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Tackling Europe's migration 'crisis' through Law and 'New Governance'

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Short title: EU migration, law & new governance

Abstract

It has become commonplace to regard the contemporary state of migration to Europe as a 'crisis'. The European Union has been under pressure to respond effectively to this 'crisis', which has gone to the very top of its policy-making agenda. However, despite the legal powers the EU has to regulate migration, legislative measures appear to have declined as an appropriate response. Rather, a constant stream of policy documents has referred to 'tools' and 'instruments' which appear to fall outside the scope of legislative processes, and the democratic scrutiny which goes hand-in-hand with them. This article argues that the practices which are emerging from the institutions can be regarded as instances of 'new governance', which are found in other areas of EU activity. To do so highlights the risks associated with using non-legal tools to deal with an area where there are extremely important consequences for individuals. The policy recommendations highlight the need for vigilance to ensure that the EU's stated values are not undermined in the quest for dealing with the migration 'crisis'.

Introduction

Migration dominates the current political agenda in Europe. It has been at the heart of election campaigns across the continent, and has spilled into wider debates about Europe's economic, cultural and political identities. Debates on migration have crystallised the situation as a 'crisis', whether or not the actual numbers of individuals coming to Europe constitutes a crisis in historical or comparative terms. Nevertheless, this perception, coupled with the use of 'migration' as a catch-all term for individuals crossing borders, a hardening of political rhetoric and inter-state tensions has put the spotlight on what the appropriate responses should be.

Policy-making on migration in Europe relies on a complex interplay of regulatory competences between the EU and member states. There is a strong distinction between free movement rights of EU citizens (where the EU has extensive competence) and regulating the situation of third country nationals (where the EU's competences are more limited). EU legislation on migration from outside Europe has been in place since Treaty reforms in the 1990s increased the legal competences of the EU institutions as the next stage in the integration process. Responding to the challenges of external migration is attracting an increasing amount of EU institutional funds and resources: a trend which began several years before migration started its ascendance to the top of the political agenda in 2014.

The language of the Treaty, which speaks in terms of developing an external ‘common immigration policy’,¹ can be contrasted with the political rhetoric from some member states who have resisted and challenged provisions of EU law, such as on refugee quotas.² The interpretation of international law adds an additional layer of complexity: for example, under the Dublin Regulation³ on asylum seekers, EU law co-exists with national law and decision-making (insofar as determining who qualifies under international obligations).

The EU’s legislative agenda on external migration is contained in an increasing number of wide-ranging policy programmes, which span the policy fields of the area of freedom, security and justice (AFSJ), and foreign policy. But examining the most recent policy documents in the AFSJ reveals that *less* emphasis appears to be placed on using established legal instruments as defined in the Treaties in favour of the undefined use of ‘tools’. This trend suggests that there are specific responses to migration challenges which sit somewhere outside established legal/regulatory responses. Attempting to meet goals via alternative routes to ‘traditional’ law (whether at nation-state or the EU level) is nothing new: the emergence of ‘soft law’ has been extensively analysed across many policy areas, and not only in the EU context. However, the express call for the use of non-traditional ‘tools’ to manage migration is problematic for two interrelated reasons.

First, the putting into place and subsequent effects of tools which operate outside legislative frameworks risk being more difficult to track. Though this depends on their level of formalisation and resemblance to existing tools, we might not know what effect they are having, and in particular on the most vulnerable migrants. The use of ‘innovative’ in various policy documents suggests that they do not follow established model(s). Because ‘tools’ eschew existing (legislative) frameworks which are open to scrutiny and rely on transparency, there is a risk that they might be used to circumvent such procedures and obligations. This includes for policies to be made ‘in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’.⁴

Second, by fusing different types of individuals into a catch-all term of ‘migrant’, it is equally difficult to ascertain whether ‘tools’ are compliant with international law on, in particular, refugees and the international legal frameworks for their protection. This is particularly problematic for the EU, since the Treaty refers to ‘the strict observance and the development of international law’ (article 3(5) TEU) as a core component of its values in foreign policy. The EU risks failing to uphold its own Treaty-based values, including the protection of human rights.

