

Elena Ignovska*

HUMAN RIGHTS AND BIOETHICS DURING THE COVID-19 PANDEMIC: THE INTERNATIONAL LEGAL MATCH DJOKOVIC V. AUSTRALIA**

Summary

The (in)glorious case of Novak Djokovic posed serious questions to the way societies were dealing with the pandemics, the crucial being: could the right to make informed decisions about one's body and announce them endanger the public health through the spread of the anti-vaccination idea and not the infectious disease per se? Legal and ethical issues at stake are observed through the prism of: private life (related to the bioethical concept of individual autonomy) and public health (related to the bioethical concepts of beneficence and non-maleficence). However, the author concludes that irrelevant of the assessment of these two, if personal views about own choices are expressed publicly and, as a result, a person is refrained from enjoyment of some human rights, then the legal certainty and the freedom of thought and expression are affected too.

Keywords: private life, public health, freedom of expression, Covid-19 pandemic, Djokovic case.

* PhD in Law, Associate Professor at the Faculty of Law, University Ss. Cyril and Methodius, Skopje, Republic of North Macedonia. E-mail: e.ignovska@pf.ukim.edu.mk

** The author of this text already wrote an article entitled 'Mandatory Vaccination against Covid-19 in Europe: Public Health v. Saved by the Bell Individual Autonomy for a publication *Law and Beyond* in the framework of MELE project that is expected to be published in 2023. Some relevant observations from there are used in this text and quoted accordingly.

1. INTRODUCTION

After the first mass vaccination program in early December 2020, societies worldwide faced many dilemmas, including their mandatory or voluntary application. This is related to the conflict between public health (as a collective duty) and free and informed consent in the sphere of personal autonomy and private life (as an individual right). Consequently, this has implications on restrictions on human rights and freedoms for non-vaccinated, as for instance on: the right to make choices about own body (ECHR, Art. 8), the right to free movement (ECFR, Art. 45), the freedom of thought and expression (ICCPR, Art. 18; UDHR, Art. 19; ECHR, Arts. 9 and 10) or possible discrimination (DH-BIO, 2021b). However, restrictions on human rights (or derogations) could be evaluated as valid or invalid (Lebret, 2020). Yet, such restrictions remain to a large extent under national supremacy of each State.

Even though vaccines are highly welcomed and expected to be the human's efficient response against the pandemics, they are accompanied with a notable vaccine hesitancy and skepticism. The reasons why a person intentionally avoids vaccination differ, mostly related to trust towards the institutions or the health system that approves and applies them (Larson et al., 2018, p. 6), or fraudulent research findings (Wakefield *et al.*, 1998). Irrelevant of the reasons, the notorious fact is that they divided those being *pro* and *contra* mandatory immunization against Covid-19. This is different from mandatory immunization against other diseases known to science that cause herd immunity (*Vavříčka and others v. the Czech Republic*, ECtHR, 2021), because they do not fully cause herd immunity (even though they lessen the disease and avoid death to some extent), do not stop the spread of the virus and are not fully efficient against new variants (Cheng, 2022; Kjumel, 2021).

The (in)glorious case of Novak Djokovic posed serious questions to the way societies were dealing with the pandemics (Bryden and Murdock, 2022), the crucial being: could the right to make informed decisions about one's body and announce them endanger the public health through the spread of the anti-vaccination idea and not the infectious disease *per se*? Legal and ethical issues at stake will be observed through the prism of: private life – related to the bioethical concept of individual autonomy, and public health – related to the bioethical concepts of beneficence and non-maleficence (Beauchamp and Childress, 2009).

The text will try to observe the international case through the prism of above enumerated aspects and try to answer the question if the Covid-19 crisis management upheld or suspended human rights and bioethical principles, especially in the (in)glorious legal match of Novak Djokovic.

2. PRIVATE LIFE: INDIVIDUAL AUTONOMY AND MEDICAL CONFIDENTIALITY

Individual autonomy and the concept of free and informed consent followed the well-established and rooted practice of patriarchy in the relationship between the patient and the physician that was unquestionable until the second half of the 20th century. The foundations could be found in the North-American jurisprudence, while the concept found its big way out after the condemnation of the cruel research practices on humans conducted by the Nazi in the Nuremberg Code. Nevertheless, the ongoing pandemic experience pulls in a different direction: from respect for autonomy to social responsibility and some authors recommend that the respect for autonomy must systematically incorporate a commitment to social responsibility (Moreno, Sándor and Schmidt 2022).

