



The news of a potential vaccine for the COVID-19 virus is a welcome one. A question which arises is whether, in legal systems around the world, such a vaccine can be made compulsory for all persons, i.e. whether persons can be compelled to take the vaccine regardless of their consent or objection.

The purpose of this article is not to examine the scientific merits of any objection to the vaccine, but rather to examine the legal issue as to whether a compulsory vaccination programme is lawful or not, focussing on the South African legal position under our Constitution. It would be interesting to ask the same legal question with respect to other countries' legal systems, but that is beyond the scope of this article.

There are a number of grounds on which certain groups of persons might object to compulsory vaccination. These range from libertarian objections, to ones founded on concern over the safety of the vaccine. The circumstances of its need and development once again raise the classical debate between individual rights and those of society as a collective.

Everyone is aware of the urgent need for this vaccine. The very urgency which has motivated the swift development of the vaccine raises important health questions as to its safety: the usual testing period for a vaccine involves at least five years, in order to monitor the long-term effects and its safety.

So, we have a classic dilemma here where the exigencies of the matter pull in opposite directions. On the one hand, the need for a vaccine is patent and urgent. The urgency in this case is of a particular nature: the longer we wait, the worse the situation becomes in terms of the pandemic. On the other hand, the very urgency in question drives the state to seek to utilise a vaccine without the usual testing period for its safety, and to administer it on a compulsory basis.

This creates a perfect set of conditions for a debate on individual versus collective rights, and of the limits of the power of the state. Certain individuals may object to taking the vaccine, on the basis that it has not been comprehensively tested and therefore constitutes a risk to their health and safety. These persons would assert individual rights which, in South African law, in terms of our Constitution, would conceivably involve a range of constitutional rights such as those to life, health and safety and security of the person.

On the other hand, any government seeking to impose a requirement that all citizens should be forced to take the vaccine will advance an argument based on the collective interests of the society as a whole. This argument is that it has been necessary to curtail the safety testing period in this case, given the urgent spreading of the virus and the need to combat it as quickly as possible. The argument would be that to take further time to test the safety of the vaccine, up to the usual five-year testing period, would undermine the purpose of the vaccine altogether and would also cause (or at least allow) many more people to die.

In the simplest terms, to force someone to take a medication when they refuse to do so is an inroad into their individual rights, regardless of the reason for their objection. For example,

certain religious fundamentalists believe that the taking of any medication is religiously prohibited. Regardless of anyone's reason for objecting, if such person is compelled to take the vaccine against their will, this is clearly a limitation of a number of their constitutional rights.

The South African Constitution was drafted in circumstances where rights of the individual and the rights of the collective as a whole as represented by the state, and their specific interaction in cases where they conflict, was a fundamental issue at the heart of the constitutional negotiations. Section 36 of the South African Constitution represents a relatively modern formulation of the agreed compromise between individual and collective rights and the limits of state power, providing that individual rights may be limited by a law of general application that is reasonable and justifiable in an open and democratic society based on dignity, freedom and equality.

The conflict between individual and collective rights is, as I have mentioned above, a classical issue both in legal theory and also, most fundamentally, in ethics or moral philosophy. A well-known thought-example postulates a group of persons who are trapped in a cave, with the water level inside the cave steadily rising such that within a certain period, say next two hours, everyone in the cave will drown. There is an exit to the cave, which everyone could use, and thereby save themselves, save for one drawback: the exit is being fully blocked by one individual, and who is stuck in the entrance. A further postulate of this example is that there is no way to remove this person from the entrance other than to blow them up with explosives (which are conveniently on hand).

The above counterexample might seem fanciful, but it represents the stark conflict between individual and collective rights. Those who are against having the vaccine forced upon them by law may well believe, supported by expert evidence, that the vaccine poses a risk to their health and indeed their lives. On the other hand, there may also be cogent expert opinion that, if the vaccine is not administered, millions of additional people will die just as those in the cave will drown if the person blocking the cave is not sacrificed.

A court in South Africa must have regard to section 36 of the Constitution, which provides as follows:

36. Limitation of rights

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

The question will become, in a South African law context, whether it is acceptable in an open and fair society, based on human dignity and freedom, to compel all persons regardless of their consent to take the vaccine. This is the formulation required by section 36, but it does

not give a clear answer to the issue at hand. Does an open and fair society, based on these values, compel such persons or not?

These are very difficult questions to answer. Ultimately, a great deal will depend, in my opinion, on how dangerous the vaccine may be shown to be, by those who object to taking it. In practical terms, a South African Court will likely only be inclined to restrain the state seeking to administer a vaccine where there can be shown to be a real danger in its administration. If the one man blocking the cave can be removed only by taking a vaccine against his consent, and it will not kill him, this seems to deprive the philosophical example of much of its force. I would be surprised if a Court went against a state effort to vaccinate the entire population only on the basis of, say, a religious objection to taking medication, as opposed to the showing of potential physical harm. This modification really cuts off one of the dilemma's horns, and it would seem to be justifiable in these circumstances to compel vaccination without consent.

However, where those who object present expert views indicating serious potential health risks posed by a vaccine, the outcome of the section 36 analysis is less clear. The various considerations which we are enjoined by section 36 to consider do not clearly give us the answer: does human dignity require the rights of the collective to be upheld over the rights of a minority who object? Both sides would assert that they seek to protect the rights of citizens, but in different ways.

In such a case, where the executive proposes a rational course of action to deal with a pandemic, there should be a degree of judicial deference exercised by the Court. As I have

said previously, these are matters where it is arguably the proper role of the executive to make policy decisions, and the Court should exercise deference to the executive in this regard.

It might well be argued that since the concept of being “justifiable in a democratic society” features prominently in the section 36 analysis, it follows that the democratically elected persons in charge of the state are those to decide what must be done in a pandemic, or at least that there should be an appropriate degree of deference shown in this context. However, this can never be without its limits, and the application of section 36 in this context remains fraught with difficulty. Ultimately, a Court will be justifiably reluctant to stand in the way of the state’s legitimate attempts to deal with the pandemic.

Nicholas Taitz (director)

E : ndt@khl.co.za

JOHANNESBURG OFFICE

Address 4th Floor, The Forum, 2 Maude Street, Sandown, Sandton, 2196

Postal P O Box 782687, Sandton, 2146 | Dx 42, Sandton Square

Telephone (011) 669 6000 | **International** +27 11 669 6000

Website www.khl.co.za | **Email** enquiries@khl.co.za

Registration No. 2000/000004/21

CAPE TOWN

Address 10th Floor, 2 Long Street, Cape Town, 8001

Postal Address PO Box 1478, Cape Town, 8000 | Dx 49, Cape Town

Telephone (021) 405 4200 | **International** +27 21 405 4200