

Revisiting The Public Arbitrability of Private Family Disputes: The Good, The Bad, And The Ugly

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Disputes concerning the consequences of a relationship breakdown have always been considered personal private matters which prevent the State from legitimately interfering either in the process or place of dispute-resolution. The only ground through which the State could intervene with the substantive outcome was that there are exceptional cases wherein the parties are vulnerable and warrant protection. In this piece, the author argues that opting for arbitration as an alternative is not an autonomous choice in the first place. Moreover, he contends that arbitration is not a purely private arrangement and hence, autonomy need not be vehemently emphasised. Lastly, he argues that the objective of autonomy vis-à-vis dispute-resolution can be achieved through several other ways apart from non-intervention.

Introduction

Disputes concerning the consequences of relationship breakdown have primarily been considered [private matters](#). Where the parties to such a dispute have chosen the process to be used to resolve it, the state ought not to have legitimate reason to interfere in the procedure used or substantive outcome reached. This position could be diluted in 'exceptional' cases where there is a serious [risk of harm](#) to a vulnerable party. I seek to deconstruct this theorisation from the perspective of the family arbitration model. *Firstly*, I argue that the smokescreen of autonomy is being used by the State to justify its exclusion of regulation; *secondly*, I juxtapose the intervention of the Courts only in exceptional circumstances with theories of vulnerability and care; and *thirdly*, I seek to answer the normative question of what should be the role of the State vis-à-vis private forums such as arbitration.

The Boy Who Called Wolf: The State Who Called Autonomy?

Eekelaar, while confronted with the question of State regulation in the sphere of family law develops the '[purposive abstention](#)' model which as the name suggests is a method of non-intervention coupled with selected grounds of deliberate intervention. He argues that moral and social obligations within the family should not be given the force of law unless their failure threatens either community interests or leads to families breaking apart. Moreover, he contends that such a model is placed within the larger context of the applicable general law, including the wide gamut of human rights law which will be available [irrespective of non-intervention](#). Hence, it is seemingly seen that Eekelaar's 'purposive abstention' model is been increasingly used to justify non-intervention in the family space.

The Supreme Court in [Afcons Infrastructure v. Cherian Verkey Construction](#) and [Booz Allen and Hamilton v. SBI Home Finance Limited](#) set out to decide the arbitrability of family disputes in India. In these cases, it was held that while arbitration tribunals are private forums, the courts belong to the public fora. Thus, tribunals can only handle civil disputes involving parties who generate rights *in personam* and not rights *in rem* because they are a part of the private fora. Thus, family disputes cannot be pursued through arbitration since they involve rights which are exercisable against the world at large and must not be subject to private settlement of disputes before a private forum whose proceedings and awards are never disclosed.

In the ever contesting realm of state regulation vis-à-vis family law, it can be assumed that the benevolent action of State, as prodded by the Courts, in [stepping-aside](#) from regulating dispute resolution ought to be appreciated and celebrated. Through this non-intervention model, the State has given people an [autonomous choice](#) in choosing the values they would want their disputes to be resolved by. Moreover, the State has enabled a private space [free from regulation](#) in order to empower individuals to make free choices regarding the consequences of your decision.

Such a paradigm seems like a dream come true; however, it is imperative to scratch beneath the surface to discover the truth. Through this part, I argue that *first*, I question whether opting for arbitration is as an alternative is autonomous in the first place; *second*, I contend that in contemporary times, arbitration is not a purely private arrangement and hence, autonomy need not be vehemently emphasised; and *third*, I

argue that the objective of autonomy vis-à-vis dispute-resolution can be achieved through several other ways apart from non-intervention.

I posit that the choice of going for arbitration itself is [not autonomous](#) since it is skewed in favour of power and gender dynamics. In cases of heterosexual relationships breaking down, it is widely known that [women are the most subjugated](#) and oppressed parties. While it might seem that it is beneficial that women are not being dragged to courts but rather private forums, I argue that women inherently lack a free choice in choosing either the mode of arbitration or the values that govern such procedure. Similar to Farrah Ahmed who writes in the context of [religious law](#), I argue that 'weaker' parties within arbitration rarely have a choice to choose a venue of dispute-resolution since their choices are guided by the potential of further suppression or mere lack of alternatives.

Arbitration leads to immense financial strain on resources, which [might not be feasible](#) for a woman who is claiming financial support after her divorce. Moreover, it might be possible for men to be guarded with a team of lawyers that might choose a process that might not be gender-sensitive or an arbitrator who is insensitive. Additionally, it is seen that women are largely self-represented and unable to dedicate much time due to caring or child-rearing responsibilities, navigate the complex legal provisions, and handle the convoluted procedural rules. Thus, in majority of the cases, it can be argued that arbitration is neither a conscious choice nor is any process of it linked with values of independence or freedom.

Furthermore, I contend that while the private family arbitration project began as a shift away from the general functioning of the public courts, under the garb of autonomy; it can now be evidenced that several contemporary cases have removed the private-public divide raising questions regarding the veracity of the autonomy argument. In [S v. S](#), it was clear that if the parties had agreed to an arbitration by freely signing a form, they were bound by the terms of the award itself which would then not be interfered with, except in compelling circumstances. Thus, there was a high-level of [judicial deference](#) provided to the freedom of dispute-resolution process. However, in [Hayley v. Hayley](#), the Court believed that arbitration in family law disputes was not the end but rather the beginning. The Court rejected the 'obviously or seriously wrong' exception and rather affirmed the Court's intervention if the judge deemed the arbitral award to be 'just wrong'.