The dignity and the integrity of the human being associated with it are protected in many international documents (such as the Universal Declaration on Human Rights, International Convention on Civil and Political Rights, International Covenant of Civil, Cultural and Economic Rights etc). In Europe (Member States of the Council of Europe), the ECHR covers the physical and mental integrity as part of the private life in Art. 8, while in severe cases (in the domain of inhuman and degrading treatment) it is covered by Art. 3. The Oviedo Convention covers it in more detail in Arts. 5, 6, 8, 9, 16, 17, 20, while the European Charter on Human Rights in its Art. 3. Under the Oviedo Convention (Art. 5) and the EU law, the modalities of informed consent (presumed – meaning that consent is implied if there is no objection, or explicit – explicitly stated) are left upon the decision on national states, while the concept is included in several directives and regulations (such as Reg. No 536/2014 on Clinical Trials). Nowadays, the concept of free and informed consent is a leading principle in Bioethics (principle of autonomy) overtaken by national laws governing the intersection between bioethics and medicine. The concept presupposes the process of enabling a person to make individual choices based on information, understanding and clearly expressed wish on the choice, bearing in mind all other alternatives as well as the future prospects. Therefore, key elements of the concept are: 1. information; 2. freedom of consent (voluntary in nature, lack of pressure or undue influence) and 3. ability to make decisions (Council of Europe, Key Human Rights Principles in Biomedicine).

Medical confidentiality and protection of health related data are also part of the private life. Starting from ancient times and the medical ethics in the Hippocratic Oath, an information about patient's health should be private. Health related data are considered sensitive under the Council of Europe and EU law and any

processing is prohibited unless under specific conditions. When it comes to the legal documents from the Council of Europe, health related data are integrated in Art. 8 of the ECHR (*Z. v Finland*, ECtHR, 1997, para 95), Art. 10 of the Oviedo Convention, Art. 6 of the Convention for the Protection of Individuals with regard to the automatic processing of personal data. When it comes to the EU law, health related data are stipulated in Art. 8 of the Charter of Fundamental Rights of the European Union, Art. 16 of the Treaty of the Functioning of the European Union and Art. 9(10) of the Reg. (EU) 2016/679 on the General Data Protection Regulation. In line with Covid-19, this is related in two ways: 1. Vaccine status – is it necessary to be publicly known and a prerequisite for instance to enter a country, institution etc? and 2. Health status (Covid positive or negative, past infections etc).

At the forefront of the pandemics in Europe was the Council of Europe's Committee on Bioethics which highlighted some of the human rights principles laid down in the Oviedo Convention via its Statements on: Human Rights Considerations relevant to the Covid-19 Pandemics (DH-BIO, 2020), Vaccines (DH-BIO, 2021a) and Vaccines Passes and Similar Documents (DH-BIO-2021b).

Regarding the human rights and fundamental freedoms (including the right to freedom of movement – Art. 2 Protocol 4 ECHR) restrictions in relation to vaccines passes and similar documents (for instance, stating that the person has previous infection or negative test), the Statement categorized them as “permissible” if they were prescribed by the law, necessary and proportionate. This is interpreted in the context of relaxing public health restrictions, in particular the right to freedom of movement, but only for those having such passes or certificates. When it comes to those who do not have them, then important human rights issues may be raised. For instance, to give exclusive access to services, areas, or to enter a country only for persons who can show a vaccination certificate or proof of previous infection. The Statement states: “Individuals who do not have such certification or cannot prove a previous infection, would indeed be excluded from such withdrawal of the restrictions on the enjoyment of fundamental rights. Any use of ‘vaccination certificate’, proof of previous infection or test results should not deviate from the purposes of prevention, protection and the health management of the pandemic.” The Statement does not afford a discriminative status between persons with different “immune status” if a range of other options remain available. That would mean that for those who for medical or other reasons cannot be vaccinated, other alternative means to vaccination certificates should make them eligible to withdrawal of some public health measures (like, for instance, the ban to travel).

Regarding the issue of privacy and personal data, the Statement recognizes that “Vaccination certificate” contains sensitive health related data or other health-related information that may appear on “passes”. However, it acknowledges

that digital vaccination certificates or machine-readable certificates can be more data protection friendly, if only the mere vaccination status is enclosed.

There are restrictions and limitations to the application of the right to private life as envisaged in Art. 8(2) of the ECHR and Art. 26 of the Oviedo Convention. The presumption of personal autonomy is, in fact, the most often overridden, for example, when an urgent medical care is needed for a patient unable to provide the consent (Beazley, 2020), or in cases when the consent is presumed unless explicitly stated the opposite. This is the case, for instance, for transplantation from deceased donors in the Republic of North Macedonia. The previous concept of informed consent was replaced by the concept of presumed consent (unless the person did not object explicitly and officially – with a written statement authorized by notary public during life (Закон (измени и дополнувања) за земање и пресадување на делови од човечкото тело заради лекување, 2011, 2013). Such a flip in concepts was decided on referendum in Switzerland in May, 2022 for purposes of shifting the organ donation in the country (Guardian, 2022).

