup>102</sup> which does resonate with both Armstrong and Dawson's views on new modes of governance fragmenting EU law while promoting managerialism or executive power, and at the same time escaping 'the tethers of the values and mechanisms of the rule of law'.<sup>103</sup> The emphasis on executive power does not preclude the strong role played by EU agencies, including Frontex (the EU's external borders agency) and the European Asylum Support Office (EASO).<sup>104</sup> However, weak democratic and judicial controls of external AFSJ agencies has already been highlighted<sup>105</sup> as well as the far-reaching secrecy of informal, executive-led deliberation structures.<sup>106</sup> This again returns us to the dangers associated with new modes of governance in migration in terms of their lack of accountability, transparency and legitimacy.

### ***Reconciling Law, Legal Process and the Rule of Law with a New Governance Approach***

A revised approach to identifying new modes of governance requires casting a wider net to capture instances of informal processes and decision-making, which might point to new ways of doing things in migration management that are efficient, but might also fail on legitimacy. This responds to Armstrong's call develop our concepts of law and expand our tools of analysis, given the scale of variation in the forms of governance and in the capacity of law to evolve to accommodate change.<sup>107</sup> Recalling that the Commission's documentation indicates a very low number of proposals for legislation, the preceding section attempted to show what is on the table instead. Various terms appear which seem to sound *like* legal measures without actually *being* them. For example, the use of 'agenda' and even the proliferation of non-legally binding 'processes' with third states<sup>108</sup> suggest that there is a deliberate attempt to use informal process to avoid legislative, democratic frames. There are echoes here of Guirandon's venue shopping

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<sup>102</sup> D. Curtin, "Challenging Executive Dominance in European Democracy" (2014) 77(1) *Modern Law Review* 1.

<sup>103</sup> Armstrong, "The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance" (2011) 64 *Current Legal Problems* 179, p. 209.

<sup>104</sup> F. Comte, "A New Agency is Born in the European Union: The European Asylum Support Office" (2010) 12 *European Journal of Migration and Law* 373.

<sup>105</sup> J. S. Vara, "The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls" (2015) 20(1) *European Foreign Affairs Review* 115.

<sup>106</sup> Curtin, "Challenging Executive Dominance in European Democracy" (2014) 77(1) *Modern Law Review* 1.

<sup>107</sup> Armstrong, "The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance" (2011) 64 *Current Legal Problems* 179, pp. 213-14.

<sup>108</sup> Rabat and Khartoum Processes with African states and the African Union, and the Budapest Process and the Prague Process with Eastern Europe, the Balkans, Central Asia, Russia and Turkey.

argument,<sup>109</sup> whereby national policy-makers escaped the confines of national capitals and worked on an intergovernmental basis without the same levels of scrutiny. Except that here, the outcomes are potentially devoid of the European levels of scrutiny too.

If the premise of new governance is to increase participation and fulfil objectives which cannot be fully or best achieved through ‘traditional’ law as a result of political bargaining, then there are risks associated with governance frameworks which lack the formalism and procedural accountability of law.<sup>110</sup> Sabell and Zeitlin recognise this but suggest that, ‘recursive framework making and revision is prompting the emergence of new forms of dynamic accountability and peer review which discipline the state and protect the rights of citizens without freezing the institutions of decision making. Arguably, these dynamic mechanisms provide effective ways of addressing longstanding accountability and rule-of-law deficits within the nation-state itself.’<sup>111</sup> In a similar vein, for Dawson, if law is too iterative or adaptable then governance potentially lacks stability and it becomes difficult to ‘reconcile dynamism on the one hand and proper involvement and deliberation on the other, too easily ignored the fact that these could be mutually constraining values’.<sup>112</sup>

Of course, one would expect the EU institutions to work produce documentation and plans which account for the political difficulties associated with cooperation on migration management, and to seek cooperation from third states. But this is precisely why they should be explained through a new governance framework, since, in a similar vein to the Social Europe agenda, (very) soft law elaboration of hard law norms could be possible.<sup>113</sup> The literature on experimental governance already suggests that the deliberation between technical elites (which is certainly part of the moves to make EU migration management work) can lead to changes or the emergence of new principles which may eventually gain binding force.<sup>114</sup> The broad goals of the tools therefore are to facilitate means by which to manage migration more effectively. But, as the Commission admits, the variety of tools which have been introduced under the GAMM lack clear, logical relationships.<sup>115</sup> As such, the problem with experimental governance as highlighted by Sabell and Zeitlin is that there is, ‘no actor among those seeking to coordinate their efforts has a precise enough idea of the goal either to give precise instructions to the others or reliably recognise when their actions do or don’t serve the

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<sup>109</sup> V. Guiraudon, “European integration and migration policy: Vertical policy-making as venue shopping” (2000) 38(2) *JCMS: Journal of Common Market Studies* 249.

