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Critiques on Contemporary Discourse of International Human Rights Law: a Global South Perspective

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ABSTRACT

International human rights law faces various critiques among scholars such as Mutua and Posner. Mutua claims that international human rights law fails to accommodate cultural values, while Posner demands its effectiveness. Referring to Langford, this paper uses a critical analytic approach to evaluate Posner's critique and Mutua's main thoughts. Langford's critiques of Mutua and Posner are significant in mediating the discourses by providing current evidence. While opposing Posner and Mutua's critiques of international human rights law, this paper supports Langford's counter critiques for three reasons. First, Langford's comprehension can ensure that IHRL not only accommodates individual rights but also communal rights. Second, Langford's recent study indicates the effectiveness of international human rights law. Third, Langford develops a new optimism that social rights are justiciable although the strategic idea of integrating human rights with development still needs to be elaborated further. Therefore, it is significant to follow Langford's suggestion to optimise international human rights law as the most recognised general standard to prevent human rights violations against abusive power.

1. Introduction

"The arc of the moral universe is long, but it bends toward justice."
(**Martin Luther King** in Schroeder, 2012).

After more than seven decades, International Human Rights Law (IHRL) has faced various criticisms from scholars (Altwicker, 2020; Bartels, 2018; Fiddian-Qasmiyeh, 2021; Fletcher, 2022; Fortin, 2022; Jones, 2021; Kattel, 2022; Perera, 2021). IHRL is a set of international rules, norms, and principles to be made and agreed upon by the international community to be used as a general standard in achieving the rights and dignity of all human beings without discrimination (Altwicker, 2018; Contesse, 2021; Duffy, 2021). Human Rights (HR)

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instruments include the Universal Declaration of Human Rights (UDHR), nine core treaties, general comments from the treaties, and various Human Rights Commission resolutions. In "The Twilight of Human Rights Law", Posner questions the effectiveness of IHRL and claims that the ratification of HR treaties is unsuccessful in influencing and reducing HR violations (Posner, 2014). Moreover, Mutua, in "Human Rights: Political and Cultural Critique", argues that IHRL is a "Western" concept and fails to accommodate cultural values to protect communal rights (Mutua, 2002). The two statements of the figures departed from the view that human rights cannot be seen in a universal framework. De Sousa Santos, in "Human rights as an emancipatory script?" as cited by Meekosha and Soldatic, expressed a similar view, where the universality of human rights can only be justified when viewed from the perspective of the Western countries (Meekosha and Soldatic, 2011).

Arguments related to the nature of HR values cannot be separated from the discourse that distinguishes between countries in the world based on their geographical location, namely the Global North and the Global South (Beall, 2022; Dados & Connell, 2012; Haug et al., 2021; Kowalski, 2021). However, the two terms not only represent geographical aspects but have developed through observations of changes in social structure, political movements, and the strengthening or weakening of each country's economy, which become new parameters in determining or classifying the position of each country in the group. Historically speaking, poverty, hunger, low quality of education, high rates of disease spread, and authoritarian government are generally some indicators used to describe the living conditions of people in the South (Fuseini et al., 2024; Garrido, 2021). However, recent developments continue to show that improvements in social, political, and economic governance can improve conditions in Southern countries, although the negative situation, as previously mentioned, can still be found (Kowalski, 2020).

The discrepancy between the Global North and the Global South also affects the perspective on respecting and protecting HR in the two regions. The Southern region generally sees HR as a product of developed countries, which tends to take longer to implement when considering the previously mentioned negative parameters. According to Bartelson, as quoted by Langford, HR values have no sociological legitimacy to be applied in the Southern Hemisphere, considering that the core values that underlie the people in the region fundamentally differ from the values adopted by Northern Hemisphere countries. Bartelson, who tends to agree with Posner and Mutua's opinion, argues further that the imposition of universal HR values can impact the emergence of resistance at the grassroots, which can trigger social and political disintegration (Langford, 2018).

Previous research on international human rights law has predominantly centred around the Western perspective, often overlooking the diverse experiences and challenges faced by countries in the Global South. This focus has resulted in a significant research gap, failing to adequately capture the nuanced realities and unique perspectives prevalent in Southern Hemisphere nations (Ahdanisa & Rothman, 2021; Boer, 2022; Mende, 2021; Sun, 2022; Weiss & Wilkinson, 2021). In contrast, this research represents a pioneering effort to address this gap by explicitly examining the spectrum of international human rights law through the lens of the Global South. By foregrounding the voices and experiences of countries traditionally marginalised in mainstream discourse, this study not only fills a critical void in the literature but also offers a fresh perspective that enriches our understanding of human rights challenges and solutions on a global scale.