When it comes to the medical confidentiality, it may be overridden when the benefits of the individual or the society coming from the disclosure outweigh both the individual and the public interest protected with the confidentiality. Even more, there is an obligation of the medical profession to notify the authorities in cases of severe threat towards the public health (such for instance in cases of serious contagious diseases).

Possible restrictions on both individual autonomy and medical confidentiality are justified in: 1. situations that are prescribed in the law so that persons are aware and can guide their actions (principle of legal certainty) and 2. situations that are necessary in a democratic society (principle of legitimate aim). Such situations may be provoked by a pressing social need – public safety, prevention of crime, protection of public health or rights and freedoms of others. In such situations, the interference by the state towards the claimed right of an individual should be proportionate to the legitimate aim i.e. if a fair balance has been struck between the legitimate aim pursued and the requirements for protection of individual rights. In these lines, restrictions of the private life due to mandatory interventions imposed by the State were already justified (or not considered as infringements on human rights) in several cases in front of the ECtHR (*Solomakhin v. Ukraine*, 2012; *Acmanne v. Belgium*, 1984; *Boffa and Others v. San Marino*, 1998; *Jehovah's Witnesses of Moscow and Others v. Russia*, 2010). Especially important is the most recent case regarding mandatory vaccination of children against diseases well-known to medical science (*Vavříčka and Others v. the Czech Republic*, 2021). Here, the Court recognized that the Czech policy pursued legitimate aims of protecting health as well as the rights of the others, noting that

vaccination protects both those who receive it and those who cannot be vaccinated for medical reasons and are, because of that, reliant on herd immunity for protection against serious contagious diseases. It furthermore noted that the fine imposed on Mr Vavříčka had not been excessive. Although the non-admission to preschool for the other applicants' children had meant loss of an important opportunity to develop their personalities, it was a preventative rather than a punitive measure, and had been limited in time in that when they would reach the age of mandatory school attendance, their admission to primary school would not be affected by their vaccination status. The Court also declared that the complaints under Art. 9 (freedom of thought and conscience) of the Convention are inadmissible and that there was no need to examine the case separately under Art. 2 of Protocol No. 1 (right to education) to the Convention.

In many aspects, this case seemed relevant to Covid-19 and analogy could be made especially when vaccines were first introduced while the situation was still severe. However, the case of mandatory vaccination against diseases well-known to medical science for children in nursery differs from the case of mandatory vaccination against Covid-19 for everyone nowadays. Firstly, the virus threat becomes less serious to both individual and public health over time (the measure is not necessary, at least not anymore). Secondly, the time has shown that prevention from Covid-19 cannot be achieved only and solely with mandatory vaccination because vaccination itself does not provide herd immunity and it does not stop the spread, while there are still other alternatives to do the same, like voluntary vaccination, wearing masks, proper hygiene etc. (the legitimate aim is not accomplished). Lastly, the time has shown that even if the level of coercion does not include direct force, instead, it includes fines or other restrictions, such as in the case of Vavříčka or in the pioneering but suspended legislation for mandatory vaccination in Austria (Chadwick, 2022; Reich, 2021), it is not proportionate to the possible infringements on private life and individual consent (Ignovska, 2023).

The cases elaborated above are irrelevant to the case of Djokovic since neither Australia nor the United States of America (past and present tournaments in which he could not participate due to his non-vaccinated status) are Member States of the Council of Europe, accordingly not under supervision of the European Court of Human Rights. Even more, within the Member States there is no European consensus about mandatory vaccination, and they enjoy a wide margin of appreciation. Nevertheless, they are part of the global debate regarding the tension between the individual consent as a self-determination agency and the public health requirements that tend to limit it.

3. PUBLIC HEALTH: BENEFICENCE AND NON-MALEFICENCE

The term public health includes ‘public’ in terms of a small or larger number of people that could spread (a disease) on a smaller or larger territory (this, for instance, makes difference between epidemics and pandemics), and ‘health’ which is already defined very wide by the WHO including physical, psychological and social well-being (WHO Constitution, 1946). The public health is defined as “the science and art of preventing disease, prolonging life and promoting health through the organized efforts and informed choices of society, organizations, public and private, communities and individuals” (Gatseva and Argirova, 2011, p. 205).

The ECHR contains many rights (as mentioned above) which can be limited for valid purposes, including public health. In those particular circumstances, the Convention has a specific provision authorizing to derogate unilaterally to conventional rights. Article 15, entitled “Derogation in time of emergency”, permits states “in time of war or other public emergency threatening the life of the Nation [...] to take measures derogating from its obligations[...]”. Similar provisions can be found in Art. 4(1) of the International Covenant on Civil and Political Rights (ICCPR). In application of Art. 15(3) of the ECHR, many countries such as Latvia, Romania, Armenia, Estonia, Moldova, Georgia, Albania, North Macedonia, Serbia, and San Marino notified the Secretary General of the Council of Europe that they were invoking this provision to face the ongoing pandemics (Lebret, 2020, p. 3). According to Emilie Hafner-Burton *et al.* derogations are “suspensions of certain civil and political liberties – in response to crise”. They defined them as “a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberty” (Hafner-Burton, Helfer and Fariss, 2011).