<sup>110</sup> C. Joerges, “How the Rule of Law Might Survive the European Turn to Governance” (2007) unpublished paper, NEWGOV Consortium Conference, 31 May – 1 June 2007, European University Institute, Florence. Available at: [http://www.eu-newgov.org/database/PUBLIC/NEWGOV\\_CC2007-Contribution\\_Joerges.pdf](http://www.eu-newgov.org/database/PUBLIC/NEWGOV_CC2007-Contribution_Joerges.pdf) [accessed 30 April 2015].

<sup>111</sup> Sabell and Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU” (2008) 14(3) *European Law Journal* 271, p. 276.

<sup>112</sup> Dawson, “Three Waves of New Governance in the European Union” (2011) 37(2) *European Law Review* 208, p. 216.

<sup>113</sup> Scott, “In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law” (2011) 48 *Common Market Law Review* 329, p. 330.

<sup>114</sup> Sabell and Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU” (2008) 14(3) *European Law Journal* 271, pp. 274-5.

<sup>115</sup> European Commission, “Communication: The Global Approach to Migration and Mobility”, COM(2011) 743 final.

specified end'.<sup>116</sup> This also places the modes outside the *Meroni* doctrine established by the Court of Justice on delegation of authority via legislative goals.<sup>117</sup>

Coupled with the gaps in judicial protection and oversight of 'informal' modes, which nevertheless might affect *more* individuals than the existing regulations and directives, migration management begins to look problematic in terms of accountability and legitimation,<sup>118</sup> as well as a reflection on how the EU upholds the Rule of Law and its own values as stated in the Treaty.<sup>119</sup> The need particularly arises when migration is presented a threat or something to be combatted, such as the reference to taking 'firm measures against irregular migration' in the Commission's 2015 Workplan.<sup>120</sup> In short, a renewed approach needs to account for what might happen to those who are unable to participate, directly or indirectly, in the modes of governance and how we should understand them.

## Conclusion

This article has argued that new governance can – and indeed should – be used to explain the contemporary workings of the European Union using the candidate example of migration management. Just as previous ways of understanding what the EU does, and how, have developed alongside changes to the legal and political system of the EU, the relationship between the EU institutions, the Member States, other actors, and citizens, new governance as an explanatory tool should also be capable of adapting to changing circumstances. This article has not undertaken a comprehensive evaluation of how significant new modes of governance are in migration management. Rather, it has posited that by starting to identify emerging phenomena as examples of new governance allows a research agenda to develop alongside this rapidly evolving law and policy area and hence deeper analysis of how influential the modes are in this – and potentially even other – areas. In this way, there is no judgement here on the question of whether new modes of governance *should* be used in migration. Rather, this article has argued that new governance's explicit and implicit ties to 'good' or 'better' governance have led to a prioritisation of the qualities of governance which are destined to connect the EU with its citizens, increase transparency and participation. The case of migration management reveals aspects of our understanding of new modes of governance that we can be critical of. Rather than highlight their supposed qualities of participation from stakeholders (in particular those focussed on citizen-involvement), seeing new modes of governance as being not necessarily connected with what we assume is 'good' about governance allows us in turn to illuminate practices which might otherwise be left out of (legal) analysis. Given the rapidly increasing importance of migration on the EU's agenda, and the impact on individuals who are unlikely to find any means of participation in the processes, being mindful of the implications of new modes of governance in this domain becomes extremely pertinent.

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<sup>116</sup> Sabel and Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" (2008) 14(3) *European Law Journal* 271, p. 304. Emphasis supplied.

<sup>117</sup> Case C-9/56 *Meroni v High Authority* [1957/1958] ECR 133

<sup>118</sup> Armstrong, "New Governance and the European Union: An Empirical and Conceptual Critique" in De Búrca, Kilpatrick and Scott (eds), *Critical Legal Perspectives on Global Governance* (Oxford: Hart Publishing, 2013) p. 269.

<sup>119</sup> Article 2 TEU and Article 3(5) TEU.

<sup>120</sup> European Commission, "Commission Work Plan 2015: A New Start", COM(2014) 910.

With this in mind, new governance loses its attractiveness as a normative means of engaging the public or civil society with law and policy-making. But instead it allows us to see beyond traditional law-making frames to discover what is happening, in ways which do impact on individuals and also challenge our understandings of EU law insofar as it respects the rule of law. Put in this way, the argument speaks to even more general questions about the way EU law works, and the way we see it. If traditional, Community law-making in migration management is eschewed in favour of new modes of governance because these allow an avoidance of democratic frames, then there is a risk that some of our understanding about European law and governance being challenged at the most basic level. As the EU and its legal system matures, and at the same time faces questions about what should it be doing and in what way, we may start to see increased ways of working in an enlarged EU which do not fulfil its own stated values of respect for the Rule of Law, fairness, openness and transparency for the benefit of the peoples of Europe – and beyond.