

Reflections on Human Rights in Arbitration

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Reflections on Human Rights in Arbitration

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Abstract

The paper offers a critical reflection of the place of human rights in arbitration. It also examines the efficacy of arbitration in managing disputes concerning human rights abuses. The paper asserts that human rights are integral in arbitration proceedings. It evaluates attempts to enshrine the place of human rights in arbitration. The paper further explores some of the human rights concerns in arbitration. Finally, it offers recommendations towards embracing human rights in arbitration.

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1.0 Introduction

Arbitration is one of the Alternative Dispute Resolution (ADR) Mechanisms¹. ADR refers to a set of mechanisms that are utilized in management of disputes without resort to adversarial litigation². These mechanisms are recognized at the global level under the *Charter of the United Nations* which stipulates 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 choice³. Further in Kenya, the Constitution mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, *arbitration* and traditional dispute resolution mechanisms⁴. ADR mechanisms have been hailed for their advantages which include privacy, confidentiality, flexibility, informality, promoting party autonomy and the ability to foster expeditious and cost effective management of disputes⁵. ADR mechanisms are thus viable in enhancing access to justice.

Arbitration has been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute⁶. It has also been defined as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution⁷. Arbitration has emerged as the preferred mode of management of disputes especially those that are transnational in nature⁸. In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as

¹ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

² Ibid

³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

⁴ Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

⁵ 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-Kenya-STRAITHMORE-CONFERENCE-PRESENTATION.pdf> (Accessed on 28/06/2023)

⁶ World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 28/06/2023)

⁷ Khan. F., '*Alternative Dispute Resolution.*' A paper presented at the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.'

⁸ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf> (Accessed on 28/06/2023)

other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable⁹. At the international level, arbitration has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems¹⁰. It also guarantees enforcement of decisions through the *New York Convention* which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration¹¹. International Commercial Arbitration has thus been widely embraced as the preferred mechanism of managing global commercial disputes.

However, despite the efficacy of arbitration, its practice raises several human rights concerns. It has been argued that since arbitration is a private and confidential process, it can potentially breach fundamental human rights due to the waiver of the right of access to courts among other reasons¹². On this basis, it has been asserted that the conduct of arbitral proceedings should meet expectations under international human rights law on due process, procedural fairness and the right to a fair trial¹³. Further, the ability of arbitration to manage human rights disputes has also been questioned due to power imbalances and differences in approaches towards human rights across jurisdictions among other reasons¹⁴. The relationship between arbitration and human rights is thus worth reflecting upon.

The paper seeks to critically examine the place of human rights in arbitration. It argues that human rights are fundamental in arbitration proceedings and thus need to be upheld and promoted. The paper analyses some of the human rights concerns in arbitration and measures adopted towards addressing them. It proposes solutions towards embracing

⁹ Ibid

¹⁰ Moses, *The Principles and Practice of International Commercial Arbitration* 2nd Edition, 2017, Cambridge University Press

¹¹ United Nations Commission on International Trade Law., *Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* (New York, 1958)

¹² Chukwuemerie. A., 'Arbitration and Human Rights in Africa.' *African Human Rights Law Journal*, No. 7 of 2007.

¹³ Agius. M., 'Human Rights in International Arbitration.' *The European Arbitration Review*, 2023

¹⁴ Ibid

human rights in arbitration in order to enhance its viability as a preferred mechanism for managing national, regional and global commercial disputes.

2.0 The Place of Human Rights in Arbitration

Human rights have been defined as fundamental universal and inalienable entitlements inherent to all human beings which they should be accorded without any form of discrimination¹⁵. Human rights are inherent to every human being by the virtue of existence and are not granted by any state¹⁶. Every person is thus entitled to fundamental human rights without discrimination based on grounds such as sex, religion, nationality, race, ethnicity, colour, religion among others. The importance of human rights across the globe received prominence following the adoption of the *Universal Declaration of Human Rights*¹⁷ (UDHR) by the General Assembly of the United Nations on 10th December, 1948. The UDHR stipulates fundamental human rights to be universally protected and common standards for achievement of these rights for all people¹⁸. According to the UDHR recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world¹⁹.