The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights set standards to delineate circumstances of permissible derogations. They note that public health may be invoked as a ground for limiting certain rights “in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population”. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured. The principles require that any measures taken which limit individual human rights shall be 1. provided for and carried out in accordance with law; 2. directed toward a legitimate objective of general interest; 3. strictly necessary in a democratic society to achieve the objective; 4. least intrusive and restrictive to achieve the objective; 5. be based on scientific evidence; 6. neither arbitrary nor discriminatory in application and of limited duration; 7. respectful of human dignity; and 8. subject to

review. Nevertheless, while these principles provide guidelines on the necessary compromises to be made between individual and collective rights, their effectiveness depends on the consent and willingness of national states to uphold and exercise them since they are a non-binding, soft law mechanism, despite the fact that pandemics are a global phenomenon (Beazley, 2022, pp. 6, 7). Beazley makes the point by asking the very obvious central question: “In the context of compulsory vaccination, whose right to health is being spoken of? An individual’s right (itself a variable determinate) or the vaguer – though no less valid – public right? (Beazley, 2020, p. 9). This author inclines more towards the second option, i.e. that any human rights qualifications must remain within the appropriate boundaries – standards such as the Siracusa Principles.

Most of the authors who approve mandatory vaccination use utilitarian arguments (Zaid, Hernowo and Prasetyoningsih, 2022, p. 967). They emphasize the aggregate collective utility, favoring the overall public health over individuals’ freedoms. The authors here rely on collective herd immunity. Other authors’ (Lefri, 2021) conclusions that approve compulsory vaccination in more moderate version (to eliminate the existence of punishment for those who refuse to vaccinate) also rely on the herd immunity argument, stressing that human rights to health during a pandemic must respect the human rights of others.

On the other hand, there are authors who consider that restricting the rights in a public health emergency derogates human dignity, civil liberties and freedoms and has the potential to unleash humanitarian crises more severe than Covid-19 in the long run (Thomson and Ip, 2020). In this light, mandatory measures should only be used as a last resort when voluntary measures cannot reasonably be expected to succeed. Otherwise, they are authoritarian and fail to engage in properly deliberative and transparent decision-making. Moreover, many of these measures are fundamentally dehumanizing, denying human autonomy, dignity, and individuality in the name of a presumed “greater good”, “communal need”, or “national interest” (Thomson and Ip, 2020, p.30).

Therefore, the central dilemma in public health law and ethics is that any legal intervention to safeguard population health will inevitably initiate a conflict between collective interests and individual rights to bodily integrity, privacy, freedom of association, freedom of movement, freedom of conscience, and other core liberties (Thomson and Ip, 2020, p. 31). Consequently, the use of extreme public health emergency measures to combat pandemics provokes an ethical tension between individual interests and the perceived collective good. In legal terms, the resolution of the conflict includes measurements of facts i.e. the demonstration that the restrictions on individual rights and freedoms are necessary and proportionate to the attainment of stated public health objectives.

4. FACTS OF THE CASE *DJOKOVIC V. AUSTRALIA* – THE LEGAL MATCH

Djokovic tested positive to Covid-19 on 16 December 2021 and negative 6 days later while still in Serbia (Bryden and Murdock, 2022). Serbian Covid regulations stipulate a full 14-day self-isolation period (during which he appeared at public events), unless the person who has tested positive receives a negative PCR test result during that period. Before arriving in Australia he made a travel declaration that he had not travelled in the 14 days prior to entering Australia (despite travelling between Serbia and Spain in December) and included a copy of his medical exemption for vaccination against Covid-19 virus. He was granted a Temporary Activity (subclass 408) visa on 5 January 2022. The very same day he arrived in Australia, was questioned by national's Border Force and detained at Melbourne's airport. Early next morning he was given a "Notice of intention to consider cancellation under section 116 of the Migration Act 1958 (Cth)". He requested couple of hours (until 8.30 am) before any further action so that he could talk to his lawyers and Tennis Australia. Even though Australian Border Force verbally agreed to his request, they did not respect it and a delegate of the Minister for Home Affairs cancelled Djokovic's Visa, according to section 116(1)(e)(i) of the Migration Act (First Decision). This section provides that a Minister may cancel a visa if he or she is satisfied that "the presence of its holder may be or might be a risk to the health, safety or good order of the Australian community". Following the cancellation, Djokovic was placed into detention. His judicial saga followed. Firstly, he made an urgent application for judicial review of the First Decision to the Federal Circuit Court and Family Court of Australia (proceeding No MLG35/2022). This was accepted on grounds that he was not given the promised reasonable time to object before any further actions. While the first decision was quashed, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs was still considering whether he would exercise his power under section 133C(3) of the Migration Act to cancel Djokovic's visa. This section provides free disposition of the Minister if he is satisfied that a ground for canceling the visa exists and if he considers that the cancellation is in public interest. The Minister used this power and canceled Djokovic's visa "on health and good order grounds, on the basis that it was in the public interest to do so" (Second decision). Explaining the reasons, the Minister measured beneficence and (non) maleficence facts. Namely, Djokovic was a low risk of transmitting the disease to others (due to his recent infection that was overpassed), he had a medical reason not to be vaccinated, entered the country consistent with documentary requirements without making an attempt to contravene any Australian law and he was known for his philanthropic efforts. On