Thus, in light of the decision in Hayley, I argue that there is an absence of judicial chorus to support the assertion that: arbitration is a private method of dispute-resolution, since

now all the outcomes can be successfully challenged and there exists regulation in this space. I acknowledge the counter-argument that this intervention is furthered by the Courts and not the State. However, I would assert that since the idea of arbitration being a private space without regulation has been debunked, there exists no adequate reason to attribute liability to a particular actor.

Lastly, I argue that if promoting true autonomy was the clarion call for the movement to family arbitration, mere non-intervention in dispute-resolution is merely the tip of the iceberg. I argue that positive obligations on the State offer a panacea to this malady, which has been explored in detail in Part III. Thus, I conclude that the choice of arbitration is not an autonomous choice, arbitration in itself is not a private arrangement since its orders can now be challenged in a public court openly, and that the State could have explored other alternatives if autonomy was truly what it wanted to achieve.

Are Only Vulnerable People Exceptional?

Fineman [argues](#) that the autonomous subject needs to be replaced by a vulnerable identity to be representative of actual lived experience and general human behaviour. She contends that this replacement would lead to valuing universal vulnerability as well as capturing the essence of relational vulnerability. Furthering this proposition, would suggest that every human is vulnerable as well as that the cause behind this vulnerability might be due to relationships between each other. In this paradigm of vulnerability, where not only the parties, but also the arbitrator and the judges are vulnerable, who could determine who is vulnerable? This can be further extended to – if everyone is vulnerable, can the State intervene in all cases? I argue that the theory of universal vulnerability attacks the construction of inviolable spaces created by the State since there is no clarity on who can intervene, on what grounds can they intervene, and are there any grounds that they cannot. Hence, this exception has become redundant and rather transformed into the rule itself i.e., the possibility that there could be a legitimate intervention in all family arbitration cases.

It maybe counter-argued that universal vulnerability might be a misfit to this puzzle and that vulnerability vis-à-vis arbitration should be understood in a much narrower sense. I contend that in most breakdown of relationships, there would be an obvious ‘vulnerable’ party that warrants a protection of rights and liberties. Hence, there could be intervention justified in all cases. *In arguendo*, even if we assume that *ceteris paribus*, how do we determine who is a vulnerable party (*albeit* in the narrowest sense) in the first place?

[Relational vulnerability](#) would suggest that parties are likely to be vulnerable in the complex web of interdependent relationships. Especially, in cases related to a relationship breakdown, it can be successfully argued that vulnerability of one party arises from the other and hence, this just remains a complex set of puzzles that seem no logical end. Thus, I argue that such an exception is erroneous both in theory and in practice.

Standing Between a Rock and a Hard Place

The discussion in the above parts warrants us to answer the normative question i.e. if not this, how should the role of the State be designed vis-à-vis arbitration as a mode of resolving family disputes?

Firstly, I believe that rather than a negative conception of non-intervention, emphasis must be provided on the positive duties that can be imposed on the State to ensure that autonomy is truly promoted. Resource optimisation should be ensured coupled with extensive legal advice being provided to parties which makes their choice to opt for arbitration truly autonomous. Additionally, legal assistance during the course of the dispute-resolution would be extremely helpful as it would help weaker vulnerable parties navigate the complex legal paradigm.

Moreover, steps must be taken to ensure that the current framework is reformed to ensure that there is no potential of discrimination or the power dynamics skewed in favour of either party. The arbitrators must be given enough training and supervision to ensure that there is no subconscious presence of bias which can lead to subordination of gender within a personal family framework. The norms adopted by arbitrators to judge cases ought to be streaked with equality, impartiality, and justice. Thus, I contend that rather than claiming non-intervention under the façade of autonomy, positive steps as mentioned above can actually promote autonomy within the dispute resolution space.

While, I acknowledge that these steps do not redress the arbitration regime holistically, I believe that the solution could be viewing arbitration as an inherently intelligible mechanism as compared to viewing it through the lens of autonomy. It is true that arbitral awards can be challenged in public courts, I argue that they highlight several benefits to the model of family dispute-resolution. These processes might be confidential i.e., having a semblance of privacy which would allow parties to solve delicate inter-personal issues. Moreover, arbitration as a forum would allow a 'safe' forum for

vulnerable parties to discuss instrumental issues such as child custody, contact-orders, financial reparations, and maintenance petitions without the Court's paternal imposition of morality or gender-subordination. Further, self-representation might allow the efficient articulation of lived experiences which are usually absent from family law cases. Hence, I contend that arbitration should be considered not specifically due to the autonomous choice it produces, but rather due to inherent advantages it possesses by its mere design.

Conclusion

Thus, overall, I have sought to deconstruct the theorisation through the example of arbitration by showcasing that while consequences of a breakdown of a relationship might be a private matter; autonomy is not the perfect justification behind legitimate non-intervention and selective interference. Furthermore, theories of vulnerability highlight the puzzling questions that such a paradigm raises especially with reference to the exception. Hence, through this piece, I have attempted to demystify the purported magic of autonomy and suggested a shift towards a framework streaked with positive obligations that would truly empower people within the family law space.

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