Since the adoption of the UDHR, many legal instruments, measures and policies have been embraced towards promoting human rights in the political, economic, social and environmental spaces among others. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) was adopted in order to enhance the protection and fulfillment

¹⁵ The Office of the High Commissioner for Human Rights., 'What are Human Rights.' Available at <https://www.ohchr.org/en/what-are-human-rights> (Accessed on 28/06/2023)

¹⁶ Ibid

¹⁷ Universal Declaration of Human Rights., Available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (Accessed on 28/06/2023)

¹⁸ Ibid

¹⁹ Ibid

of economic, social and cultural rights across the globe²⁰. Further, the *International Covenant on Civil and Political Rights* (ICCPR) was adopted in order to foster the realization of civil and political rights in the world²¹. These are among numerous legal instruments that have been adopted towards fostering human rights in the world. The concept of human rights has evolved into a pertinent topic both in academic debate and in political decision-making²². Human rights continue to shape the political, economic, social, environmental and legal agendas across the globe²³. Countries have increasingly adopted the concept of human rights and undertaken measures towards fostering their attainment including embracing human rights in their constitutions²⁴.

The Constitution of Kenya is devoted towards protection of human rights. It recognizes the aspirations of all Kenyans for a government based on the essential values of *human rights*, equality, freedom, democracy, social justice and the rule of law²⁵. It further enshrines human rights as among the national values and principles of governance that bind all persons²⁶. Chapter four of the Constitution contains the Bill of Rights which stipulates fundamental rights and freedoms which all Kenyans are entitled to²⁷. According to the Constitution, the Bill of Rights applies to all and binds all state organs and all persons²⁸. The Bill of Rights in Kenya thus equally applies to the private sphere including arbitration proceedings. Among the fundamental right enshrine under the Bill

²⁰ United 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 28/06/2023)

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 28/06/2023)

²² Hannam. M., 'On Human Rights.' Available at <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=4f2fdd2bf949c6521b433897da4e1f169eba9e90> (Accessed on 28/06/2023)

²³ Boyle. A., 'Human Rights and the Environment: Where Next' *The European Journal of International Law*, Vol. 23 no. 3

²⁴ Ibid

²⁵ Constitution of Kenya, 2010., 'Preamble.'

²⁶ Ibid, Article 10 (2) (b)

²⁷ Ibid, Chapter four

²⁸ Ibid, Article 20 (1)

of Rights in Kenya is the right of access to justice²⁹. It has been asserted that arbitration alongside other ADR mechanisms can foster attainment of the right of access to justice in Kenya³⁰. Human rights are thus integral in arbitration.

Human rights guide arbitral proceedings in International Commercial Arbitration by prescribing procedural safeguards³¹. Human rights can also be considered in commercial arbitration, through reference to trade practices involving the corporate responsibility to respect human rights³². Further, in investor-state arbitration, there may be allegations of state or investor human rights abuse³³. Consequently arbitral tribunals are increasingly considering human rights issues³⁴.

*The Hague Rules on Business and Human Rights Arbitration*³⁵ further provide a set of rules for the arbitration of disputes related to the impact of business activities on human rights. In furthering 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* impacts³⁶. The Rules further enshrine the need for proper and informed consent as the cornerstone of business and human rights arbitration³⁷. The Rules are vital in furthering human rights through arbitration. In addition, the *UNCITRAL Model Law on International Commercial Arbitration* embraces the concept of equal treatment of parties and provide that parties shall be treated with

²⁹ Ibid, Article 48

³⁰ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Ci

³¹ Agius. M., 'Human Rights in International Arbitration.' Op Cit

³² Ibid

³³ ACERIS Law., 'Human Rights Law and Investment Arbitration.' Available at <https://www.acerislaw.com/human-rights-law-and-investment-arbitration/> (Accessed on 28/06/2023)

³⁴ Ibid

³⁵ 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-and-Human-Rights-Arbitration_CILC-digital-version.pdf (Accessed on 29/06/2023)

³⁶ Ibid, Article 18

³⁷ Ibid

equality and each party shall be given a full opportunity of presenting their case³⁸. This is integral in fostering the human right of access to justice through arbitration.

The place of human right in arbitration is thus well enunciated. However, there are several human right concerns in arbitration.

3.0 Human Rights Concerns in Arbitration

Arbitration raises several human rights concerns. It has been observed that in International Commercial Arbitration, the purpose of arbitration is to enhance expediency and privacy in management of disputes to enable parties preserve their commercial interests³⁹. Thus, 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 concern⁴⁰. Parties may thus adopt defensive approaches such as restricting contracting terms to eliminate the consideration of any human rights issues in arbitration⁴¹.