The purpose of this article is to explore the types of ‘tools’ currently found in the EU’s management of external migration (i.e. excluding the free movement of citizens within the EU). Although a comprehensive analysis of every tool is beyond the scope of this article, identification of the diverse types reveals the extent to which legal and non-legal measures co-exist. The analysis here focusses on irregular migration, asylum seekers and refugees (who, whilst subject to different national, EU and international legal regimes and levels of protection are often not treated differently by the emergent tools), rather than the regulation of ‘regular’ migration (such as the ‘Blue Card’ initiative).

The means of identifying the tools draws on the extensive literature on ‘new governance’ in the EU. ‘New governance’ includes a variety of diverse tools including coordination, target-setting, benchmarking and peer-review, and has provided opportunities to understand the effects of informal mechanisms on the European integration process and

‘traditional’ law. External-focussed governance, including migration, has played little part in the debate. The argument here is that using ‘new governance’ can help illuminate what is happening in contemporary EU migration and if the procedural formalism, associated transparency and accountability of law is lacking. More specifically, if vague and undefined *de novo* tools are used to circumvent democratic scrutiny, then the commitment to human rights and democracy in the Treaty requires us to highlight why this is problematic.

To use new governance in this way uncouples its synergy with ‘good’ governance and to instead consider what new governance may offer policy-makers opportunities to meet goals *outside* legislative processes. In the first part, the features of new governance in the EU context are explored, before identifying why migration has generally remained outside of this context and why. After setting out the extent of existing EU migration law and its limitations, the article posits two ways of seeing new governance in migration at work. The recommendations are to ensure that migration management at the EU is subject to democratic scrutiny, and in managing the ‘crisis’ and beyond, migrants do not fall victim to rights (and the process of enforcing those rights) being circumvented.

New Governance and the EU

The EU is governed by a set of Treaties which allow the EU institutions the power to create legislation (regulations and directives), which is binding on the member states and enforceable in courts across the EU. The EU also has competence to make international agreements with third countries or international organisations (Article 218 TFEU). The legislative process is complex and can, given the EU’s unique nature, be lengthy and cumbersome. Since the 1990s, the EU’s maturing system of governance has witnessed the rise of alternative means to fulfil goals, which have been grouped together as ‘new modes of governance’ or ‘new governance’.

In contrast with the regulations and directives that we have come to readily recognise as ‘EU law’, new governance does not rely on legal enforceability as its key characteristic. This does not mean they lack effectiveness. Indeed, a large body of literature tells us that they might facilitate change as a result of processes including: shaming, diffusion through mimesis or discourse, deliberation, learning, and networks (Trubek and Trubek, 2005, p.356). They might therefore be more effective in fulfilling goals in more abstract, less direct way via varied institutional frameworks (Hooghe and Marks, 2001; Piattoni, 2010; Stephenson, 2013). However, and of particular relevance for migration where the subjects are individuals and their rights, the relationship between Courts and new governance is less clear (Scott and Sturm, 2007; Hervey, 2010). This opens the possibility that the effectiveness of tools might be a double-edged sword, despite their potential to be more reactive to changing contexts than traditional law (Walker and De Búrca, 2007, p.521). As tools sometimes exist in conjunction with regulations and directives, there is a tendency to overlook their role and importance without adopting a more holistic view (Sabel and Zeitlin, 2008; Eberlein and Kerwer, 2004).

New governance has been particularly visible (and analysed) in areas including economic coordination (Hodson and Maher, 2001), the environment (Jordan et. Al., 2005) and the ‘Social Europe’ agenda including employment policy and social protection (Héritier, 2001). New governance came to particular prominence during the early 2000s: the Lisbon European Council (2000) called for the strategic adoption of existing instruments and strategies under the ‘Open Method of Coordination’ (OMC). The enthusiasm over OMC led to the only identifiable proposal for new governance in migration, as noted above

