

**CRITICAL ANALYSIS OF VARIOUS PHILOSOPHICAL CONTROVERSIES OVER
HUMAN RIGHTS IN 2020: RIGHTS VS. OBLIGATIONS**

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ABSTRACT

All rights have corresponding duties attached to them and human rights is no exception to this. Society today is rapidly walking on the road to development be it social, economic or political. In this race, more often than not humans ignore their inherent rights and so the relationship between human rights and development today is divergent rather than being mutually convergent.

Firstly, the article will bring out in detail the analysis of two major kinds of duties and explain how failure to perform them leads to the human rights violation. In doing so the article analyses the two major arguments put forth by supererogation and subordination thesis. Further, the article will explore the question that Human rights despite being the subject of binding legal obligations are ignored in the process of the so-called development of mankind and society alike. In doing so the article will focus on a few but stark examples of human rights violations that took place in 2020 such as the #black lives matter campaign and the recently adopted Hong Kong National Security Law. Moreover, by public international law, human rights treaty obligations are not only legally binding member states but also bind all other states other than objector states and hence, as such they should be respected in all contexts, be it peace, war, development, politics, pandemic etc.

Finally, the article will conclude with the debate surrounding the patentability of the covid vaccine and the potential human rights violation that can be caused if the stakeholders do not perform their respective duties.

KINDS OF DUTIES

There are two broad kinds of duties namely positive and negative duties. Simply put, Positive duties require actions (to do something for others betterment) whereas negative duties require omission (abstain from doing something that might be foreseeably harmful to others).¹

There are two lines of arguments as far as positive vs negative duties are concerned.

The first line of argument is advanced by the supererogation thesis which denies the very existence of positive duties and says that it is not obligatory in the sense that they merely improve the well-being of others and their omissions have no legal consequence. Moreover, this argument says that is not required to be performed as for them there is no such thing as a duty that requires performance².

The second line of argument advanced by the subordination thesis which although does recognise the existence of positive duties but it considers positive duties as weaker than negative duties. So, this line believes that there can be duties to act but they are weak. It is largely believed by subordination thesis that positive duties are weak in the sense that they can only command moral force and have no legal sanctions and so are supererogatory acts or imperfect duty. Essentially, what they mean to say is that no one has a legal duty to perform them and no one's legal rights are violated by the absence of its performance. So essentially, these duties are without corresponding rights³.

So, both of these thesis comes from the line of argument that it's good to help the poor but they don't have a corresponding right to demand help.

Critical Analysis Of The Supererogation And Subordination Thesis

Critiques of supererogation thesis say that not all positive duties or actions are supererogatory such as a lifeguard is duty-bound to rescue drowning people. And this duty is indeed positive as

¹ Hugh Breakey, Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities, Wiley Online Library (Aug. 08, 2014), <https://onlinelibrary.wiley.com/doi/full/10.1111/1467-9248.12150>.

² Corinna Mieth, On human rights and the strength of corresponding duties, De Gruyter (Nov. 2011), <https://www.degruyter.com/view/book/9783110263886/10.1515/9783110263886.159.xml>.

³ Id.

it entails the act of rescue. And if the lifeguard doesn't save a drowning person on the beach then there will not only be moral but also legal sanctions⁴.

Critiques of subordination thesis focus on peter singer's drowning child case experiment wherein a person is made to imagine a drowning child in need of help⁵. The person who sees this knows how to swim but will it be justified for him/her to not save the child because he/she doesn't want to ruin his/her trousers. Can the person get away by saying that I didn't push the child or that it's not my child so why bother to save the child? Through this experiment the singer concludes that there is a very strong duty on the person to save the child because the less the helper has to sacrifice to help, the stronger is the duty. Moreover, failure to render assistance in cases of emergency such as the present one is also legally sanctioned in several European countries under the ambit of duty to rescue in Torts law⁶.

The reason for talking about these two kinds of duties is that it is under this ambit of imperfect duty that the concepts such as humanity, charity etc find a place and accordingly a good understanding of these two duties can help us understand the reason for violation of human rights.

