

A 50/50 Ball: The East versus the EU in the Refugee Relocation Game

Raluca Bejan
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Raluca Bejan is an Assistant Professor at the School of Social Work at the Dalhousie University in Halifax, Canada.

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Raluca Bejan

The soccer terminology of a 50/50 ball refers to a free ball contested by two opponents, usually after a badly behaved goal kick. Analogy that much resembles the ongoing political game between some of the former Eastern Bloc nations and the European Union (EU) in regards to the proposed relocation mechanism for people in need of international protection.

Several coastal areas of Italy and Greece had long seen significant numbers of boat arrivals from the Middle East and Africa. In the summer of 2015, however, the numbers of irregular entries reached unprecedented levels. To ease out the burden felt by these front line states, in terms of asylum claims, the EU Council, following talks carried out in June 2015, made use of Article 78(3) from the Treaty on the Functioning of the European Union (TFEU) – which outlines that in case of a Member State being confronted with a sudden inflow of irregular entries the Council may adopt provisional measures for the benefit of the concerned state – and subsequently proposed a quota-based provisional system to relocate some of the refugees to other EU Member States. Four weighted indicators – GDP (40%), size of the population (40%), unemployment rates (10%) and past number of asylum seekers applications (10%) – were taken into account to equalise states' responsibility in terms of accommodating asylum claimants.

The proposed numbers were 40,000, on a 60/40 ratio from Italy and Greece to be transferred over the next two years. This decision entered in force on 15 September 2015. During this time, entries continued to rise and a new entry route opened up via the Western Balkans, turning Hungary into an additional 'hot spot', and prompting the EU Council to take a second decision, on 22 September 2015, which added a new relocation goal of 120,000 people: 15,600 from Italy, 50,400 from Greece and 54,000 from Hungary. Hungary refuted the 'front line state' label and refused to be considered a beneficiary of the relocation scheme. Member States did not unanimously agree on the decision. The Czech Republic, Hungary, Romania and the Slovak Republic voted against it. Finland abstained. Within two months' time, by December 2015, Hungary and Slovakia launched two separate claims at the EU Court of Justice (CJEU) (C-647/15 and C-643/15) to question the legal validity of the (second) EU Council Decision.

Of note that relocation (unlike resettlement) strictly refers to the transfer of persons already located within an EU Member State. The legally foreseen commitment was of 902 people for Slovakia and 1,294 people for Hungary. As of 21st July 2017, Slovakia launched 16 pledges and relocated 16 people (from Greece) while Hungary refused to pledge any numbers.

Hungary and Slovakia's legal claims mainly brought into discussion procedural issues: that Article 78(3) of the TFEU does not legally empower the Council to adopt the decision, since only non-legislative procedures can be taken in behalf of the Treaty; that the two years' time-frame for relocation does not fit within the parameters of a provisional mechanism; that the inflow of irregular entries was foreseeable, hence we cannot talk about an emergency crisis; that the decision was not voted on unanimity; that the national parliaments were not consulted on the matter; that the European Parliament did not review the re-amended text (once Hungary refused assistance from the program); that the decision in itself is contrary to the Geneva Convention (i.e. the right of a person to stay in the state of their application); and that it infringes on the principle of proportionality – by opting out of the beneficiary position, Hungary already takes part in 'responsibility-sharing'. The two states demanded the Council annuls the (second) relocation decision.

On Wednesday, 26th July 2017, Advocate General Yves Bot dismissed the claims brought forward by the two Eastern states. His opinion will serve as the main directive for what the CJEU would legally pronounce on the matter. Bot's assessment established that: it is irrelevant to seek classification of the decision as a legislative or non-legislative act, since Article 78(3) of the TFEU constitutes the legal basis for adoption of provisional measures; that the decision is provisional since its temporal scope (i.e. 24 months) was clearly defined; that the number of irregular entries at the EU borders actually increased by 546% from 2014 to 2015, denoting an emergency situation; that Article 78(3) of TFEU allows the Council to adopt decisions by a qualified majority and unanimity is only needed if the Commission objects to an amendment to its proposal; that the Parliament did not have to be re-consulted since the text was not fundamentally altered after Hungary's withdrawal from the beneficiary status; that the

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responsibility; that the decision is not contrary to the Geneva Convention, since this treaty does not guarantee an applicants' country of preference.

The two cases are dismissed for now, yet the issue got further complicated by EU's decision to launch an infringement procedure, on June 13th 2017, against the Czech Republic, Hungary, and Poland for failing to comply with the decision. As of 21st July 2017, the Czech Republic pledged 50 numbers and relocated 12 people; Poland pledged 100 numbers yet it did not relocate any, and Hungary stays at zero, as indicated above. Regardless of the future outcome of this 'infringement procedure', larger questions are worth posing as to why these Eastern Bloc nations are as reluctant to take in asylum seekers and as to what is going on within the EU in terms of the politically charged relations amongst the Member States.