(Caviedes, 2004). As its name suggests, the focus was on *coordination*, rather than express *integration* or *harmonisation*, since the EU law-making competences are limited in social and employment policy areas. As Borrás and Jacobsson (2007, p.186) neatly put it, ‘The OMC aims to unleash the EU’s social dimension from the constraints of the Community method. In this sense, the OMC has so far been able to link, in both substantial as well as in procedural terms, the social and economic aspects of the (renewed) politics of European integration.’ Commentators and the EU institutions alike have highlighted the opportunities for citizen participation and making policy-making less ‘remote’ (European Commission, 2001), though this is by no means universally accepted (Idema and Keleman, 2006; Smismans, 2008). Thus, there is a synergy between ‘new’ governance and ‘good’ or ‘better’ governance which connects citizens to decision-making processes, and in most of the areas where they have been used are also associated with progressive policies of direct concern to citizens. This has suited both advocates of more effective policy-making but also the institutions who can legitimately claim ownership of an open and inclusive structure (Shore, 2011, p.301).

New Governance in Migration Management

Internal migration has always been a part of the European integration process, since the free movement of workers is one of the ‘four freedoms’ of the single market. By contrast, external migration management is a newer area of EU competence. Developing law and policy-making on external migration emerged as a consequence of moves towards abolishing internal borders. Although provisions on the rights of third country nationals can be found in external agreements between the EU and third countries dating back to the 1970s,⁵ the Treaty of Amsterdam (1998) marked the point at which the EU institutions gained more extensive competences. The general aim of the EU, as per the Treaty, is an ‘ever closer Union’. However, in the fields of AFSJ, and foreign policy, the Treaty language is of ‘cooperation’ and ‘common policies’ rather than integration. This does not imply a grand aim of full integration of migration systems (Walker, 2004, p.5) but nevertheless relies on a commitment from the member states to act in solidarity. In addition, Denmark, Ireland and the United Kingdom have opted-out from some of the relevant parts of the Treaty⁶ and the Treaty text is more explicit in terms of the competences member states retain in this area than in many other areas (Peers, 2008-9). This is significant for meeting the challenges of migration as a priority for Europe: it sits at the top of the EU’s working agenda but is not found within the ‘core’ of integration.

As discussed above, new governance is prominent in some recent areas of EU activity. But the literature has pointed to other features in common, including:

- where member states are reluctant to pool sovereignty, making ‘integration’ problematic and often limiting efforts to coordination (see e.g. Walker and De Búrca, 2007; Cardwell, 2016)
- where legislation is limited because it is not the most suitable means to pursue coordination/integration in a particular policy area (e.g. Hodson and Meyer, 2001; Armstrong, 2013)
- where multiple actors are involved beyond the EU institutions and member states to meet goals, including agencies and civil society organisations. (e.g. Vos, 2000, De Schutter, 2010; Cram, 2011).

Migration management shares some of these features. Without a doubt, it is an area close to the heart of sovereignty debates. Recent national elections across the continent have highlighted its prominent place on domestic agendas, often bound up in discussions of

what the EU should, or should not, be doing. Migration is not only a feature of political agendas and rhetoric in western or southern European states but newer members in central and eastern Europe.

The other two features are more difficult to apply to migration management. Migration is an example of, usually, very extensive legislation covering entry to the territory, penalties for infringement and rules on visas, employment rights etc. Although there is legislation at the EU level (examined below), this is by no means comprehensive and thus new governance is not filling in a 'gap'. There was, in 2001, a proposal from the Commission to use the Open Method of Coordination (generally regarded as the archetype of new governance (Borrás and Jacobsson, 2004)) in migration governance. Caviedes (2004) suggested that the use of OMC in migration could 'prise open' the image of 'fortress Europe' that had already crystallised by the late 1990s/early 2000s. However, this proposal did not come to fruition and largely disappeared from the debates.

From an institutional perspective, the emphasis on the use of executive power does not preclude the strong role played by EU agencies, including Frontex (the EU's external borders agency) (Neal, 2009; Carrera et.al., 2013) and the European Asylum Support Office (EASO) (Comte, 2010). However, weak democratic and judicial controls of externally-focussed AFSJ agencies has already been highlighted (Carrera et.al, 2013; Vara, 2015) as well as the far-reaching secrecy of informal, executive-led deliberation structures (Curtin, 2014). Frontex's approach to migration across borders was initially security-focussed, with the requirement to protect fundamental rights only brought into the founding Regulation later: and not without criticism from the Council of Europe and the European Ombudsman (Lavenex, 2015). As Caviedes (2016) has noted, 'the member states have granted the EU authority even in an immensely salient high politics area, but in terms of setting the agenda, governance remains in the hands of the member states in the area of irregular migration'.