the other side, he considered that Djokovic publicly opposed to vaccination even prior to vaccines' availability, stating that he "wouldn't want to be forced by someone to take a vaccine" to travel or compete in tournaments. This led the Minister to the conclusion that his "publicly expressed anti-vaccination sentiment [...] may be counterproductive to efforts at vaccination by others in Australia". Consequently, he found that Mr Djokovic's presence in Australia may be at risk to the health of the Australian community and good order. Djokovic objected to this decision urgently asking for judicial review, so the matter was transferred to the Federal Court of Australia (according to section 153(1) of the Federal Circuit Court and Family Court of Australia Act 2021). There, Djokovic's counsel argued three grounds as to why the Minister's Second Decision was invalid: 1. the decision is illogical without giving arguments how Djokovic's presence would affect Australia's efforts to vaccinate as many people as possible against Covid-19; 2. the decision is not open on the evidence to find that the presence of Mr Djokovic in Australia is or may be a risk to the health or good order of the Australian community by "fostering anti-vaccination sentiment"; 3. the decision is not open to the Minister to make a finding concerning Mr Djokovic's "well-known stance on vaccination". The Full Federal Court rejected all three grounds and unanimously upheld the Second Decision to deport Djokovic.

The Court was ruling on the lawfulness and legality of the decision, not on the merits of the case – whether it was the right, bad or incorrect decision. In its written reasons, the Court stressed that for an administrative decision to be overturned there needs to be some form of legal error, which in the case did not exist since the Minister had competence to bring decision based on his own evaluations (satisfaction). At paragraph [17] of the reasons the Court states that:

"[...]The Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it." The Court held that: "[...] it is not the fact of Mr. Djokovic being a risk to the health, safety or good order of the Australian community; rather it is whether the Minister was satisfied that his presence is or may be or would or might be such a risk for the purposes of s 116(1)(e)(i), through s 133C(3). Furthermore, "the characterization of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made." The Minister's evidence regarding how he arrived at his "state of satisfaction" was: the evidence that Mr. Djokovic in the past demonstrated an apparent disregard for the need to isolate following a positive Covid-19 test result; the fact that Mr. Djokovic's high profile status and position

as a role model in the sporting and broader community, may foster similar disregard for the precautionary requirements following a positive Covid-19 test in Australia if allowed to stay; and that Mr. Djokovic's presence in Australia may be counterproductive to vaccination efforts by others in Australia, which may be a risk to the health of the Australian community. In these sense, the Court upheld the Minister's decision stating that his state of satisfaction was reached lawfully, irrelevant of the content of the decision. Therefore, the case was a matter of procedural, not material justice – whether he was really a threat to the public health or not. The reasoning of the Court in the explanation of the decision was based on obeying procedural law, while the substantive law (if it was right or wrong) was not considered (considered irrelevant for the case). It did not raise any issues whether there was legal certainty in terms of one planning own conduct according to the law. This is relevant since Djokovic obtained visa lawfully, and had a medical exemption to vaccination document. Nevertheless, the visa was canceled only once he arrived in Australia. Legal certainty is an established legal concept that in the civil law tradition is defined in terms of maximum predictability of officials' behavior, while in the common law tradition is often explained in terms of citizens' ability to organize their affairs in such a way that does not break the law. In both legal traditions, legal certainty is regarded as grounding value for the legality of legislative and administrative measures taken by public authorities (Claes, Wouter & Kairsblick, 2009, pp. 92–93). Also, it did not raise any issues about private life (including, informed consent in mandatory vaccination, medical confidentiality and protection of health related data) versus public health. Even more, the threat to the public health and good orders was located in the spread of not the infectious disease *per se*, but the anti-vaccination's idea, raising issues about freedom of thought and expression too. Even though it is clear that the national decision making body has the competence to make the decision based on its own evaluation of arguments (satisfaction), the case provoked lot of publicity around the world and the hearings were broadcasted online. It was discussed long after and the bitter experience of being notoriously unvaccinated threat, therefore not eligible to compete remained (Djokovic could not attend future important tournaments – such as US open because the United States banned non-vaccinated visitors since October, 2021 (BBC sport, 2022)).