BLACK LIVES MATTER PROTEST IN AMERICA- A CLASSIC CASE OF HUMAN RIGHTS VIOLATION

Facts of the Case

On 25 May 2020, George Floyd (African American) was arrested by American police because he was trying to use a 20-dollar fake note at a grocery store⁷. Agreed it was not only the right but also the duty of the police to arrest him. However, what went wrong here was the merciless treatment of Floyd by the police as during the arrest, the police officer had kept his knee on

⁴ Id.

⁵ Adrian Liu, How to think about a drowning child, Stanford Daily (Feb. 05, 2019), <https://www.stanforddaily.com/2019/02/05/how-to-think-about-a-drowningchild/#:~:text=The%20philosopher%20Peter%20Singer%20asks,where%20this%20argument%20is%20headed.>

⁶ Martin Vranken, Duty to Rescue in Civil Law and Common Law: Les Extrêmes se Touchent?, The International and Comparative Law Quarterly, Vol. 47, No. 4 (Oct. 1998), pp. 934-942.

⁷ PragadishKirubakaran, George Floyd Death: Trudeau Joins Black Lives Matter Protest in Canada, Kneels For 9 Mins, Republic World (Jun. 06, 2020), <https://www.republicworld.com/world-news/us-news/george-floyd-death-trudeau-joins-black-lives-matter-protest-in-canada.html>.

Floyd's neck for 9 minutes during which he kept saying I can't breathe due to which Floyd died⁸. The most glaring fact about this is that the entire incident happened publicly and the people present were constantly asking the police officer to remove his knee and handcuff him according to the procedure.

According to the facts of the case, the police officer had no right to deny the wrongdoer his right to life. Moreover, the police officer violated a negative duty legally imposed upon them by human rights laws requiring omission of acts that would take away the wrongdoer's life. This is more so because it defeated the entire concept of Separation of Powers that the USA follows and showed all of us how fatal it can be when the executive tries to become the judge.

Moreover, in this case, we cannot say that the onlookers had a positive duty to prevent the police from killing George Floyd as Singer's child drowning case can be differentiated from this on the following two bases: Firstly, there is a vast difference as far as the success rate of the positive act is concerned. In the child drowning case it was obvious that once you jump into the water you will come out saving the child and that will be the end of the problem. However, in this case, the problem would not have ended as the real problem is fighting the mentality that treats blacks as criminals. Secondly, in the child drowning case, there was no danger to the helper's life however, in the present case anyone who would have dared to come between the police and Floyd who have either gotten killed or would have had to face the serious consequence for allegedly causing hindrance in police's work.

Aftermath Of George Floyd's Death

This incident also brought to the limelight the bias of the US Police against the blacks. This was also the reason why the human rights organization namely 'Blacks Lives Matter' vociferously supported the protest against police brutality.

In the aftermath of brutal death which was killed in a way, the black lives matter protest in the USA. This protest highlighted several social issues one of which is a violation of human rights

⁸ Hamza Mohamed, EU shocked and appalled by George Floyd's Killing: Live updates, Aljazeera (Jun. 02, 2020), <https://www.aljazeera.com/news/2020/6/2/eu-shocked-and-appalled-by-george-floyds-killing-live-updates>.

by the power holders of society especially the issue of police brutality that came to the limelight. In the garb of their positive obligation to arrest the wrongdoers, society completely seems to forget the basic human rights of the accused.

Debate About The Black Lives Matter Protest

When this protest of black lives matter was gaining popularity, then something quite opposite was going on at the other end of the spectrum. Some People were questioning why only black lives matter, what about the lives of whites, aren't they equally important. So, they countered black lives matter with all lives matter⁹. However, those people failed to understand that the whole campaign never said only black lives matter but they only focused on blacks as historically blacks have been placed at a disadvantage.

According to this, an analogy can be drawn between feminism and black lives matter as both of these struggles are essentially about parity but they are focusing on one particular group only because that has been placed at a disadvantage historically and this is the only reason why there is no campaign or concept about manism in the society.

Is Violence During Protest Justified?