Similarly, migration management is not an area where civil society is generally regarded as having a similar role to play as in areas where new governance is established. With the exception of integration of migrants post-arrival, management of migration (and migration flows) is generally understood as a governmental function, operating within a framework of international law and not susceptible to deregulation or outsourcing. However, operationalising migration management relies on the participation of non-state actors: for example, private security firms, transport companies (such as airlines) and NGOs. Therefore, characterising what happens in contemporary migration management in Europe needs to recognise these differences. The involvement of civil society is distinct from giving opportunities to civil society actors to voice concerns. The Commission has attempted to do in the past, but the emphasis was on marginalisation of immigrants rather than policy formation per se (see, for example, Guild 1998, Caviedes 2004).

The Existing Law on EU Migration

Given the extensive regulation of migration at national level, it is logical to assume that that uploading migration to the European level makes 'law' the expected means to manage it and deal with the 'crisis'. Although stopping short of full integration, the Treaty articles foresee common immigration policies for regular and irregular, permanent and temporary migration. Treaty articles commit the member states to a 'common policy on asylum, immigration and external border control', a 'common policy on asylum, subsidiary protection and temporary protection', 'the gradual introduction of an integrated

management system for external borders’, ‘common policy on visas and other short-stay residence permits’, and ‘a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally ... and enhanced measures to combat, illegal immigration and trafficking in human beings’.⁷ Significantly for the discussion here, the mechanisms to achieve these goals are listed as the ordinary legislative procedure, administrative cooperation between the member states, and agreements with third countries.

A reading of the relevant Treaty articles suggests that the goals should primarily be met by EU legislation that harmonises national legislation. Taken to its logical conclusion, agreed rules rather than flexibility would ensure clarity and uniformity in who is able to migrate, under what conditions and what happens to those who in an irregular state. Even in coordination between systems as foreseen by the Treaty, such as the conditions for resident permits for third country nationals, the uniformity provided by legal provisions would appear to be the most appropriate means to the end. This view of what law *should* be accomplishing to meet the Treaty goals would in theory leave fewer gaps in governance at the formal level at the very least. New governance would then potentially serve the purpose of promoting best practice and cooperation between the member states within an overarching, legal framework. Unlike in social policy, where the type of structuring law is not generally seen as the only or most appropriate means to achieve goals, in migration we expect law to do just that.

To attain the goals set out in the Treaty, the Council of the EU has set out multi-annual working agenda in the Tampere (1999), Hague (2004) and Stockholm (2009) programmes. Concurrently, the Global Approach to Migration and Mobility (GAMM) (2005)⁸ is an externally-focussed policy which points to the direction of travel the EU should take to achieve its goals. As result, some of the proposals emerging from these plans have turned into EU legislation. Many legislative proposals emerged after the entry into force of the Treaty of Amsterdam, including the Long-Term Residents Directive, Family Reunification Directive, Qualification Directive and Returns Directive (see Peers, 1998; Groenedijk, 2006; McAdam, 2005). Some of these original directives have more recently been revised, though their overall content remains largely the same from the time of their enactment. As Lavenex has highlighted, the governance of migration has particular challenges:

‘Notwithstanding the generally weak legal character of most policy instruments, which, adopted under intergovernmental decision-making procedures, rarely exceeded the lowest common denominator between the member states, implementation has remained a challenge in JHA. Limits on the jurisprudence of the CJEU have compounded this deficit’ (2015, p.385).