5. CONCLUSION

The World Health Organization emphasizes that mandatory vaccination against Covid-19 is not unconditionally compulsory (i.e. imposed by force), criminal sanctions should not be used to penalize non-compliance, and shots should not be a condition of international travel by national authorities and transportation operators (WHO, 2021a, p. 1; WHO, 2021b). Instead, it should fulfill the minimum standards of legality, proportionality and necessity. It should be considered only if it is necessary for, and proportionate to, the achievement of an important public health goal (e.g., achieving herd immunity, protecting the most vulnerable, protecting the capacity of the acute health care system) identified by a legitimate public health authority. If such a public health goal can be achieved with less coercive means, than the mandate for mandatory vaccination could not be ethically justified, as achieving public health goals with less restriction of individual liberty and autonomy is a more favorable risk-benefit ratio (WHO, 2021a).

Anyhow, the case of *Djokovic v. Australia* was not (only) about mandatory vaccination and its effects on individual liberty and autonomy. It became apparent that it is more about the way it is publicly perceived to accept the entrance of a first-class sportsman, notoriously known for his rejection of Covid-19 shots for himself in a country that did its best to promote the opposite for its population. Even though top athletes are often perceived as role models for others and have a dose of responsibility for publically expressed opinions, yet their right to freely express own opinions on non-sports topics in public is questioned (Radenovic, Savovic, 2021).

Just a simple declaration in the past, admitting his own sentiment to remain unvaccinated against Covid-19 (while fully vaccinated as a child), due to his own assessments added to the medical reasons for medical exemption to vaccinate made him a public threat as alleged promoter of the anti-vax movement. In this sense, “he was a threat to the *moral* purity of the people, rather than their respiratory systems, and to the placidity of the public square” (O’Sullivan, 2022). O’Sullivan raises several concerns about the precedent this case may provoke: 1. the influence of the perceptions and actions of others (the Australian people) to the status (to remain in the country or not) of a person (Djokovic) that may provoked them; 2. the status of a person that is claimed to be a “role model” in his capacity as a high-profile sportsperson that puts him in a worst position then for instance if he did not enjoy that position (no high profile, yet not vaccinated); and the last but not the least important 3. the perception that any personal views expressed publicly may affect the health and safety or good order of the Australian community, which certainly raises issues for freedom of expression.

It is obvious that the Minister has the capacity to make decisions based on his own assessments in a particular case (the law allows him) and that is undisputable. The case of Djokovic tested how far these assessments can go in terms of giving him the entire disposition he could possibly have confronted with the understandable public tension of people that were detained in quarantines for long period, already terrified by the pandemics. Having such sentiments and circumstances in mind, it is not strange that his decision was such. Otherwise, he would have sacrificed the public trust in the severe public health measures, as well as their further obedience. Nevertheless, the decision sends rather intimidating message towards anyone (especially high-profile persons”) who publicly announce their own opinions about their life choices (while they still have them, if the vaccination is voluntary) without imposing or preaching on others to do the same. Therefore, the case is not about the assessments of individual autonomy v. public health, but about the provocation of the freedom of thought and expression regarding personal opinions about mandatory vaccination against Covid-19.

Nowadays, when the last variants of the virus have showed to be less dangerous, while the herd immunity via vaccination is almost impossible (buster doses are constantly needed, even though they cannot stop the spread of the infection themselves), mandatory vaccination may walk on a minefield regarding possible infringements on human rights and liberties. Perhaps that is why (added to the bitter taste of the decision to expel Djokovic previously) Australia Open will probably accept him to play in 2023, despite the rule that Australia’s laws stipulate that deportees cannot return to the country for three years which could be waived in individual circumstances if the government chooses (Zagoria, 2022; Pathak, 2022). Hopefully, this Governmental decision will not affect legal certainty as a citizens’ ability to organize their affairs in such a way that does not break the law this time.

REFERENCES

- Acmanne and Others v. Belgium* (1984). Commission (Plenary), Application No. 10435/83.
- BBC sport. 2022 *Novak Djokovic unable to Travel for US open*. Available at: [https://www.bbc.com/sport/tennis/62679272?at_custom3=BBC%20Newse&at_custom4=7F4D1DF0-248F-11ED-995D-AFDD2052A482&at_custom2=facebook_page&at_custom1=\[post%20type\]&at_medium=custom7&at_campaign=64&fbclid=IwAR0y0v99-Ys9xOaKeXvOJF6_BgD7CUjUYtS_DppIB-TuBx3RZheuc8O9j4qI](https://www.bbc.com/sport/tennis/62679272?at_custom3=BBC%20Newse&at_custom4=7F4D1DF0-248F-11ED-995D-AFDD2052A482&at_custom2=facebook_page&at_custom1=[post%20type]&at_medium=custom7&at_campaign=64&fbclid=IwAR0y0v99-Ys9xOaKeXvOJF6_BgD7CUjUYtS_DppIB-TuBx3RZheuc8O9j4qI).