In addition, the transnational nature of arbitration may hinder effective application of human rights standards due to differences in approaches towards human rights across different jurisdictions⁴². Thus, international arbitral tribunals may find themselves in conflict with host states for enforcing human rights standards that may not be appreciated in such states⁴³. Cases have been highlighted where arbitrators have been prosecuted and imprisoned for applying human rights standards that are not welcome

³⁸ UNCITRAL Model Law on International Commercial Arbitration., 'Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf (Accessed on 29/06/2023)

³⁹ Moses, *'The Principles and Practice of International Commercial Arbitration'* Op Cit

⁴⁰ 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/?cn-reloaded=1> (Accessed on 29/06/2023)

⁴¹ Ibid

⁴² Besson. S., 'Arbitration and Human Rights.' ASA Bulletin, Volume 24, Issue 3 (2006)

⁴³ Ibid

in particular states⁴⁴. On this basis, it has been asserted that human rights concerns such as reliable freedom from unjust imprisonment of arbitrators may influence the decision of arbitrators to work in given country⁴⁵. It is thus essential to adopt a uniform approach and guarantee human rights in order to ensure the success of arbitration especially in transnational disputes.

Further, it has been asserted that the flexibility of arbitration can potentially hinder its effectiveness in addressing human rights concerns⁴⁶. Arbitration is a power based system and in some instances there is unequal bargaining power between the parties⁴⁷. The process is premised on the agreement of parties to submit present or future disputes to be managed through arbitration⁴⁸. Thus, parties with higher bargaining power such as large organizations and multinational corporations may be unwilling to subject themselves to arbitration in cases involving human rights violations but are more likely to arbitrate disputes that are in their favour such as contractual disputes for the supply of goods among others⁴⁹. This problem has largely been witnessed in international investment law where multinational corporations especially in Africa have been accused of violating human rights such as the right to a clean and healthy environment, the right to health among others⁵⁰. However, progress has been made towards addressing this concern such as the emergence of the concept of human rights in investment treaty arbitration⁵¹.

⁴⁴ Stanaro. K., 'The Evolving Role of Human Rights in International Arbitration.' Op Cit

⁴⁵ Ibid

⁴⁶ HSF., 'Arbitration, Business and Human Rights.' Available at <https://hsfnotes.com/publicinternationallaw/2021/07/21/arbitration-business-and-human-rights/> (Accessed on 29/06/2023)

⁴⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁴⁸ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

⁴⁹ HSF., 'Arbitration, Business and Human Rights.' Op Cit

⁵⁰ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' available at <http://kmco.co.ke/wpcontent/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf>

⁵¹ Franck. S., 'Development and Outcomes of Investment Treaty Arbitration.' *Harvard International Law Journal.*, Volume 50, No. 2. (2009)

Court involvement in arbitration can also potentially raise human rights concerns. Despite existing outside the judicial court system, arbitration still relies on courts on aspects such as grant of interim measures of protection and enforcement of awards⁵². Courts can also intervene in arbitration through setting aside of arbitral awards⁵³. Court intervention in arbitration proceedings through setting aside of awards can interfere with parties procedural human rights such as the right of access to justice⁵⁴. This creates the notion of arbitration as an inconclusive process that may hinder parties from effectively attaining their fundamental rights⁵⁵. There is need to address the concern of court involvement in arbitration in order to enhance the relationship between arbitration and human rights.

From the foregoing, it is evident that arbitration raises several human rights concerns. It is necessary to deal with these concerns in order to embrace human rights in arbitration.

4.0 Way Forward

In order to attend to the concerns raised above, it is essential to promote human rights in arbitration. Human rights are fundamental entitlements in international law and reflect the inherent dignity and equality of all human beings⁵⁶. Thus, it is pertinent for arbitral tribunals to ensure that arbitration proceedings comply with human rights standards as enunciated in human rights instruments such as the UDHR, ICESCR, ICCPR and state Constitutions⁵⁷. Such rights include the right of access to justice, the right to a fair hearing

⁵² Muigua. K., 'Role of the Court Under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.' Available at http://kmco.co.ke/wpcontent/uploads/2018/08/080_role_of_court_in_arbitration_2010.pdf (Accessed on 29/06/2023)

⁵³ Ibid

⁵⁴ Krumins. T., 'Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR.' Available at <https://link.springer.com/book/10.1007/978-3-030-54237-5> (Accessed on 29/06/2023)

⁵⁵ Ibid

⁵⁶ Universal Declaration of Human Rights., Op Cit

⁵⁷ Besson. S., 'Arbitration and Human Rights.' Op Cit

before an impartial tribunal and the right to adequate and effective remedies⁵⁸. By adhering to appropriate human rights standards, the place of human rights in arbitration will be elevated.