Regarding these statements, Langford's counter critique in "Critiques of Human Rights" can mediate the discourses by providing strong evidence supporting IHRL. Referring to Langford, this paper uses a critical analytic approach to evaluate Posner and Mutua's main arguments. This paper supports Langford's counter critiques for three reasons, which are

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elaborated in three sections. The first section is how Langford's counter critique on Mutua provides a meaningful argument and can comprehend that the concept of IHRL accommodates both individual and communal rights. The second section elaborates on Langford's study, which acknowledges the progressive advances in HR enforcement and social movements. The third section validates Langford's study that social rights are justifiable and bring equality towards vulnerable groups. Finally, this paper provides concluding sentences with recommendations.

2. Research Methods

This manuscript was written based on the results of socio-legal qualitative research that was theoretically first introduced by Ziegert in 2005 (Bedner et al., 2012). Further back, citing Wiles and Campbell first developed Banakar and Travers, the socio-legal method in legal research in the '70 (Banakar and Travers, 2005). This method is used to distinguish between the process in question and the study of the sociology of law, which is often equated. According to Wiles and Campbell, the difference between socio-legal and sociology of law lies in using social studies or approaches in the research to be carried out (Herklotz, 2020). In contrast, the sociology of law tends to shift the focus of researchers from the core legal studies to understanding social sciences, while socio-legal only uses social science studies to analyse the substance of research material or data collection (Banakar and Travers, 2005). Banakar and Travers cite Wheeler and Thomas, who stated that socio-legal is an alternative way to conduct interdisciplinary research between legal and social studies to look at the position and enforceability of law as an entity where the law exists or applies (Banakar and Travers, 2005). Specifically, in this study, related to the criticism of IHRL, qualitative socio-legal research was used with secondary data sources because there were limitations in mobility to obtain primary data directly. The use of secondary data in socio-legal research can be justified because, in every composition of data, primary or secondary, there is still an empirical dimension (Nalle, 2015).

3. Discussion

3.1. Discourse on IHRL: Between Individualism and Communalism

First, among the criticisms of IHRL, one is whether IHRL accommodates communal rights. Mutua argues that conceptualising the "universality of human rights" is problematic. According to Mutua, this concept is considered to override cultural values that have taken root in a pluralistic society and compelling what happened to the movement of African values in the 1970s and 1980s of Asian values. However, communal rights and the right to development remain unpopular (Mutua, 2002). Therefore, Mutua believes that IHRL was set up to protect only individual rights rather than communal rights. For example, Mutua calls his own experience and other Africans who were forced to convert to Christianity by a colonised Western country (Mutua, 2002). This kind of human rights violation is probably irrelevant and needs to be addressed. Still, it could happen in a minimal number of cases, particularly in a country under an authoritarian regime. However, many constitutions of democratic countries have articulated that the right of proselytism is not absolute. Mutua considered that IHRL did not protect the communal rights of Africans to defend their native religion, where their religions should not be disturbed through proselytism.

Thus, the conceptual gap of IHRL can be resolved by reconciling universalism and relativism to accommodate the protection of communal rights through state discretion. According to Langford, States may utilise the limitation clause or margin appreciation doctrine to apply certain restrictions on implementing human rights as long as the

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restrictions are carried out strictly, without intending to violate any essential rights, and not aiming to discriminate against certain groups of people (Langford, 2018). Mutua needs to address these aspects when discussing the right of religious proselytism. Mutua focuses only on the demand to amend IHRL and suggests that the right of proselytism should not be absolute. Mutua also implied that the right to thought dissemination must be limited (Mutua, 2002). However, Mutua must remember that this limitation clause is accommodated in IHRL. Mutua's arguments indicate he does not comprehend the limitation clause in the International Covenants on Civil and Political Rights (ICCPR). Article 18 (3) and Article 19 (3) of ICCPR clearly state that the right to expression and manifest religion are not absolute rights and, therefore, can be limited. The domestic and regional courts commonly apply the limitation clauses when dealing with such cases. The reservation of specific provisions of the human rights treaties provides a persuasive way for countries to prepare their domestic legal readiness to carry out the agreement's contents as consistently as possible (Goodman, 2002). Mutua's critique is irrelevant since IHRL provides a way to protect communal rights.