Another problem that happened during black lives matter protested that the campaign turned violent and that led to a huge loss of property. So essentially what happened here was that the original victim community (blacks) protested violently and in doing so they breached their negative duty thereby creating another victim community (people who were harmed during protests). To overcome this police force again fired tear gas and rubber bullets on protestors. According to my such eye for eye approach cannot be justified as far as human rights are concerned as no human including a victim has the right to take the right to property of another individual as even that is a basic human right because this would create a vicious cycle in perpetuity that will in no way further the cause of human rights.

⁹ Christina Capatides, Why saying "all lives matter" communicates to Black people that their lives don't, CBS News (Jul. 08, 2020), <https://www.cbsnews.com/news/all-lives-matter-black-lives-matter/>

However, a deeper analysis of the violence that took place during the protest would reveal that the justification used by the police departments to justify its use of tear gas and other modes of violence ignores the video recordings that show that police kettled peaceful protesters before the curfew came into effect and also blocked all paths to disperse¹⁰.

Moreover, in the above mentioned example of riots, the police indeed had a duty to “prosecute people who looted and vandalized, however, the police crossed the line because of the brutal treatment that is offered to the protestors that killed a few people including a 22-year-old person named Sean Monterrosa¹¹. The police department by using excessive force violated rights to free expression of the initially peaceful protesters and the injuries to the protestors amounts to a violation of the basic right to health. So essentially the police department that was supposed to protect the public has indeed become a threat to public safety¹².

The Larger Problem

It is contended that despite the harm caused to the protesters, and violations of international human rights law, till now the trend has been that the police officers and their supervisors are unlikely to face any disciplinary or legal consequences. This is due to a deeply entrenched system that prevents meaningful scrutiny and allows officers and police departments to commit abuses with impunity in the garb of protecting society from such criminals.

Moreover, the entire campaign about black lives matter was about the deep-rooted racial prejudices that people in general hold against blacks. This topic of racism not only exists in the USA but exists in various parts of the world across all walks of life.

¹⁰ Black Internationalist Unions, Systemic Police Brutality and Its Costs in the United States, Abolition Journal (Oct. 12, 2020), <https://abolitionjournal.org/kettling-protesters-in-the-bronx-systemic-police-brutality-and-its-costs-in-the-united-states/>.

¹¹ Janie Har, More than 100 charged with looting, assaults in California, The Press Democrat (Jun. 03, 2020), <https://www.pressdemocrat.com/article/news/more-than-100-charged-with-looting-assaults-in-california/>.

¹² Morgan Simon, Stop Focussing on Looting and Start Focusing on Police Accountability, Forbes (Jun. 01, 2020), <https://www.forbes.com/sites/morgansimon/2020/06/01/stop-focusing-on-looting-and-start-focusing-on-police-accountability/#2325c036c1a7>.

A similar example exists in India wherein according to a survey conducted by the Centre for the Study of Developing Societies (CSDS), more than 50% of police officers believe that Muslims are naturally more likely to commit more crimes¹³. Such a preconceived notion leads to a greater number of wrongful convictions.

Is There A Workable Solution To Racism And Police Brutality That Violates Human Rights?

Some criminal punishment scholars believe that more human rights violations happen in presence of militarized police officers than would have in their absence¹⁴. According to them since police forces enjoy immense powers with impunity they very often misuse it by acting like armed animals rather than compassionate and helpful public servants. Accordingly, they suggest the policing done by the police officer must not be without fear of consequences and so must be regulated to combat human rights violation by police brutality. However, according to me, such a solution is no doubt ideally correct but the implementation of the same requires rethinking of how laws are enforced and how social problems are addressed at large.

According to me, to solve this issue, we need to at a very micro level first acknowledge it and try to find out the root causes of the generation of such biases against any particular community be it blacks or Muslims for that matter. Moreover, it is very important to point out and discuss the racial biases that exist in people and determine the reasons as to why they exist to eradicate it from the roots. However, having said that individuals alone will not be able to bring about such a massive change so there needs to be an institutional change at a macro level.