Further, it is imperative that we embrace arbitrability of human rights disputes⁵⁹. Arbitration has the ability to ensure greater attainment of justice for complaints and victims through its ability to foster flexibility, expeditious and cost effective management of disputes⁶⁰. Progress has been made towards fostering the arbitrability of human rights disputes through the formulation of *The Hague Rules on Business and Human Rights Arbitration*⁶¹. Parties should adopt these rules in order to enhance the arbitration of human rights disputes. Further, it is necessary to continue refining investment treaty arbitration in order to promote arbitration of human rights disputes emanating from investment activities such as environmental pollution⁶².

In addition, it is essential to limit court intervention in arbitration proceedings to a basic minimum in order to enhance its viability to manage various kinds of disputes including those concerning human rights⁶³. Court interference in arbitration can hinder the growth of International Commercial Arbitration and inhibit its ability to manage disputes including those concerning violation of human rights⁶⁴. It may discourage investors from subjecting disputes to arbitration in particular countries due to the likelihood of court interference⁶⁵. This could potentially result in continued human rights violation pending determination of such disputes through other mechanisms such as litigation at the

⁵⁸ Ibid

⁵⁹ Chukwuemerie. A., 'Arbitration and Human Rights in Africa.' Op Cit

⁶⁰ Ibid

⁶¹ 'The Hague Rules on Business and Human Rights Arbitration.' Op Cit

⁶² Franck. S., 'Development and Outcomes of Investment Treaty Arbitration.' Op Cit

⁶³ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf> (Accessed on 29/06/2023)

⁶⁴ Kariuki. F., 'Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' Available at <http://kmco.co.ke/wpcontent/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf> (Accessed on 29/06/2023)

⁶⁵ Ibid

expense of arbitration that could foster expeditious management of the disputes⁶⁶. Thus, court intervention in arbitration should ideally be limited to processes aimed at enhancing the viability of arbitration such as granting of interim measures of protection and enforcement of arbitral awards⁶⁷. This will ensure the growth of International Commercial Arbitration and further enhance its viability to manage disputes including those concerning violation of human rights.

Finally, there is need for compliance with the Sustainable Development agenda especially by multinational corporations in the investment sphere⁶⁸. The activities of multinational corporations in Africa have often resulted in concerns such as environmental degradation and violation of human rights such as the right to health and labour rights⁶⁹. It is vital for them to adhere to the principles of Sustainable Development in order to foster human rights and environmental protection⁷⁰. Sustainable Development is an important part of the international investments law regime⁷¹. Thus, multinational corporations should foster Sustainable Development in order to ensure respect for human rights.

5.0 Conclusion

Human rights are fundamental entitlements that reflect the inherent dignity and equality of all human beings⁷². They are applicable in all spheres of life including arbitration proceedings⁷³. However arbitration raises several human rights concerns related to due process, procedural fairness and the right to a fair trial⁷⁴. Further, the ability of arbitration

⁶⁶ Krumins. T., 'Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR.' Op Cit

⁶⁷ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Op Cit

⁶⁸ Bello.I & O.M., 'Multinational corporations and Sustainable Development Goals Examining Etisalat Telecommunication Intervention in Nigeria's Basic Education' *International Journal of Educational Management* , August 2019

⁶⁹ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

⁷⁰ Ibid

⁷¹ Bello.I & O.M., 'Multinational corporations and Sustainable Development Goals Examining Etisalat Telecommunication Intervention in Nigeria's Basic Education' Op Cit

⁷² Universal Declaration of Human Rights., Op Cit

⁷³ Constitution of Kenya, 2010., Article 20 (1)

⁷⁴ Agius. M., 'Human Rights in International Arbitration.' Op Cit

to manage human rights disputes has also been questioned due to power imbalances and differences in approaches to human rights across jurisdictions among other reasons⁷⁵. There is need to address these challenges by promoting human rights in arbitration, embracing the arbitrability of human rights disputes, limiting court intervention in arbitration and fostering Sustainable Development. Through these measures, the relationship between arbitration and human rights will be ideal.

⁷⁵ Ibid

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