Moreover, it relates to Mutua's critique that HR is a product of the West because Western countries and their allies designed it; therefore, it is unsuitable for use in third-world countries (Mutua, 2002). In contrast, Langford's counterargument provides vital evidence and claims that IHRL protects individual and communal rights and gains social and legal legitimacy. First, according to Glendon, cited by Langford, the concept of HR adopts both East and West values in which non-Western States and experts had powerfully contributed to the drafting of UDHR (Langford, 2018). Both Eastern countries, such as the Soviet Union, Lebanon, China, and Chile, and Western countries, the United States, France, Australia, and the United Kingdom, drafted a preceding worldwide study and the declaration itself. Human rights treaties have legal legitimacy due to the many ratifications and implementations (Neumayer, 2005). Second, IHRL is being utilised through social movements everywhere. Civil society in various countries uses IHRL as a framework to fight for human rights and protect against human rights violators (Merry & Levitt, 2017). Therefore, Mutua's criticism seems to have ruled out the role of developing countries in forming the IHRL foundation. These services should be recognised and appreciated if developed countries' role brings benefits. If there are deficiencies in the IHRL framework and its implementation, it is a shared responsibility to make improvements.

In general, Mutua's criticism of IHRL puts the idea of HR as technical and individualistic values that derogate HR's goals to ensure the realisation of distributive justice and communal community participation. Langford breaks down this criticism into several parts to extract the essence of the criticism he wants to convey to produce an appropriate counterargument. There are four classifications of criticism of HR's position in the realm of international law, namely material, democratic, instrumental, and epistemological criticisms (Langford, 2015). The material criticism of the IHRL was expressed by D'Souza, as quoted by Langford, as a weakening of its enforcement efforts when compared with other international legal instruments, such as global economic law, which contains economic rights but tends to be individualistic in the practical implementation, in which the protection of economic rights is only felt by interested business subjects (Langford, 2015). Thus, IHRL, which is supposed to protect as many parties as possible, has a weaker position regarding business actors' rights. Moreover, the IHRL enforcement is generally quasi-judicial. Thus, structural weakening occurs to protect IHRL.

Critiques of IHRL in a democratic context focus on the weaknesses of IHRL's institutionalisation. The lack of agency that occurs because the IHRL discourse often clashes with the concept of state sovereignty makes it challenging to protect HR, primarily through activism. Madlingozi shared, based on his experience in various countries, that the weak

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position of IHRL in protecting HR activists led to the emergence of new victims to reduce victims, which is very ironic (Langford, 2015). Furthermore, Mutua's critique of IHRL also touches on the epistemological aspect, which underlines the universalism of IHRL as the most significant weakness because of its nature, which is considered a core value, thus overriding group or communal interests (Langford, 2015). The last group of critics, instrumental, points out that IHRL's universalism in theory is contradicted by its practice, which tends to be regionalist or nationalistic. The existing IHRL instruments are centralised, but their implementation in the field obscures this centralised nature with regional or national interests, which often need to align with the IHRL's objectives. Thus, IHRL is considered only an isomorphic prototype that becomes a facade investment aiming to trick its weaknesses (Langford, 2015).

Various criticisms from the groups described above in Langford's writing are supported by empirical evidence showing that IHRL does not significantly impact civil and political rights protection, as stated by Hafner Burton and Ron. Activism by NGOs or similar community institutions that operate based on a right-based approach tends to be localised and tied to local power. Hence, the universality of IHRL is only a theoretical sweetener. Some examples cited by Langford include those written by Rajagopal, namely in the form of the weak role of the judiciary in India in protecting people's rights, which has an impact on mass evictions such as the modernisation of urban governance that displaces street vendors and the abolition of land rights for farmers and indigenous communities in rural areas. The eviction of people experiencing poverty in Cape Town, South Africa, as written by Pieterse, is also a clear example of how weak IHRL is in achieving its goal of implementing the universality of human rights values because even though the court decision in the Grootboom case has stated that the national housing program initiated by the South African government unconstitutional, the eviction is still carried out (Langford, 2015).

The same practice also occurs in Indonesia, where the role of the Constitutional Court as the Guardian of the Constitution, which includes respect for and protection of human rights values, has a small empirical impact. In various legal considerations of its decisions, the Court often pays attention to the human rights clauses contained in international human rights declarations and covenants such as the UDHR and the ICCPR. Moreover, the Constitutional Court's decision also has the nature of erga omnes, which means binding for all parties, so it can be interpreted that the decision is a form of law or part of a new law that must be obeyed and implemented. Unfortunately, the constitutional awareness of the Indonesian people, especially policymakers, to follow the Constitutional Court's decision is still under the radar. Hence, the IHRL values the Court uses as part of its legal considerations must be appropriately implemented (Nugroho, 2019).