- Beauchamp, T. L. & Childress, J. F. 2009. *Principles of Biomedical Ethics*. Oxford University Press, sixth edition.
- Beazley, A. 2020. Contagion, Containment, Consent: Infectious Disease Pandemics and the Ethics, Rights, and Legality of State-enforced Vaccination. *Journal of Law and the Biosciences*, Vol. 7, Issue 1.
- Boffa and Others v. San Marino* (1998). ECtHR, Application No. 16536.
- Bryden, S. & Murdock, C. 2022. *Game, Set, Match! The Djokovic Legal Saga Explained*, Holding Redlich. Available at: <https://www.holdingredlich.com/game-set-match-the-djokovic-legal-saga-explained>.
- Chadwick, L. 2022. Which Countries in Europe Will Follow Austria and make Covid Vaccines Mandatory?, *Euronews*. Available at: <https://www.euronews.com/2022/02/01/are-countries-in-europe-are-moving-towards-mandatory-vaccination>.
- Charter of Fundamental Rights of the European Union/European Charter of Fundamental Rights – ECFR (2000).
- Cheng, F.K. 2022. Debate on Mandatory COVID-19 Vaccination. *Ethics, Medicine and Public Health*, No. 21.
- Claes, E., Wouter, D. & Kairsblick, B. 2022. *Facing the Limits of the Law*. Springer, 2009.
- Committee on Bioethics – DH-BIO (2020). *Statement on Human Rights Considerations Relevant to the Covid-19 Pandemic*, Council of Europe.
- Committee on Bioethics – DH-BIO (2021a). *Covid-19 and Vaccines: Ensuring Equitable Access to Vaccination during the Current and Future Pandemics*, Council of Europe.
- Committee on Bioethics – DH-BIO (2021b). *Statement on Human Rights Considerations relevant to “Vaccine Pass” and Similar Documents*.
- Convention for Protection of Human Rights and Fundamental Freedoms/European Convention on Human Rights – ECHR (1950). Council of Europe.
- Council of Europe HELP Course, *Key Human Rights Principles in Biomedicine – Bioethics*, Module 2.
- Gatseva, P. D., Argirova, M. 2011. Public Health: The Science of Promoting Health. *Journal of Public Health*. Vol. 19, Issue 3.
- Hafner-Burton, E., Helfer, R.L. & Fariss, J. C. 2011. Emergency and Escape: Explaining Derogations from Human Rights Treaties. *International Organizations*, Vol. 65, No. 4, pp. 673–707.
- Ignovska, E. 2023. Mandatory Vaccination against Covid-19 in Europe: Public Health v. Saved by the Bell Individual Autonomy. *Law and Beyond*. (Forthcoming)

- International Covenant on Civil and Political Rights – ICCPR (1966). United Nations.
- Jehovah's Witnesses of Moscow and Others v. Russia (2010) ECtHR, Application No. 302/02.
- Kjumel J. (2021). Compulsory Vaccination against Covid-19 within the Scope of Article 2 and Article 8 of the European Convention on Human Rights. *Academia.edu*.
- Larson, H., Figueiredo, A., Karafillakis, E. & Rawal, M. (2018). *State of Vaccine Confidence in the EU*, European Commission.
- Lebret, A. (2020). Covid-19 Pandemic and Derogation to Human Rights. *Journal of Law and the Biosciences*, Vol. 7, No 1.
- Lefri, M. 2021. International License Covid-19 Vaccination as Part of The Basic Right to Health, Should It Be Mandatory During The Covid-19 Pandemic. *S A S I*, Vol. 27, Issue 4, pp. 423–429.
- Moreno, J.D., Sándor, J. & Schmidt, U. 2022. Autonomy and Social Responsibility: The Post-Pandemic Challenge. *Perspectives in Biology and Medicine*, Vol. 65, No. 3, pp. 426–441.
- O'Sullivan, M. 2022. Why Novak Djokovic Lost His Fight to Stay in Australia and Why It Sets a Concerning Precedent. *The Conversation*. Available at: <https://theconversation.com/why-novak-djokovic-lost-his-fight-to-stay-in-australia-and-why-it-sets-a-concerning-precedent-175038>.
- Pathak, R. 2022. Novak Djokovic Cleared to Play at Australia Open 2023: Reports. *Sports Tiger*. Available at: <https://www.sportstiger.com/news/novak-djokovic-cleared-to-play-at-australian-open-2023-reports>.
- Radenovic, S. & Savovic, B. 2021. Is the Top Athlete Allowed to Talk about Non-sports Topics? Novak Djokovic and Vaccination. *Academia.edu*. Available at: https://www.academia.edu/49328581/IS_THE_TOP_ATHLETE_ALLOWED_TO_TALK_ABOUT_NON_SPORTS_TOPICS_NOVAK_DJOKOVIC_AND_VACCINATION.
- Reich, O. 2021. Mandatory Covid Vaccines and Human Rights: Questions and Answers. *Liberties*. Available at: <https://www.liberties.eu/en/stories/mandatory-covid-vaccines-human-rights/43918>.
- Solomakhin v. Ukraine (2012). ECtHR, Application No. 24429/03.
- The Guardian (2022). *Switzerland Votes for Organ Donation by Default*. Available at: <https://www.theguardian.com/world/2022/may/16/switzerland-votes-for-organ-donation-by-default>.
- Thomson, S. Ip E. C. (2020). Covid-19 Emergency Measures and the Impending Authoritarian Pandemic. *Journal of Law and the Biosciences*, pp. 1–33.
- Universal Declaration of Human Rights – UDHR. (1948). United Nations.