HONG KONG NATIONAL SECURITY LAW VIOLATES HUMAN RIGHTS

Background of Hong Kong and China's Relation

The aim of this article is not to go into the far more complex relationship between Hong Kong and China but for the sake of a proper beginning, it would briefly delineate their relation. Hong Kong is not a completely separate country but is accorded a special administrative region's status

¹³ Vishnu Padmanabhan, [What data says about police biases](https://www.livemint.com/news/india/police-prejudices-what-the-data-says-11580808263948.html), Live Mint (Feb. 04, 2020), <https://www.livemint.com/news/india/police-prejudices-what-the-data-says-11580808263948.html>.

¹⁴ Nathan Robinson, [Across America, police are responding to peaceful protests with violence](https://www.theguardian.com/commentisfree/2020/jun/01/george-floyd-violent-rioters-america-police-officers), The Guardian (Jun. 01, 2020), <https://www.theguardian.com/commentisfree/2020/jun/01/george-floyd-violent-rioters-america-police-officers>.

under the Chinese mainland¹⁵. The existence of one country two systems allows capitalism (Hong Kong) and socialism (China) to coexist.¹⁶ Due to Chinese interference in its affairs, there has been long civil unrest in the region. The basic law of Hong Kong is governed by its mini-constitution, which provides for its separate legal and judicial system.¹⁷ Majorly, the military and international relations of Hong Kong are managed by China as it is not a full-fledged country yet and is suffering from an identity crisis.

The National Security Law

The Hong Kong National Security Law introduced on June 30, 2020, raises serious questions about the violation of human rights and fundamental freedoms of people. The law not only applies to the Hong Kong nationals who reside on its territory but also have extraterritorial jurisdiction in the sense that it extends its application to Hong Kong nationals who commit an offence under the law elsewhere on some other territory.

Essentially this law gives Beijing unprecedented judicial powers in Hongkong such as jurisdiction over cases, secret trials without a jury in cases involving state secrets etc. This law questions the right of self-determination of the people of Hongkong. The law also endangers Hongkong's territorial integrity by questioning its independent legal system guaranteed by its mini-constitution. Moreover, unlike China where the press and all forms of public commentary are immensely monitored by the government, Hong Kong's constitution guarantees freedom of speech, expression and press in the public sphere.

The subject matter of the law entails secession, subversion of state power and terrorist activities.¹⁸ Nonetheless, I believe that the subject matter is not as disturbing as their definition inside the law is. According to the law damaging public transport and specific public facilities

¹⁵Prableen Bajpai, Hong Kong vs. Mainland China: What's the Difference?, Investopedia (Jun. 02, 2020),

<https://www.investopedia.com/articles/investing/121814/hong-kong-vs-china-understand-differences.asp#:~:text=Key%20Takeaways,country%2C%E2%80%9D%20which%20is%20mainland%20China>.

¹⁶ Chien-Min Chao, One Country, Two Systems: A Theoretical Analysis, *Asian Affairs: An American Review*, Vol. 14, No. 2 (1987), pp. 107-124.

¹⁷ Explained Desk, Explained: How China is seeking more control on Hong Kong, *The Indian Express* (May. 27, 2020), <https://indianexpress.com/article/explained/china-hone-kong-basic-law-explained-6423313/>.

¹⁸ Palki Sharma, Here's How China is Killing democracy in Hong Kong, *WION News* (Jul. 02, 2020), <https://www.wionews.com/world/heres-how-china-is-killing-democracy-in-hong-kong-309996>.

would come under the ambit of terrorism.¹⁹ Moreover, anyone who takes part (actively, tacitly, violently or even non-violently) in acts aimed at splitting the country would be liable. According to my this law curtails freedom of expression in the widest possible manner.

The law empowers the police to collect evidence, byways such as phone tapping and spying thereby completely undermining the right to privacy of an individual. Moreover, the officials of the national security agency established under the law will not be subject to the jurisdiction of the Hongkong government and will not be bound by local law while carrying out their duties.²⁰ Accordingly, they can undoubtedly violate human rights under the garb of performance of their positive obligations and worse still is the fact that they can get away scot-free. In a way, the law sets in motion the demise of Hong Kong's legal system by envisaging the transfer of cases that involve national security questions to china. This aspect is controversial as China is known to have an opaque judicial system where more often than not accused are denied the right to open and fair trial. Moreover, activists, lawyers and other opponents of the government are often subjected to torture and extra-legal detention while awaiting trial.

