

RIGHT OF VETO – UNDEMOCRATIC INSTRUMENT VIS-A-VIS THE REFERENDUM

1. The term “veto” in the international traffic

*T*he term “veto” originates from the Latin language (*veto*) and means *ban*¹ or rejection of something that is offered. The ban is based on a right to authority.² From the past practice and subsequently, the right of veto is used in order to emphasize that a certain subject of international law can unilaterally stop particular decision-making. In other words, the right of veto is unlimited authority of the entities with the aim to initiate changes or on the other extreme - not to allow such changes to be adopted. Namely, the “legal” right to disobedience (Stevanović, 2005, pp.3), although at first glance appears pointless, in the international practice is legalized under the “veto” instrument – as a positive right of the entities of international law.

The right of veto dates from the time of the Roman magistrate, when the Roman magistrates

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1 <http://public.findlaw.com/>

2 <http://www.thefreedictionary.com/veto>

(elected officials of Rome) had the right to unilaterally reject a law that was forwarded from the Roman Senate.³ Consequent but not less important is the cause of the introduction of the right of veto. Historically, the introduction of the right of veto was inevitable requirement from the states of the bloc of great powers. The right of veto was introduced under the Charter of the United Nations due to the need of power in extraordinary situations. For example, the Soviet Union in particular, in order to protect itself from the western bias that the Council and the General Assembly had at that time, would not have accepted the UN Charter as it was conceived without the establishment of the right of veto (Nicholas, 1975 pp. 11-13).

If on the one hand, the introduction of the right of veto promises global stability, on the other hand, it is exactly what can be considered as a beginning of the criticism of UN, or more concretely the Security Council, due to the accumulation of the power for maintaining the international peace and security in certain states that actually create monopoly of power and strength in relations to the other actors on the international scene. So, since then, the right of veto introduced one very sensitive issue regarding the representativeness and transparency of the great powers in relation to the “smaller” ones. The purpose of the paper is through the five chapters to make an overview of the establishment of the right of veto, the role and the importance of the right of veto in the major international organizations, UN and EU, and also to argue the unity and the validity of the veto instrument in regards to the democracy and the democratic nature of the international organizations, as main pillars and creators of the democracy.

2. Right of veto in the UN, as a major universal international organization

The purposes of the United Nations are:

1. To maintain the international peace and security, to take collective measures for the prevention and removal of threats to the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international prob-

3 <http://sr.wikipedia.org/wiki/%D0%92%D0%B5%D1%82%D0%BE>

lems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be center for harmonizing the actions of nations in the attainment of the common ends.⁴

The organization and its members in pursuit of the purposes stated in Article 1 of the Charter of UN act in accordance with the principle of the sovereign equality of all the members.⁵

Firstly, it is necessary to emphasize that the UN principles and purposes are extremely positive in the long-running practice of the functioning of positive cohesion among the states, but the right of veto of certain states violates the democratic principle of the functioning of International Community (IC) through creating possibility for monopoly, and thus forming blocks of superiority and inferiority of the states. The principle of equality of the states is additionally undermined.⁶

During the negotiations at the San Francisco Conference,⁷ numerous small and medium-sized states protested against the privileged status of the five permanent members, as a form of justice and an unacceptable infringement of the sovereign equality of the states. Nevertheless, the five permanent members made it clear that the complete and unconditional acceptance of the permanent membership and the veto power was a condition sine qua non for the creation of the new world organization (Wouters and Ruys 2005, p. 5). The great powers were convinced that they should play a dominant role in order to establish a new functional body (Fassbender 1998, p. 163). Here, the purpose of the great powers can be clearly seen, to gain a right of veto with the explanation that it is the only way to exclude the possibility to act against one another, as the biggest threat to the peace and security.

In the end, the founding members were forced to accept the codification of the proposed power balance through the insertion of the Article 27 of the UN Charter. Namely, each member of the Security Council has one vote.⁸ The decisions of the Security Council on procedural matters are made by

4 Article 1 of the UN Charter available on the website <http://www.un.org/en/documents/charter/chapter1.shtml>

5 Article 2(1) of the UN Charter available on the website <http://www.un.org/en/documents/charter/chapter1.shtml>

6 Equality regardless of the size, population, demographics, GDP, etc.

7 The United Nations Conference was held in San Francisco from 25 April – 26 June 1945 and resulted in adoption of the United Nations Declaration.