Although the development of a body of EU migration law and policy in the decade following the entry into force of the Treaty of Amsterdam has been termed ‘remarkable’ (Menz, 2015, p.309), EU legislation on external migration is often limited to ‘minimum standards’ legislation. The directives listed above were only agreed after long processes of watering down by the member states in the Council and back-and-forth negotiations between the institutions. It is significant for the discussion here that the Stockholm programme proposed relatively few concrete pieces of legislation. We are certainly very far from seeing the comprehensive EU-wide approach that it suggested by the text of Treaty. There has also been no comprehensive follow-up to the Stockholm programme, which expired in 2014. In the absence of a firm timetable or concrete proposals, it seems that EU legislation is only likely to appear on the horizon when it concerns recasting directives,⁹

regulating relatively small sectors or dimensions of migration (such as proposals for facilitating entry procedures for non-EU students and researchers),¹⁰ or will concern minimum requirements to which only the member states need subscribe.

Where legislation has emerged, the ‘fight’ against irregular (‘illegal’) migration was initially the target rather than regular (‘legal’) migration, which was the subject of only very limited measures.¹¹ The ‘Blue Card’ directive¹² was hailed as a potentially significant means to attract highly-skilled migrants, though heavily criticised (Lavenex, 2015). It is currently being recast, but against the background of different approaches to skilled and regular migration amongst the Member States (Cerna, 2016). As Lavenex (2015) notes, the migration agenda has moved into the domain of foreign policy, with an intensification of dialogue with neighbouring and African countries. However, the limitations of EU competence over regular migration means that it is in a relatively weak position in terms of what it can offer third countries in return for securing the EU’s external border and reducing the flows of irregular migration.

Finally, even when migration is perceived as a ‘crisis’, the response has not been a legislative one at the EU level. This contrasts sharply with, in particular, the push for legislation to deal with the economic crisis engulfing the EU during the same period (Armstrong, 2013, p.267). Instead, we find an increasing number of ‘innovative’ tools to confront the crisis.

Identifying ‘New Governance’ in Migration

In 2014, the first Commissioner with a portfolio devoted to migration was appointed, accompanied by a large budget (1.8 billion euros) (European Commission, 2015b) to fund migration programmes. In turn, this makes the Commission’s annual workplans (European Commission 2015a, 2016, 2017a) an ideal place to seek the measures envisaged to tackle migration. Just as the Stockholm programme identified numerous areas where legislation would *seem* to be appropriate but did not explicitly state that proposals would be made, there are references to using ‘all available tools’ to manage migration in the workplans. In fact, there are few new legislative proposals on migration, and the focus is squarely on developing a ‘permanent capacity to manage migration in a credible and sustainable manner [which] requires a full range of migration instruments to be in place’ (European Commission, 2016, p.13). It is the references to ‘full range’ and ‘instruments’ that are of interest here.

Similar provisions are found in the Commission’s European Agenda on Migration (2015c). The Agenda emphasises a number of ‘core measures’ to reduce migration routes across the Mediterranean, through a combination of enforcement of existing rules and new measures. There is again an emphasis on using ‘all policies and tools at our disposal’ (European Commission, 2015c, p2) but scarce mentions of explicit goals to be achieved through new legislation, such as a mandatory and automatically-triggered relocation system for refugees and asylum seekers in the case of future mass influxes (European Commission, 2015c, p4). The only other mentions of EU legislation in the Agenda are to better enforce existing law, such as the Employers Sanctions Directive,¹³ the Returns Directive,¹⁴ and ‘coherent implementation’ of the Common European Asylum System. Continued emphasis on the Agenda’s aims continues to be the centrepiece of the Commission’s Work Plan (European Commission, 2016, p.13). Thus, the references to using ‘all available tools’ and ‘a full range of migration instruments’ must logically mean something other than traditional legislation.

The Stockholm programme provides some specific examples of tools beyond legislation: the use of ‘migration profiles’, ‘migration missions’, ‘cooperation platforms on migration and development’ and ‘mobility partnerships’ figure strongly as ‘available tools’ under development in migration management (Cardwell, 2013). All share a strong emphasis on non-binding or enforceable frameworks, involving third countries and international organisations in EU policy-making but without being underpinned by legally enforceable texts. As ‘innovative and sophisticated tools’, they are flexible, non-binding and involve other partners. Here, partners are third countries who are in positions of ‘joint responsibility’ to meet goals, generally on the basis of conditionality, especially for those third states in the EU’s neighbourhood.