- Vavříčka and Others v. the Czech Republic* (2021). ECtHR, Application No. 47621/13.
- Wakefield, A., Murch, S., Anthony, A. *et al.* 1998. Ileal-lymphoid-nodular Hyperplasia, Non-specific Colitis and Pervasive Developmental Disorder in Children. *The Lancet*, No. 351, pp. 637–641.
- World Health Organization. (2021a). *Covid-19 and Mandatory Vaccination: Ethical Considerations and Caveats: Policy Brief*. Available at: <https://apps.who.int/iris/handle/10665/340841>.
- World Health Organization. (2021b). *Interim position paper: Considerations regarding proof of Covid-19 vaccination for international travelers*. Available at: <https://www.who.int/news-room/articlesdetail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>.
- World Health Organization – WHO Constitution (1946).
- Z. v Finland*, ECtHR (1997). Application No. 22009/93.
- Zagoria, A. 2022. Novak Djokovic ‘Cleared to Play’ Australian Open Despite Refusing to Get Vaccinated: Report’. *Forbes*. Available at: <https://www.forbes.com/sites/adamzagoria/2022/09/11/novak-djokovic-cleared-to-play-australian-open-despite-refusing-to-get-vaccinated-report/?sh=6a64b3466ca2>.
- Zaid, Z. Hernowo, W.S. & Prasetyoningsih, N. 2022. Mandatory Covid-19 Vaccination in Human Rights and Utilitarianism Perspectives. *International Journal of Public Health Science*, Vol. 11, No. 3, pp. 967–974.
- Закон за земање и пресадување на делови од човечкото тело заради лекување, ‘Службен весник на РМ’ бр. 47/2011 and Законот за изменување и дополнување на Законот за земање и пресадување на делови од човечкото тело заради лекување објавен во ‘Службен весник на РМ’ бр. 91/13.

Prof. dr Elena Ignovska*

LJUDSKA PRAVA I BIOETIKA TOKOM PANDEMIJE KOVIDA 19: MEĐUNARODNA PRAVNA UTAKMICA ĐOKOVIĆ PROTIV AUSTRALIJE

Sažetak

(Ne)slavni slučaj Novaka Đokovića postavio je ozbiljna pitanja o načinu na koji su se društva nosila s pandemijom, a ključno je bilo: može li pravo na donošenje informisanih odluka o vlastitom telu i njihova objava ugroziti javno zdravlje širenjem antivakcinalnih ideja, a ne zarazna bolest sama po sebi? Pravna i etička pitanja posmatrana su kroz prizmu: privatnog života (vezano za bioetički koncept autonomije pojedinca) i javnog zdravlja (vezano za bioetičke koncepte dobročinstva i neškodljivosti). Međutim, autorka zaključuje da je irelevantno za ocenu ovog dvoga, ako se lični stavovi o vlastitim izborima iznose javno i, kao rezultat toga, osoba biva uskraćena uživanja nekih ljudskih prava – onda pravna sigurnost i sloboda mišljenja i izražavanja jesu takođe pogođeni.

Ključne reči: *privatni život, javno zdravlje, sloboda izražavanja, pandemija kovid-19, slučaj Đoković.*

* Doktor pravnih nauka, vanredna profesorka na Pravnom fakultetu Univerziteta Sv. Ćirila i Metodija u Skoplju, Republika Severna Makedonija. E-mail: e.ignovska@pf.ukim.edu.mk