It is fairly easy to perceive the former communist countries as culturally backwards, liberally underdeveloped, having low tolerance levels in regards to cultural and religious diversity. Yet there is no empirical research that shows that the East is more racist and xenophobic than the West. In fact, when asked if they want to live next door to people from a different race, the French score negatively higher than the Hungarians and Romanians, while the scores for Polish and the Czechs were at par with those of Italians and Finish.

We could also interpret such stance as politically connected with the rise of right wing parties. This could make for a strong association with respect to *Fidesz* and *Law and Justice* who hold the majority of parliamentary seats in Hungary and respectively Poland. In Slovakia, Romania and the Czech Republic, however, these are held by centre-left leaning fractions: the *Czech Social Democrat Party*, the *Direction Social Democracy* in Slovakia and the *Social Democratic Party* in Romania. Such a hypothesis seems insufficient to fully explain these states' position.

Another assumption could be that of difference, of a Cold War reminiscence dividing the West from the East and additionally creating tensions within the Union. The Eastern Bloc States are not equal players at the EU table, hence they might not want to equally share responsibility for the refugee crisis. Let us reverse the situation. If Germany or France would have vetoed the relocation scheme, we can be sure we would not have a relocation scheme. Moreover, Austria, for example is not taken to court by the EU, although it failed to process any relocation numbers out of the legally foreseen commitment of 1,953 people. Within special circumstances, States may request a 30% exemption from their quota, and indeed, Austria made use of this amendment, as it was confronted with a 230% increase in entry numbers between November 2014 and November 2015. Yet, there is no explanation as to why Austria is not pledging to relocate the remaining 70% of its commitment or as to why the EU is not pressuring Austria to do so. By the same token, while the UK decided to hold its opt-in right on the matter and Denmark chose to opt-out ('rights' outlined as such under the Lisbon Treaty, although this might change for the UK within the context of the Brexit vote), there were no provisional measures to request these countries' participation in the relocation scheme, although economically they are in a position to do so: relating to its GDP, the UK holds the fifth place globally, and Denmark, the 34th. While relocation was thought to ease the burden on the front line states, the reality is that it further unburdens many of the wealthier Northern members, which would constitute the primary options for a large number of refugees, if their preferences were ever to be considered.

Interpretations can also be formulated in terms of Eastern States' political subjectivity. It is unsettling to see that countries that produced high number of refugees themselves, during the communist times as well as in the 90s, after the fall of the Wall, are now reluctant to take people in. Perhaps as a consequence of the cultural othering that (Western) Europe has projected on the East for years, an othering process that mirrored the West's alleged superiority, produced a pejorative image of the East internalized by themselves, which cemented, in turn, an imaginary ideal of distinguished Europeaness. Finally, part of the EU, the Eastern States do not want to lose such privileged status. Their acceptance by the EU makes them want to guard Europe (and what they consider to be European) even more than their Western counterparts. Hungary forgets that it was not even allowed in the EU until 2004, but nowadays self-proclaims itself as the official guardian and main defender of European borders. Those who are in can now keep others out and retain the inside unpolluted. A classic Hegelian double negation, where the (negative) part of the inside, which was excluded (negated) at some point, gets established

and ideal homogenous space.

Political dynamics within the EU are clearly a matter of power play. The East does not follow Western Europe's orders and, since the EU did them the favour of taking them in, they should know their place and do as they are told. Hitherto, the EU can continue to wonder why the Eastern States feel pushed around on the matter. The relocation scheme also raises politically charged questions about how proportionality should be measured when equality is lacking within the Union and between the Member States.

Responsibility-sharing should ideally refer to the fair share of refugees each country should absorb according to own capacities. Yet, the fairness of the equalizing process also depends on how one defines fairness vis-à-vis equality (as in equality of starting points or equality of results), why the weighted indicators were proportionally valued to equally matter (i.e. the GDP seen as equivalent in weight with the size of population) and why these particular indicators were deemed most appropriate to equalize the share (i.e. although the GDP per capita is the paramount measure to gauge economic well-being, this measure can be high due to significant economic inequality—the rich members of society are so rich that they pull up the average). Where there is no universal definition of proportionality, equality and equity, the EU should clearly state how it defines the terms guiding its provisional measures. Fairness from unequal premises might mean unequal adjustment indicators to proportionally equalize results. It is not about the States proportionally sharing the actual numbers, but about the States proportionally weighting the actual share, which might translate into un-equalizing rather than equalizing proportions.

And if we fail to define what we mean by such proportionality, we continually get stuck in the perpetual East/West political cliché, where the barbarian Eastern States are simplistically seen to refuse to hold their part on the matter in contrast with the civilized West.

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2 COMMENTS

Fran, Mo 31 Jul 2017 / 19:18 → Antworten

This whole article starts out with the assumption that these are refugees, rather than economic migrants. The EU's own figures show this to be incorrect.

It also ignores the fact that the Eastern EU countries had nothing to do with the pull factors driving this phenomenon.

Firstly Merkel's reckless invitation and now the current ferry service to Italy in collusion with criminal people smugglers.