Critical Analysis Of The Law From The Perspective Of Human Rights

The sole reason cited by Beijing Official for such a controversial piece of legislation is the need for restoration of peace in Hong Kong.²¹ With all due respect, this reasoning is completely flawed as I believe that Every government has a right as well as the duty to ensure peace in society, however the same cannot be restored at the cost of basic human rights. Moreover, the world community (countries such as France, the USA, Britain, Canada etc.) has responded to this violation of human rights by suspending their fugitive extradition treaties with Hong Kong.²²

¹⁹ Javier C. Hernandez, Harsh Penalties, vaguely defined crime: Hong Kong's Security Law Explained, The New York Times (Jul. 13, 2020), <https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html>.

²⁰ Nandini Sharma, Hong Kong's National Security Law: Implications for India, ORD Online (Oct. 08, 2020), <https://www.orfonline.org/research/hong-kongs-national-security-law-implications-for-india/>.

²¹ Tony Cheung, Beijing slams foreign 'interference', 'malicious slander' after UN rights experts' letter of concern on Hong Kong national security law, South China Morning Post (Sept. 04, 2020), <https://www.scmp.com/news/hong-kong/politics/article/3100214/national-security-law-un-rights-experts-send-beijing-joint>.

²² Chris Lau, Hong Kong national security law: Jimmy Lai arrest, sanctions war and extradition reprisals mark the legislation's second month in force, South China Morning Post (Aug. 31, 2020), <https://www.scmp.com/news/hong-kong/politics/article/3099442/hong-kong-national-security-law-jimmy-lai-arrest-sanctions>.

Google, Facebook and Twitter have also officially cut off ties with Hong Kong as the law empowers the police to request data as well as demand removal of content.²³ On a concluding note, I would just say that it is clear that in a way Hong Kong is on a road to becoming the next China.

COMPETING RIGHTS AND DUTIES IN THE DEVELOPMENT OF COVID-19 VACCINE

To overcome the pandemic, vaccine developers all over the world are reporting promising results in the field of covid vaccine invention. Accordingly, it is very likely that sooner or later the vaccine will come out in the market and impact society in a threefold manner:

Firstly, it will be the solution to the pandemic. Secondly, however, it will create another major public health question that is in light of the anti-vaccination activists can the governments all over the world make vaccination compulsory. Thirdly, the question of patentability of the vaccine remains highly controversial.

Now, from the purpose of human rights, I believe only the second and third impacts are debatable and so I will be focusing on the same. Talking about the competing interests of both the state and its subjects involved in making vaccines compulsory there are a few major points. Firstly, making vaccines compulsory is a violation of an individual's right to personal autonomy that includes within its ambit the right to bodily integrity that is also recognised by way of the very first article of the Universal Declaration of Human Rights.²⁴

Accordingly, since humans are endowed with reason and conscience, they are capable of deciding what can and more importantly cannot be done with their bodies. So we can see that while UDHR tacitly supports such a right, it nowhere expressly talks about the rights to refuse

²³ Newley Purnell, Google, Facebook and Twitter Suspend review of Hong Kong requests for user data, The Wall Street Journal (Jul. 07, 2020), <https://www.wsj.com/articles/whatsapp-to-suspend-processing-law-enforcement-requests-for-user-data-in-hong-kong-11594034580>.

²⁴ Jaunius Gumbis, Vytaute Baciaskaite & Jurgita Randakeviciute, Do Human Rights Guarantee Autonomy?, Cuadernos constitucionales de la Catedra Fabrique Furioceriol, Universitat de Valencia, Vol No. 62/63 (2011), p. 77-93.

life-saving medical treatment.²⁵ And this exactly is the line of argument due to which the governments want to make it compulsory as the states have an international obligation to protect their citizens from life-threatening diseases of which covid-19 is a classic example.

