

Protecting Human Rights in Arbitration and Alternative Dispute Resolution

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Kariuki Muigua*

Abstract

This paper critically discusses the place of human rights in arbitration and Alternative Dispute Resolution (ADR). The paper posits that human rights are vital in arbitration and ADR. It argues that arbitration and ADR can foster the realization of key human rights. The paper further asserts that the conduct of arbitration and ADR proceedings have to comply with international human rights standards. The paper examines some of the key human rights concerns in arbitration and ADR. It further suggests measures towards protecting human rights in arbitration and ADR.

1.0 Introduction

Human rights are standards that recognize and protect the dignity of all human beings¹. According to the United Nations, human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status². It has been noted that human rights are rights we have simply because we exist as human beings; these rights are not granted by any state³. They range from the most fundamental rights including the right to life to those that make life worth living, such as the rights to

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¹ UNICEF., 'What are Human Rights?' Available at <https://www.unicef.org/child-rights-convention/what-are-human-rights> (Accessed on 17/06/2024)

² United Nations., 'Human Rights' Available at <https://www.un.org/en/global-issues/human-rights> (Accessed on 17/06/2024)

³ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights' Available at <https://www.ohchr.org/en/what-are-human-rights#:~:text=Universal%20and%20inalienable&text=This%20means%20that%20we%20are,conventions%2C%20declarations%2C%20and%20resolutions.> (Accessed on 17/06/2024)

food, education, work, health, and liberty⁴. Every person is entitled to human rights without discrimination⁵.

Human rights are based on certain fundamental principles. These principles include universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, and accountability and rule of law⁶. The principle of universality means that we are all equally entitled to our human rights⁷. The principle of inalienability means that human rights should not be taken away, except in specific situations and according to due process⁸. Interdependence and indivisibility means that one set of human rights cannot be enjoyed fully without the other⁹. According to the principle of equality and non-discrimination, all individuals are equal as human beings and by virtue of the inherent dignity of each human person¹⁰. Therefore, no one should suffer discrimination on the basis of factors such as race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as set out by human rights standards¹¹. The principle of accountability and rule of law means that states and other duty-bearers are answerable for the observance of human rights¹². As a result, they have to comply with the legal norms and standards enshrined in international human rights instruments¹³.

⁴ Ibid

⁵ United Nations., 'Human Rights' Op Cit

⁶ United Nations Population Fund., 'Human Rights Principles' Available at <https://www.unfpa.org/resources/human-rights-principles> (Accessed on 17/06/2024)

⁷ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights' Op Cit

⁸ Ibid

⁹ Ibid

¹⁰ United Nations Population Fund., Op Cit

¹¹ Ibid

¹² Ibid

¹³ Ibid

The idea of human rights governs how individual human beings live in society and with each other, as well as their relationship with the State and the obligations that the State have towards them¹⁴. Human rights also oblige states to do some things, and prevents them from doing others¹⁵. States have obligations and duties under international law to respect, protect and fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights¹⁶. In addition, the obligation to protect requires States to protect individuals and groups against human rights abuses¹⁷. Further, the obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights¹⁸. These obligations have been laid down in key international human rights instruments such as the *Universal Declaration of Human Rights*¹⁹, the *International Covenant on Economic, Social and Cultural Rights*²⁰, and the *International Covenant on Civil and Political Rights*²¹. Further, it has been noted that individuals also have responsibilities in safeguarding human rights²². In using their human rights, they must respect the rights of others²³.

It has been noted that in many countries around the world, domestic human rights and anti-discrimination law provides for Alternative Dispute Resolution (ADR) as a central

¹⁴ UNICEF., 'What are Human Rights?' Op Cit

¹⁵ Ibid

¹⁶ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights'

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Universal Declaration of Human Rights., Available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (Accessed on 17/06/2024)

²⁰United Nations., 'International Covenant on Economic, Social and Cultural Rights.' Available at https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf (Accessed on 17/06/2024)

²¹ United Nations., 'International Covenant on Civil and Political Rights.' Available at https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf (Accessed on 17/06/2024)

²² UNICEF., 'What are Human Rights?' Op Cit

²³ Ibid

component of the process by which alleged human rights breaches can be addressed²⁴. For example, in Kenya, the Constitution provides for the application of ADR mechanisms including arbitration, mediation, and Traditional Dispute Resolution Mechanisms (TDRMs) in realizing the right of access to justice²⁵. It has been posited that arbitration alongside other ADR mechanisms can foster attainment of the right of access to justice in Kenya²⁶. In addition, human rights are fundamental in arbitration and ADR in a number of ways such as prescribing procedural safeguards, obligation of arbitration and ADR to respect human rights, and providing an avenue to safeguard and enforce human rights²⁷.