8 Article 27(1) of the UN Charter available on the web location <http://www.un.org/en/documents/charter/chapter1.shtml>

an affirmative vote of nine members.⁹ The decisions of the Security Council¹⁰ on all other matters are made by an affirmative vote of nine members, including the concurring votes of permanent members, provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.¹¹ The Article 27(3), which carefully avoids the term “veto” was adopted with 30 voices in favor, 2 against, and 15 abstentions.¹² Here should also be mentioned the ironic situation with France, because earlier, in May 1945, France suggested a similar restriction of the veto power, but it abandoned this idea when it was awarded permanent membership. (Wouters and Ruys 2005, p.10)

The unequal position of the member states is also reflected in the composition of the Security Council, which consists of fifteen members of the United Nations. The Republic of China, France, Russia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are permanent members of the Security Council. The General Assembly additionally elects ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.¹³ The UN Charter does not mention the right of veto explicitly, but indirectly, the fifth Chapter is about voting, presumes that each member-state of the Security Council should have one vote, but the decisions of the Security Council on procedural matters should be made by an affirmative vote of nine members, including the concurring votes of the permanent members.

Also, the actual usage of the right of veto is controversial and unsound by itself. For example, China had once used its right of veto about Taiwan (1946-71), but also an interesting fact is that in 1999 China has vetoed the renewal of the UN Peacekeepers mandate in Republic of Macedonia, that at that time due to the Macedonia's recognition of Taiwan and the establishment

9 Article 27(2) of the UN Charter available on the web location <http://www.un.org/en/documents/charter/chapter1.shtml>

10 The Security Council consists of 15 UN members, 5 of which are permanent: Republic of China, France, The Union of Soviet Socialist Republics, United Kingdom and Northern Ireland and USA. Article 23(1) of the UN Charter.

11 Article 27(3) of the UN Charter available on the web location <http://www.un.org/en/documents/charter/chapter1.shtml>

12 San Francisco, 12 June 1945, UNCIO vol. XI, pp. 495.

13 Article 23 of the UN Charter

of diplomatic relations with it, was interpreted as a China's "revenge".¹⁴ Up until today, the usage of the veto power has resulted in prevention of more than 260 decision makings of the UN Security Council. But, in many cases the decisions were not directly influencing the international peace and security. In about 60 cases, the usage of veto has prevented the admission of new members. During the Cold War, it was almost a regular practice for the Former Soviet Union (USSR) to exercise the right of veto to the applications for memberships, even for several times in the cases of Italy, Finland, Austria, Japan, North and South Korea, Kuwait, Vietnam, etc. On the other hand, US was also exercising the right of veto in a similar manner for the Vietnam's membership, but also for prevention of the resolutions that condemned Israel, South Africa, etc.¹⁵ Or, in 1955, Republic of China vetoed the admission of Mongolia, which it considered to be its own integral part, and in revenge, the Soviet Union vetoed the application of Japan; in 1964, Malaysia complained to the Council of aggression by Indonesia to whose draft-resolution was vetoed; in 1986, Great Britain and US blocked the draft-resolutions that condemned South African attacks against Angola, Zambia, Botswana and Zimbabwe.¹⁶

The fact that the permanent members make the other members dependant on them, and they in order to enjoy privileged and protected status by the permanent members are prepared for maintaining close diplomatic and economic relations with them is additional reason why the right of veto is considered as a threat to the peace, security and equality. In other words, not only the permanent members of the Council have privileged status, but also their close friendly states, which in this way have indirect privileged status and that results in multiple separation of the states.

Additionally and perhaps most importantly, is the inability for controlling the usage of the so-called "hidden veto", which the permanent members use as a threat to certain measure against other state. The worst in this situation

14 Although the initiator of the establishment of the right of veto was America, from the UN establishment until today, Russia has used it more times – 123 times than America – 82 times. Unlike those two superpowers, the other three permanent members of the Security Council have used this right considerably less: United Kingdom 32 times, France 18 and China 5 times. Veto power, read more on the web location <http://www.politika.rs/rubrike/ostali-komentari/t23475.lt.html>

15 The right of veto was even used (more than 40 times) for preventing the election of the Secretary – General of the UN. The same.

16 Read more about the use and the abuse of the right of veto in Jan Wouters and Tom Ruys, *Security Council Reform: a New Veto for a New Century?*, Royal Institute for International Relations (IRRI-KIIB), Academia Press, Brussels, August 2005, pp. 14-15.

is that the hidden veto is almost always used in informal consultations and briefings, not in open meetings, so although there are data about the formal usage of the right of veto, it is very difficult and almost impossible to gain information about the hidden usage of the right of veto, which is actually open and permanent threat.