Even more recently, the Commission continues to call for ‘a comprehensive approach, making full use of the entire range of tools at the EU’s disposal, combining our legal framework, our policy levers and the EU budget to deliver results’ (European Commission, 2017b, p.2). The juxtaposition of the legal framework with policy levers is interesting here, and suggestive of the use of tools which combine with, or at the very least operate within, the existing competences in conjunction with the participation of others (such as third states) over whom the EU has influence. Such an approach can be seen as the ‘externalisation’ or ‘extra-territorialisation’ of migration control, which has long been a focus of criticism of EU migration policy (see e.g., Rijpma and Cremona, 2007; Davitti and La Chimia, 2017). To examine this further, the remainder of this article suggests how we might categorise such tools. As noted above, a comprehensive analysis of every tool is beyond the scope of this article. However, identification of the diverse types of instrument detected within the management of irregular migration reveals the extent to which legal and non-legal measures co-exist. These are grouped into two categories: co-existence, where tools of new governance exist alongside or as part of the established legal framework; and replacement or substitution, where tools are used instead. Whilst both instances can be understood as new governance, it is argued here that the latter are of particular concern from the perspective of the legal protection of migrants and their rights.

Co-existence of Law and New Governance

Existing literature points to the combination of new governance with law, sometimes even within the same legislative instrument (Jordan et al, 2005, Falkner et al, 2005). If migration management is brought within the scope of analysis, then we can see that this is also the case. For instance, in the Council’s Conclusions of 9 June 2016, we find the following:

in addition to readmission agreements, non-legally binding working arrangements on identification, return and readmission could be established with third countries at EU level ... Such non-legally binding arrangements ... may pave the way for the negotiation and conclusion of future EU readmission agreements as cooperation improves. (Council of the EU, 2016, p.4)

This means of supplementing and operationalizing agreements via ‘working arrangements’ is logical from the point of view of efficiency. We would expect it in national contexts, and therefore we should expect it in the EU context too. However, what this means in practice is much less clear or transparent. It is unclear, for instance, what other bodies might be involved in ‘working arrangements’ and to what extent human rights obligations can be transferred to other actors. Carrera and Hernández i Sagraera (2011) have highlighted these risks, and their judicial ‘softness’ in relation to mobility partnership, which they term ‘insecurity partnerships’. In other words, we find the risks associated with governance

frameworks lacking the formalism and procedural accountability of law (Joerges, 2007). Herein lies an important distinction between the promises of new governance for accountability and transparency in the internal spheres, namely the ‘new forms of dynamic accountability and peer review which discipline the state and protect the rights of citizens’ (Sabel and Zeitlin, 2008, p.276), since the individuals concerned by the working arrangements have little or no access to the tools which affect them.

Therefore, whilst we could expect EU institutions to work to put policies in action via cooperation on migration management, including with third states, the missing link is being able to track what is happening. The literature on Social Europe tells us that (very) soft law elaboration of hard law norms is possible (Scott, 2011, p.330). What is meant by this is that regarding ‘working arrangements’ between technical elites and experts as not ‘legal’ because the processes and outcomes do not work in the same way is an insufficient means to regard them as having only negligible effects. The broad goals of the tools therefore are to facilitate the 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 (European Commission, 2011) and the emergence of a relatively high number of policy documents on dealing with the migration ‘crisis’ leads to an increasing likelihood that tools, processes and mechanisms will be hidden from scrutiny. This includes the scrutiny of the European Parliament, despite its increasing important role in the legislative procedure (Lopatin, 2013). As such, the problem with new governance as highlighted by Sabel and Zeitlin (2008, p.304) 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 specified end’. Returning to a core legal point, the tools would then sit outside the important and long-standing *Meroni* doctrine established by the Court of Justice on delegation of authority via legislative goals.¹⁵ This opens the possibility that the effects on migrants and their rights may not necessarily be intended as escaping scrutiny, but evolve in such a way that they do. In this respect, they can be distinguished from the following category.