Related to the argumentative theory and empirical examples that show the weakness of the IHRL that seems forced to be universal, Langford, in his writing, attempts to examine practice in the broader scope, such as his findings on evictions, in which the role of judicial institutions that use IHRL in the majority its decisions can prevent evictions by increasing the sensitivity of the community and the government together to oversee the implementation of development programs. Likewise, the role of NGOs is to obtain moral and legal support structurally through court decisions. Thus, downstream, all elements of society can communally 'force' policymakers to think and produce more innovative development policies based on respect and protection of human rights values (Langford, 2015).

Langford also revealed that the weakness of criticism of IHRL is that the legal instrument is positioned as a rigid ideology. Human rights values are often widespread and present new challenges on various political spectrums. The fault of IHRL is always considered a weapon of opposition, so emerging perspectives usually show their weaknesses in dealing with power.

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According to Langford, human rights are not an ideology but a critical norm. Thus, as with other norms in social life, human rights can be used as a tool for marginalised people to stand together with different communities and side by side with the government in fulfilling their rights and carrying out their obligations (Langford, 2015). That is why the IHRL can be justified as a universal legal instrument that can guarantee communal rights because, like a boat, the IHRL is not a rigid boat but the oar used to direct the boat's movement. In short, this paper supports Langford wisely, viewing Mutua's critique as a whip for advancing IHRL. However, Langford is more optimistic and progressive in ensuring that IHRL accommodates individual and communal rights.

3.2. The Current Studies Evidence of the Effectivity of IHRL

The second critique of IHRL is concerned with its effectiveness. Posner's study, which was done in 2012, argues that the ratifications have less impact on decreasing HR violations since some states do not comply with IHR treaties (Posner, 2014). Posner's research findings report that from the time of the ICCPR's entry into force in 1976 to 2012, 170 countries ratified the ICCPR, but HR protection in some countries, such as China or Russia, was not good enough (Posner, 2014). Moreover, the United Nations HR monitoring system is ineffective and inefficient, and the States do not always follow its recommendations (Posner, 2014). However, Posner's study generalised the conditions in authoritarian countries such as China and Russia. Posner ignored many other facts that most members of the HR treaties enhance in protecting human rights.

Langford's countering critique is more optimistic and objective, considering that IHRL's enforcement is happening internationally and nationally. First, Langford refers to Simons's argument that the effectiveness of the law changes from time to time, depending on the country's political restraints (Langford, 2009). For example, on the international level, in contrast to Posner's data, Langford refers to White, who states that the Universal Periodic Report (UPR) mechanism and the European Court of Human Rights (ECtHR) are quite successful (Langford 2018). Second, Langford cites Sikkin's recent study and indicates that one of the positive effects of ratification is the change in States' attitudes and willingness to protect HR (Sikkink, 2017).

Furthermore, the effectiveness of IHRL should be evaluated through international monitoring mechanisms and domestic adjudication. Langford indicates that domestic adjudications are effective around continents. For instance, in the last two decades, around two hundred thousand cases have been brought before the national court in Brazil (Langford, 2009). Langford argues that IHRL has been embedded in constitutional laws to accelerate the protection of economic and social rights, such as social security, health care, and education in many countries (Langford, 2018). Many studies present that constitutional courts in various countries play an important role in adjudicating human rights violations (Bokshi, 2018). This adjudication has brought benefits to large populations or obligation erga omnes, such as in Latin America (Langford, 2018). For example, the Constitutional Court of the Republic of Kosovo has adjudicated with the legally binding decision of Case No. KI08/09, Applicant, the Independent Union of Workers in Ferizaj, to claim for compensation of unpaid salaries of 572 employees of the socially owned IMK Steel Pipe Factory of EUR 25.649.250, 00 (Bokshi, 2018). Many other cases brought before the Constitution Court of Kosovo demand the protection of both civil and political rights as well as economic, social, and cultural rights such as the rights of peaceful enjoyment of their possessions (Case No. KI65/15), the right of payment of unpaid salary (Case No. K191/16), the right to having property register (Case No. K165/15) can be looked at Bokshi studies (Bokshi, 2018). See also the most prominent Constitutional Court in the world, such as in the U.S., Japan, and Germany.