This paper critically discusses the place of human rights in arbitration and ADR. The paper posits that human rights are vital in arbitration and ADR. It argues that arbitration and ADR can foster the realization of key human rights. The paper further asserts that the conduct of arbitration and ADR proceedings have to comply with international human rights standards. The paper examines some of the key human rights concerns in arbitration and ADR. It further suggests measures towards protecting human rights in arbitration and ADR.

2.0 Overview of Arbitration and Alternative Dispute Resolution

ADR has been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching resolution²⁸. ADR involves the use of several mechanisms that are applied in managing disputes that

²⁴ Australian Human Rights Commission., 'ADR: An Essential Tool for Human Rights' Available at <https://humanrights.gov.au/about/news/speeches/adr-essential-tool-human-rights> (Accessed on 17/06/2024)

²⁵ Constitution of Kenya, 2010., Article 159 (2) (c)., Government Printer, Nairobi

²⁶ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf> (Accessed on 17/06/2024)

²⁷ Global Arbitration Review., 'Human Rights in International Arbitration' Available at <https://globalarbitrationreview.com/review/the-european-arbitration-review/2023/article/human-rights-in-international-arbitration> (Accessed on 17/06/2024)

²⁸ JAMS., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 17/06/2024)

may be linked to but function outside formal court litigation processes²⁹. The idea of ADR therefore entails a set of processes that are applied to manage disputes without resort to adversarial litigation³⁰. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and TDRMs among others³¹.

Arbitration alongside other ADR processes have been recognized at both the global and national levels. At the global level, ADR mechanisms are recognized under the *Charter of the United Nations*³². The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other *peaceful means* of their own choice³³ (Emphasis added). At a national level, the Constitution of Kenya mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs³⁴.

ADR processes have been hailed as being ideal in enhancing access to justice which is a fundamental human right³⁵. ADR allows for more creative and collaborative solutions than traditional litigation³⁶. Most ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious

²⁹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

³⁰ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

³¹ Ibid

³² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

³³ Ibid, article 33 (1)

³⁴ Constitution of Kenya., 2010., article 159 (2) (c)

³⁵ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-developmentinKenyaRevised-version-of-20.10.14.pdf> (Accessed on 17/06/2024)

³⁶ JAMS., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Op Cit

and cost-effective management of disputes which makes them a viable tool of enhancing access to justice³⁷.

3.0 The place of Human Rights in Arbitration and ADR

Human rights are fundamental in arbitration and ADR. It has been noted that despite arbitration and most other ADR proceedings being a private form of justice, the conduct of such proceedings should meet expectations under international human rights law on due process, procedural fairness and the right to a fair trial³⁸. Human rights-based procedural safeguards are therefore relevant in arbitration and other ADR proceedings³⁹. It has been noted that human rights standards guide arbitral proceedings in international arbitration by prescribing procedural safeguards including fairness, due process, transparency, disclosure, and participation⁴⁰.

Further, it has been noted that mediators and other ADR practitioners can make use of human rights to enhance the quality and effectiveness of mediation efforts, including by opening space for political negotiations, strengthening ongoing peace processes and reinvigorating stalled efforts⁴¹. Human rights can set the ground for facilitated negotiations, for example, by establishing channels of communication⁴²; improving the negotiations context⁴³; allowing parties to test conflict resolution efforts⁴⁴; incentivizing parties to initiate negotiations on sensitive issues⁴⁵; providing entry points for conflict

³⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁸ Global Arbitration Review., 'Human Rights in International Arbitration' Op Cit

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Office of the United Nations High Commissioner for Human Rights., 'Enhancing the Quality and Effectiveness of Mediation Efforts through Human Rights: DPPA-OHCHR Practice Note' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPA-OHCHR-Joint-Practice-Note.pdf> (Accessed on 18/06/2024)

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

prevention and de-escalation⁴⁶; and building confidence between parties⁴⁷. In addition, it has been noted that once mediation efforts begin, human rights can further contribute by providing principles and standards within which to frame agenda issues; leveraging the power of economic, social and cultural rights; improving the inclusivity of processes, such as by enhancing the participation in peace talks of women, victims and survivors, Indigenous Peoples, minorities and other marginalized groups⁴⁸.