Replacement or Substitution

Two examples in irregular migration management suggest how less formal tools are potentially capable of attaining similar results as law. First, the use of readmission agreements between the EU and third countries has increased in recent years. Readmission agreements themselves have been strongly criticised in terms of the ‘blurring’ of human rights protection in the third country (Carrera, 2016) and the lack of transparency surrounding their practical enforcement, but there are also examples of where readmission ‘arrangements’ are facilitated, even where a readmission agreement is not in place.

The Pilot Project on Returns to Pakistan and Bangladesh as agreed by the Council in June 2014 (Council of the EU, 2014) is one such example. An EU-Pakistan readmission agreement is in place since 2010, but with Bangladesh, only a bilateral High Level Dialogue exists. Therefore, it is unclear what specific legal framework the practical arrangements are taking place. The project aims to ‘mobilise all adequate means in the framework of the more for more principle’, to ‘stimulate’ the third countries to improve the return rate of nationals found to be in an irregular state (Council of the EU, 2014, p4). The European Agenda states that this approach is an ‘important practical demonstration of the way forward’ in returning migrants. It can be understood as an example of new governance, since it is flexible, member states can opt to 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.

With Afghanistan, there is no readmission agreement but rather a ‘Joint Way Forward’ between the EU and Afghan government.¹⁶ The document clearly states that it is ‘not intended to create legal rights or obligations under international law’. But its main purpose is ‘to establish a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals who do not fulfil the conditions in force for entry to, presence in, or residence on the territory of the EU, and to facilitate their reintegration in Afghanistan in a spirit of cooperation’. This includes both voluntary and non-voluntary returns. In the absence of an agreement, this informal mechanism for returning individuals with the cooperation of non-governmental organisations (such as airlines), appears to substitute a legally-defined procedure with an informal tool.

The EU’s 2016 ‘agreement’ with Turkey is another case in point. On the one hand, we might expect states or organisations to be able to pursue cooperation with other countries but which do not entail any particular obligations. But this agreement goes beyond that: it was not put in place via the process set out in Treaty but rather through informal means. As such, although it is an agreement (in the everyday sense of the word) as both parties commit to certain actions, it is not termed an ‘agreement’. Rather, it is a ‘statement’: a term which does not imply any legal connotations or consequences.

The statement, published on the Council’s website, states that all new irregular migrants crossing from Turkey to Greece will be returned; migrants not applying for asylum or whose application for asylum has been found to be unfounded or inadmissible will be returned to Turkey; for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the European Union.¹⁷

The statement therefore avoids obligations under both EU law and international law in two ways. First, it is not a legal agreement and therefore its legality cannot be successfully challenged in court. This was also made clear by the General Court (which is responsible for individual claims on the validity of EU law via Article 263 TFEU). Following a challenge to the legality of the statement in the Court brought by three Pakistani and Afghan nationals,¹⁸ the Court found that the ‘statement’ is not an agreement. Furthermore, the view of the Court is that it was not concluded by the Council of the EU, but rather the member states (in spite of it being termed the ‘EU-Turkey statement’). The Court stated that:

neither the European Council nor any other institution of the EU decided to conclude an agreement with the Turkish Government on the subject of the migration crisis. In the absence of any act of an institution of the EU, the legality of which it could review under Article 263 TFEU, the Court declares that it lacks jurisdiction to hear and determine the actions brought by the three asylum seekers.

Second, the obligation of non-*refoulement* in international law is avoided because the emphasis is placed on prevent migrants from reaching the territory of the EU, or returning them as soon as possible to Turkey. The statement has been lauded as a success by the EU

(despite the growing tensions in the bilateral relationship with Turkey) as this migration route has effectively been closed and fewer migrants are making the perilous trip. However, this is likely to mean that they are instead finding alternative (and more dangerous) routes (Sigona, 2017). Therefore, the statement might be understood as representing a successful meeting of migration policy goals. However, the substitution of an agreement which can be susceptible to legal challenge with a ‘statement’ which is not, is suggested here to be an example of new governance which avoids established frames of transparency and legitimacy.