So essentially the entire debate hinges upon the question of whether the human right of individuals is subject to the state's obligation which is also in a way in furtherance to the basic human right to life or is it vice-versa. Now focusing on the question of patentability of covid-19 vaccine, it is a war between patent vs patient's rights. So, the patent right is a right to property which is recognised as a basic human right under article 17 of the UDHR. Moreover, clause 2 of the same article ensures that no one is arbitrarily deprived of their property. Now, what amounts to arbitrary deprivation is again very subjective and changes from time to time on a case to case basis.

So, it's obvious that anyone who comes up with the covid vaccine will apply for its patentability. However, in my opinion, it should not be patented as it is a life-saving drug and any monopoly will deny its just access to all.

According to me, it should either be compulsorily licensed as a compulsory licence can be granted in circumstances of national emergency and extreme urgency such as this pandemic or be acquired by the State for this pandemic. Moreover, the United Nations Human Rights Council has repeatedly upheld the supremacy of human rights, such as the right to life which includes health over trade and other intellectual property rights.²⁶

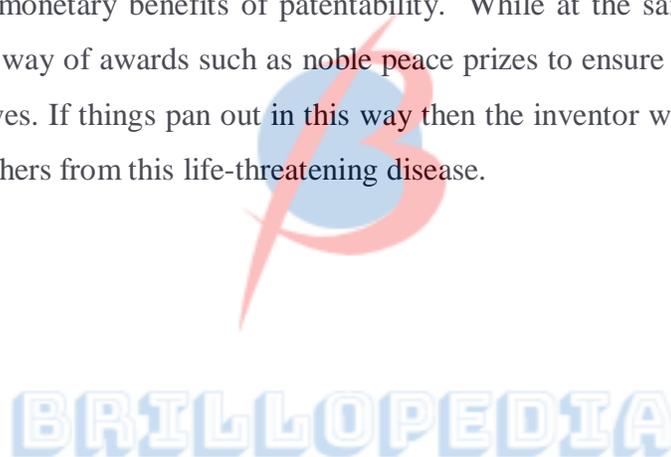
However, the issue is not as simple as it may appear because the argument put forth on behalf of the prospective patent holders is also equally if not more valid. They say that ironically enough patent laws all over the world are balancing private property rights against the public interest by allowing the invention in the public domain after a particular no of years, in India that is 20

²⁵ Claire Breen, Should a COVID-19 vaccine be compulsory — and what would this mean for anti-vaxxers? The Conversation (Aug. 06, 2020), <https://theconversation.com/should-a-covid-19-vaccine-be-compulsory-and-what-would-this-mean-for-anti-vaxxers-143742>.

²⁶ Justice Prabha Sridevan, Patent and Patient Rights in COVID-19: Is the Right to Exclusivity a Hamlet Question?, The Leaflet (Oct. 08, 2020), <https://www.theleaflet.in/patent-and-patient-rights-in-covid-19-is-the-right-to-exclusivity-a-hamlet-question/#>.

years.²⁷ However, the entire reason for patenting is to incentivise and encourage inventions by awarding the inventions patent rights to enjoy maxim monetary profit and fame. So, if the vaccine is not allowed to be patented on the ground of public policy there will be absolutely no incentive left for the people to innovate. Moreover, just like the right to life, the property right is also recognised as a basic human right, and there is no absolute rule that the latter should always give way to the former in case of conflict. So, the conflict of property vs. right to life remains without there being any mutually agreeable solution for both parties.

In my opinion, the only way to solve this is that the government must grant a lump sum or any monetary compensation that both parties agree upon to compulsorily license the vaccine. So, this step takes care of the monetary benefits of patentability. While at the same time the inventor must be recognized by way of awards such as noble peace prizes to ensure that the inventor gets the fame, he/she deserves. If things pan out in this way then the inventor will have a very strong positive duty to save others from this life-threatening disease.



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²⁷ Vijay Pal Dalmia, Patents Law in India - Everything You Must Know, Mondaq (Dec. 18, 2017), <https://www.mondaq.com/india/patent/656402/patents-law-in-india--everything-you-must-know#:~:text=The%20term%20of%20every%20patent,from%20the%20international%20filing%20date.>