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In line with the examples presented by Langford above, the latest practices related to climate change litigation are also starting to occur. They are getting more appreciation from judicial institutions in various countries. According to data from the United Nations Environment Program (UNEP) in the Global Climate Litigation Report: 2020 Status Review, 2017, at least 884 climate change cases were brought to court in 24 countries. In the next three years, cases nearly doubled to 1,550 in 38 countries (Law Division, 2020). In general, these lawsuits are filed together, or class action lawsuits, which show that in new phenomena such as climate change, litigation which is closely related to various human rights such as the right to life and the right to a safe, clean, healthy, and sustainable environment, comes from global interests are contained in various international legal instruments. Still, their implementation and enforcement rely heavily on the internal role of each country.

Moreover, IHRL influences the development of new rights in many European countries, such as the rights of LGBT (Langford, 2018). Through social movements, many countries reform their domestic laws or utilise their various courts to accommodate human rights protection, such as in criminal and administrative courts. Langford demonstrates to Merry-Levitt that vernacularisation has happened in many countries, such as Hong Kong and the U.S.A. Even though it occurs in authoritarian regimes like China, people adopt IHRL to fight for their rights (Langford, 2018).

Hence, Posner's study seems out of date or only relevant until 2012 but fails to acknowledge that HR enforcement does not only happen internationally but also domestically. Posner's argument is not strong enough since Posner does not look deeply into how legal institutions applied IHRL in various cases because Posner sees IHRL as a rigid-ism, so the universalism of IHRL is understood as an unimplementable entity (Posner, 2014). In fact, according to Langford, effectiveness of IHRL is a dynamic and fluctuating entity, highly dependent on space and time, as well as the willingness and the ability of a country to use its power to protect the human rights of its citizens (Langford, 2018).

3.3. Social Rights Are Justiciable

In this section, Langford counter-critiques Nickel's argument, claiming that human rights are non-justiciable. Nickel in Langford critiques that IHRL makes it challenging to achieve distributive political equality and natural resources (Langford, 2018). Nickle also argues that HR fails to address equality between disempowered, vulnerable, and empowered (Langford, 2018). However, Langford argues that integrating human rights and development would help reach equality for vulnerable groups still marginalised by the States (Langford, 2018). Langford focuses on material equality, such as economic, social and cultural rights. Langford believes that equality can be achieved through sustainable development programs. He elaborates on his other study concerning the MDG's problematics and offers six ways to resolve the problem of poverty. However, Langford's strategy to integrate human rights and development must be elaborated further.

For example, Langford's research in 2014 published in Housing Rights Litigation: Grootboom and Beyond, it can be seen that litigation efforts based on IHRL values are very influential on the development of the fulfilment of community rights in several areas, especially regarding the right to a better place to live. Its form is a communal or shared right. Some cases investigated include Grootboom, Valhalla, Modderklip, Olivia Road, Bardale, Joe Slovo, Makause, and Mandeville. Based on the analysis of the quo cases, primarily related to practice after the decisions on these cases, there are several findings such as the absence of degradation in the quality of housing by 88%, 63% improvement in services or provision of emergency shelter for the short term, availability of housing formally within a period of 5 and 10 years by 50% and 100% respectively, an increase in the quality of communal organisations

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by 69%, and the occurrence of policy changes to become more innovative by 75% (Langford, 2013). This concrete example is one of the many precedents that show that social rights have standing to be positioned as a real effort to obtain justice.

Langford also provides some evidence that social rights are justifiable. For instance, various social rights, such as education rights, were successfully claimed through the courts in Brazil, where the decision benefited 78% of citizens, including marginal groups (Brinks and Gauri, 2014). In addition, Langford noted in Latin America and Colombia, claiming the fulfilment of the right to health was also successfully decided by the court in dealing with the HIV/AIDS crisis and other health policies. These examples verify that social rights are justifiable and bring equality towards vulnerable groups.

4. Conclusion

Contemporary critiques of IHRL are part of a long arc to justice. In contrast to Posner and Mutua, Langford is more optimistic and comprehends the historical context, conceptual balance, and the progress enforcement of IHRL. Rather than lament the discourse of universalism versus relativism that never ends or lament the lack of effects of ratification of HR treaties, it is significant to follow Langford's suggestion to optimise IHRL as a framework and the most recognised general standard to prevent HR violation against the abusive power. In addition to supporting the integration of human rights and development, it is urgent to increase the country's commitment to HR protection through simplifying international HR monitoring mechanisms, raising people's awareness of HR in each country, and providing experts to support social movements or vernacularisation process in the national level.

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