Conclusions

With the gaps in judicial protection and scrutiny in terms of obligations under international law, migration management looks increasingly problematic in terms of accountability and legitimation, as well as a reflection on how the EU upholds its own values as stated in the Treaty.¹⁹ This is brought into sharp focus when migration is presented as a ‘crisis’, and less as a humanitarian one than a security threat and therefore something to be combatted. Reference to taking ‘firm measures’ in official documentation respond to this need to feel secure by ensuring that the migration ‘crisis’ is contained (European Commission, 2014).

This article has explored contemporary management of migration in the EU and suggested that the use of ‘tools’ can be understood as examples of ‘new governance’. It has argued that new governance therefore can help us to identify some of the contours of the tools which the official discourse of the EU refers to, but which do not enjoy clear definitions. The language of ‘innovation’ in migration policy-making masks the danger of bypassing existing, legitimate frames. Whilst these instruments could have been put in place by the established legislative process or international agreements, instead they have emerged through alternate means. Unlike other areas where new governance has played a significant role, in this domain the human rights dimension is at the forefront. As a result, those most concerned by the tools, i.e. individual migrants, may have no opportunity to challenge them. The gaps in judicial protection at the EU level are revealed to be particularly flagrant when instances of new governance seemingly go beyond coordination but actually resulting in decisions which affect individuals.

The EU and its member states appear therefore to be faced with a stark choice. The innovative development of tools which facilitate responses to the challenges of migration might have the advantages of expediency. But in doing so there is a real risk that the values the EU upholds are undermined, in turn losing credibility both with populations in the member states, international organisations and third countries. There is thus an urgent need to better understand the tools of governance and inform the debate about what are the appropriate responses to migration challenges. This article has argued that ‘new governance’ allows us to do so, but with caveats. The association with ‘good’ or ‘better’ governance has 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 governance that we can, and should, be critical of. This in turn implies a challenge to our understanding of EU law insofar as it respects the rule of law and the values the EU itself is supposed to uphold. 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.

Policy implications

- Institutions including the European Parliament and civil society need to ensure that the mention of ‘tools’ in official policy documentation are not a substitute for existing legal measures.
- Particular care needs to be taken to assess whether international legal frameworks for protection are not circumvented by informal agreements, for example with third states, or practices which are shielded from public view.
- If instances of new governance are in operation in migration as an alternative to ‘traditional’ legal framework, then the use of established modes, such as the Open Method of Coordination, should be prioritised in order to ensure scrutiny at the member state level as well as the EU level.

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¹ Article 79(1) TFEU.

² For example, Slovakia and Hungary unsuccessfully challenged Decision 2015/1601 on the emergency relocation of migrants needing international protection from Italy and Greece: Cases C-643/15 and 647/15 *Slovakia and Hungary v Council of the EU* ECLI:EU:C:2017:631

³ Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

⁴ Article 78 TFEU.

⁵ For example, the Association Agreement between the EEC and Turkey, Additional Protocol, Arts 36-40.

⁶ Protocols 21 and 22 attached to the TFEU.

⁷ Articles 67-79 TFEU.

⁸ The GAMM was originally the Global Approach to Migration and adopted in 2005, but was broadened to include 'Mobility' in 2011 (European Commission, 2011).

⁹ For example, Directive 2011/95/EU (recast) [2011] OJ L337.

¹⁰ 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.

¹¹ See Directive 2011/98/EU [2011] OJ L343; Directive 2014/36 [2014] OJ L94; Directive 2014/66 [2014] OJ L157.

¹² Council Directive 2009/50/EC [2009] OJ L155.

¹³ Directive 2009/52/EC [2009] OJ L168.

¹⁴ Directive 2008/115/EC [2008] OJ L348.

¹⁵ Case C-9/56 *Meroni v High Authority* [1957/1958] ECR 133.

¹⁶ Joint Way Forward on Migration Issues by the EU and the Government of Afghanistan. https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf [accessed 17 November 2017].

¹⁷ Summary of the content of the statement taken from the Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council*.

¹⁸ Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council*.

¹⁹ Article 2 TEU, Article 3(5) TEU.