3. The role of the “veto” in the EU, as a major democratic regional organization

The above chapters made an overview about the establishment of the right of veto and the interpretation of the problem from the veto usage, as well as the controversial aspects of the veto usage in regards to the legal authority of the states that posses the veto power. Because the meaning of and the problem arising from the “veto” are already explained, this chapter addresses the controversy or the “justifiable” threat of the veto usage in the case of Republic of Macedonia.

Regarding the democracy in and the democratic nature of EU, as the major regional organization, apparently the situation is a bit different. The decision making system is divided on the following segment (Petrushevskva 2006, p. 118):

- Unanimous decision making by the Europe Union Council (the Council) for opening of accession negotiation to the Union;
- Opening of the negotiations between RM on the one side and the EU member states on the other side;
- Proposing the negotiation positions of the Union regarding RM by the European Commission and unanimous adoption by the Council;
- Reaching an agreement between RM on the one side and the European Community (EC) and EU member states on the other side about the draft Accession Agreement;
- Submission of the reached agreement to the Council and to the European Parliament;
- Giving Accession Agreement Opinion by the Commission;
- Granting consent (with absolute majority voices) of the Accession Agreement by the European Parliament and
- Unanimously approving the Accession Agreement by the Council.¹⁷

¹⁷ Later, it proceeded towards signing of the Accession Agreement by the contracting parties, towards ratification of the Agreement and towards entry into force on the day of RM accession to the EU (The day when RM would become EU member). The same.

Each member state may prevent the decision making by using the right of veto if there is unanimity of decision making presumed with an agreement. Between 1966 and 1985, the member states had the opportunity to also use a political veto in accordance with the so-called Luxemburg Compromise (Bojchev, 2007, p.36). Although, the style of the Luxemburg veto was replaced by a “softer” protection of the member states through the possibility for making a request to the EC (Craig- De Bruca 2008, p. 29). However, if we take into consideration that the Council is the main decision making institution within the EU, we can realize that actually all the EU member states have the right of veto.

In the institutional reforms sphere introduced under the EU legal regulations, the right of veto is becoming increasingly restricted. The authority that has the greatest benefit from the Amsterdam Agreement is the European Parliament, which got the right of veto a decision of the Council if the decision is made without a mutual agreement of the both institutions. The European Council has the right to cancel the voice of the member states for which it has been proven that have violated some of the EU basic principles.¹⁸

The date for the commencement of the negotiations between Republic of Macedonia and Greece has turned into a surprisingly complicated issue for the ambassadors of the EU member states who determine the agenda of the Council of Ministers meeting. The rationale is that it is overly complicated situation, because Greece opposes the determination of the start of the negotiations due to the name dispute. It is becoming increasingly apparent that the Council of Ministers is probably applying a type of tacit veto, in the way that would asses Macedonia as country that has implemented the reforms and meets the requirements for a start of negotiations, but it will start them as soon as the name dispute will be resolved, according to Brussels.¹⁹

4. Veto – democracy

Today, we have to ask ourselves whether the UN Charter must actually be qualified as something different from, or, to be more precise, something “more” than international treaty, in order accurately to describe its place in the world of the legal order (Fassbender 1998, p.19). In fact, should the UN Charter illustrate the imperfection of the world constitution as a fundamental legal act of the legal order. On the other hand, the majority of states want

18 http://bs.wikipedia.org/wiki/Historija_Evropske_unije#Ugovor_iz_Amsterdama

19 Nova Makedonija, No 21855, from 5.12.2009

to abolish or lessen the right of veto of the permanent members, but the current permanent five (P-5) do not want to accept any kind of reduction of their privileges. They also oppose the question whether the new permanent members should have the right of veto (Fassbender, 2004, pp. 342).

Even the present debate among the governments about the right of veto resembles very much the one of 1945. Many governments oppose the veto for its alleged violation of the principles of sovereign equality of states. Very often, the veto also violates the UN concept of democracy. In general, in accordance with this standpoint, many states made specific recommendations for restricting the right of veto or, in more general terms, a call for “revision” of the current voting system of the Security Council.²⁰

So, today, in the 21st century, there is democracy on the one side, which in practice means a form of governance where all the decisions are made directly or indirectly by the majority of citizens through fair election process, but on the other side, there is the right of veto, which is inviolable and we would say unfounded power, superiority of some states over the other. The great powers have obtained that superiority through self-declaration as super sovereign power in comparison to the other sovereign entities. Even in the recent years various discussions were made about the today’s suitability of the Security Council right of veto. The main argument in this debate is the fact that the five permanent members are not the most suitable and responsible United Nations member states anymore and that their right of veto slows down and even prevents the making of important decisions for the international peace and security.²¹

Namely, there are paradoxical situations when in the organizations which thoroughly defend and advocate for democracy, equality and sovereignty actually exist asymmetrical picture about them. Today, there is no space even for a debate about the restrictions of the power or the scope of the right of veto, but only for abolition of the undemocratic instrument, which violates the essence of the democracy and the foundations of the rule of majority. Here, a room is left for a dilemma about the fact for the possible insufficient and unclear understanding of the term “democracy” or of the term “right of veto”.