Arbitration and other ADR processes are also appropriate processes in managing disputes involving human rights⁴⁹. For example, arbitration is increasingly being embraced to manage human rights impacts or failures to respect human rights in the global supply chain in the form of business and human rights arbitration⁵⁰. In addition human rights are often invoked in arbitration between states and foreign investors, through allegations of either state or investor infringements of such rights in investor-state arbitration⁵¹. The idea of investor-state arbitration may involve allegations of state or investor human rights abuse⁵². It has been observed that rights to health, to water, to a healthy and safe environment, and to be free from torture, forced labor and arbitrary detention are among the human rights affected by the circumstances that give rise to investment disputes⁵³. Abuse of human rights, or failure to protect human rights, may factually underlie an investment dispute in investor-state arbitration⁵⁴. For example, an

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Muigua. K., 'Reflections on Human Rights in Arbitration' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reflections-on-Human-Rights-in-Arbitration.pdf> (Accessed on 18/06/2024)

⁵⁰ Agius. M., 'Human Rights in International Arbitration' Available at <https://globalarbitrationreview.com/review/the-european-arbitrationreview/2023/article/humanrights-in-international-arbitration> (Accessed on 18/06/2024)

⁵¹ Ibid

⁵² Ibid

⁵³ Feldman. J., 'Human Rights and International Investment Arbitration: A snapshot' Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/11a8c614/human-rights-and-international-investment-arbitration-a-snapshot> (Accessed on 18/06/2024)

⁵⁴ Ibid

alleged failure by foreign investors to respect the rights of Indigenous peoples, environmental rights, or labor rights may lead to a dispute with a local population that escalates into an international investment dispute under the auspices of investor-state arbitration⁵⁵.

Other ADR processes such as mediation can also be used to foster human rights. It has been pointed out that for effective mediation processes, preventing further human rights abuses is crucial to securing a lasting peace while simultaneously addressing the root causes of conflicts and violence⁵⁶. Protecting human rights in a mediation processes can therefore end conflict, prevent further human rights violations and lay the groundwork for sustainable peace and human development⁵⁷.

Arbitration and other ADR processes offer several advantages in addressing human rights disputes. It has been noted that due to the diversity of human rights disputes, the flexibility of arbitration and other ADR processes is potentially applicable across a broader range of disputes⁵⁸. Further, the transnational nature of some ADR processes such as international arbitration and international mediation makes them viable in managing cross border human rights disputes⁵⁹. This feature is also key where there are concerns about the neutrality or capacity of the relevant domestic judicial systems⁶⁰. Another key advantage of arbitration is the capacity to select an arbitrator with specific expertise in human rights and the enforceability of arbitral awards under the Convention

⁵⁵ Ibid

⁵⁶ O' Neill. W., 'Mediation and Human Rights' Available at <https://www.hdcentre.org/wp-content/uploads/2016/07/MediationandHumanRights-July-2005.pdf> (Accessed on 18/06/2024)

⁵⁷ Ibid

⁵⁸ Arbitration, Business, and Human Rights., Available at <https://www.herbertsmithfreehills.com/notes/publicinternationallaw/2021-07/arbitration-business-and-human-rights> (Accessed on 18/06/2024)

⁵⁹ Ibid

⁶⁰ Ibid

on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)⁶¹.

The *United Nations Guiding Principles on Business and Human Rights*⁶² provide a framework for the utilization of arbitration to manage human rights disputes. They are grounded on the recognition of states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms⁶³; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights⁶⁴; and the need for rights and obligations to be matched to appropriate and effective remedies when breached⁶⁵.

The *Hague Rules on Business and Human Rights Arbitration*⁶⁶ flow from the United Nations Guiding Principles on Business and Human Rights and provide a framework through which business entities can be compelled to comply with human rights. The Rules stipulate that the arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expenses and to provide a fair, efficient, culturally appropriate and rights-compatible process for resolving the parties' dispute, including in particular by giving due regard to the urgency of addressing the alleged human rights impacts⁶⁷. The Rules recognize the need for proper and informed consent as the cornerstone of business and human rights arbitration⁶⁸. The Hague Rules are therefore vital in fostering human rights through arbitration.

⁶¹ Ibid

⁶² United Nations Guiding Principles on Business and Human Rights., Available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (Accessed on 18/06/2024)

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ The Hague Rules on Business and Human Rights Arbitration., Available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-andHumanRights-Arbitration_CILC-digital-version.pdf (Accessed on 18/06/2024)

⁶⁷ Ibid

⁶⁸ Ibid

From the foregoing, it emerges that arbitration and ADR are viable options in managing human rights disputes. However, arbitration and ADR can also raise some human rights concerns. It has been noted that the purpose of ADR processes such as international commercial arbitration and international commercial mediation is to enhance expediency and privacy in management of disputes to enable parties preserve their commercial interests⁶⁹. Therefore, if human rights goals such as transparency, disclosure and victim participation become too dominating in arbitration, they might threaten the priorities of parties by delaying the management of disputes and further exposing them to the public space since human rights are most often a public concern⁷⁰. The transnational nature of arbitration may also hinder effective application of human rights standards due to differences in approaches towards human rights across different jurisdictions⁷¹.