20 The same, pp.351.

21 Right of veto reform, available on the web location http://mk.wikipedia.org/wiki/%D0%92%D0%B5%D1%82%D0%BE#.D0.A0.D0.B5.D1.84.D0.BE.D1.80.D0.BC.D0.B0_.D0.BD.D0.B0_.D0.BF.D1.80.D0.B0.D0.B2.D0.BE.D1.82.D0.BE_.D0.BD.D0.B0_.D0.B2.D0.B5.D1.82.D0.BE

Additional argument for the abovementioned is that the right of veto is introduced under the UN Charter due to the need of power in extraordinary situations. The Soviet Union in particular, in order to protect itself from the western bias that the Council and the General Assembly had at that time, would not have accepted the UN Charter as it was conceived without the establishment of the right of veto (Shaw 2008, p. 1042).

5. Conclusions and recommendations

This last part will assess whether the veto still serves its purposes, if there is any room for its usage. Regarding the debate about the justifiability of the right of veto in the 21st century, the argumentation is more than clear, but still there is room left only for finding solution to the current nonsense situation, when in the major democratic institutions there is a possibility for complete authoritarian rule of power through the veto threat.

- Additional argument for starting this discussion is the fact that in the time of the establishment of UN, a well defined framework of the rule of democracy did not exist, but in the 21st century, which is actually an era of great political and economic changes, a new ordering of the states, that is a new ranking of the superpowers is actually required. But the new ranking or expanding of the list of superpowers would also establish itself on real undemocratic criteria. The veto concept has to be entirely changed by introducing the referendum, as a democratic tool for expression about some issue. In other words, the referendum will be consistent replacement of the undemocratic instrument like the veto. With the expression through referendum within the organizations, an opportunity for democratic decision making in relation to any matter would be provided. Such a referendum decision would be relevant democratic positive statement about a particular issue. That is, positive opinion of the majority not just of certain states that has the right of veto.

- To answer the question whether the right of veto actually played until today a real decisive balance of the political decisions or just a demonstration of the real political power. Or in particular, whether perhaps the formation of blocs of privileged countries with the right of veto opens by itself an additional possibility for disrupting the international peace and order. In my opinion, replacing the right of veto with a referendum will contribute to reduction of the legal usage of the right of veto for adopting illegal resolutions and

- Finally, if at the time of the establishment of UN and EU (although it is also characteristic for other organizations, but the paper focuses on mak-

ing a parallel between universal and regional organizations and the veto issue) a right of veto was necessary for balancing the powers and ensuring the world peace and security, in the 21st century exactly that separation or privileged position of some states may be a reason for increased instability in the world. And as can be seen from the abovementioned, the same practice of separation of the power of states in the process of decision making also exist in EU. On one side, there is a strategy for EU expansion to the states that meet the prescribed conditions, but with a large precondition of unanimous adoption by the stronger states.

Abstract

Democracy is a fundamental social value, both on internal and external plan. With the disruption of the balance of democracy and democratic governance, the peace and security are disrupted indirectly. Hence, more realistic possibilities and conditions for endangering the world order and peace are created. Although a protective instrument like the veto was established in the UN, starting from the legal framework for its establishment to its actual usage, series of violation of the democratic values by that instrument were evident. The replacement of the right of veto with internal referendum is the only way out of the multiple disruptions of the democratic values by the major democratic organizations, because through it at least there is an opportunity for expressing the opinions of the majority of members of the organization, avoiding it being a pledge of a single member or entity.

Резиме

Демократијата е темелна општествена вредност, како на внатрешен, така и на надворешен план. Со нарушувањето на рамнотежата на демократијата и демократското владеење, индиректно се нарушуваат и мирот и безбедноста. Имено, се создаваат поголеми реални можности и услови за загрозување на светскиот ред и мир. Иако во ООН, е востановен заштитнички инструмент како што е ветото, евидентни се низа прекршувања на демократските вредности со истиот инструмент, почнувајќи од давање правна рамка за неговото користење, па се до неговата употреба. Единствен излез е замена на правото на вето со внатрешен референдум, бидејќи преку него се добива можност за изразување мислење од повеќето членки на организацијата, и истото не е залог на само една членка или единка.

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