Another major challenge in utilizing arbitration in human rights disputes is the likelihood of inequality of arms between victims of human rights abuses and businesses⁷². It has been noted that arbitration has the potential to privilege the powerful and well-resourced over the less well-equipped parties⁷³. For example, it may be difficult for an employee who has been subjected to abusive working conditions to arbitrate such claims unless there is an explicit agreement to that effect between the employee and the employer⁷⁴. However, on the other hand, businesses such as large multinational corporations may find it comparatively easy to include an arbitration provision in their business affairs

⁶⁹ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

⁷⁰ Stanaro. K., 'The Evolving Role of Human Rights in International Arbitration.' Available at <https://aria.law.columbia.edu/the-evolving-role-of-human-rights-in-international-arbitration/?cnreloaded=1> (Accessed on 18/06/2024)

⁷¹ Besson. S., 'Arbitration and Human Rights.' *ASA Bulletin*, Volume 24, Issue 3 (2006)

⁷² Arbitration, Business, and Human Rights., Op Cit

⁷³ Ibid

⁷⁴ Ibid

meaning that they can easily arbitrate their disputes⁷⁵. This inequality of arms is therefore a key challenge in utilizing arbitration in human rights disputes.

It has also been asserted that commercial arbitration may be a problematic forum for resolving human rights-related disputes⁷⁶. This results from the various features of commercial arbitration, including its confidentiality, lack of transparency and participation by affected stakeholders, and the lack of human rights expertise of commercial arbitrators⁷⁷. It is imperative to address these concerns in order protect human rights in arbitration and ADR.

4.0 Conclusion

Human rights are vital in arbitration and ADR. Human rights standards guide proceedings in international arbitration and other ADR processes such as international mediation by prescribing procedural safeguards⁷⁸. Arbitration and ADR processes such as mediation can also be effectively utilized in managing human rights disputes⁷⁹. The practice of arbitration and ADR also raises certain concerns such as inequality of arms between parties which could potentially affect human rights⁸⁰. It is therefore necessary to protect human rights in arbitration and ADR.

In order to realize this goal, it is imperative to align the laws and rules governing arbitration and other ADR processes with human rights standards⁸¹. It is important to ensure that both procedural and substantive rules on arbitration and ADR uphold human rights standards including fairness, equality, non-discrimination, access to justice, and

⁷⁵ Ibid

⁷⁶ Yeum. J., 'Aligning Human Rights in Business with International Commercial Arbitral Rules' Available at <https://arbitrationblog.kluwerarbitration.com/2021/10/09/aligning-human-rights-in-business-with-international-commercial-arbitral-rules/> (Accessed on 18/06/2024)

⁷⁷ Ibid

⁷⁸ Global Arbitration Review., 'Human Rights in International Arbitration' Op Cit

⁷⁹ Ibid

⁸⁰ Arbitration, Business, and Human Rights., Op Cit

⁸¹ Yeum. J., 'Aligning Human Rights in Business with International Commercial Arbitral Rules' Op Cit

access to effective legal remedies in case of human rights violations⁸². Arbitral institutions have a key role to play in aligning arbitral rules with human rights standards⁸³. ADR practitioners including arbitrators and mediators should also ensure that the conduct of ADR proceedings adheres to procedural human rights standards including due process, procedural fairness and the right to a fair trial⁸⁴. They should also uphold human rights standards in their decisions especially in business and human rights arbitration and investor-state arbitration⁸⁵.

It is also necessary to embrace the arbitrability of human rights disputes⁸⁶. Adopting the *Hague Rules on Business and Human Rights Arbitration* is a key step towards enhancing the role of arbitration in managing human rights disputes⁸⁷. It is also imperative to continue refining investment treaty arbitration in order to promote arbitration of human rights disputes emanating from investment activities that result in challenges such as pollution, environmental degradation, land injustices, and violation of labour rights⁸⁸.

Human rights are vital in arbitration and ADR. Protecting human rights in arbitration and ADR is therefore a key priority in realizing access to justice and human development.

⁸² Ibid

⁸³ Ibid

⁸⁴ Global Arbitration Review., 'Human Rights in International Arbitration' Op Cit

⁸⁵ Ibid

⁸⁶ Muigua. K., 'Reflections on Human Rights in Arbitration' Op Cit

⁸⁷The Hague Rules on Business and Human Rights Arbitration., Op Cit

⁸⁸ Franck. S., 'Development and Outcomes of Investment Treaty Arbitration.' *Harvard International Law Journal.*, Volume 50, No. 2. (2009)

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United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

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