

# Autonomy and family justice

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*Family law's promotion of autonomy and its 'settlement mission' have combined to create an imbalance between public and private justice in the family justice system. In the new system autonomy has become more than simply one aspect of justice, to be considered alongside, for example, fairness, equality and the rule of law; it is becoming the very essence of family justice. I explore here how the idea of autonomy-as-justice is expressed in two ways in the new family justice system. The first is structural and procedural. It relates to the creation of an autonomous system of dispute resolution that includes mediation, arbitration and provision of information hubs. This autonomous system marginalises formal law and legal principle and prioritises only autonomy; it runs parallel with and separate from the formal system. The second expression relates to assumptions about the type of autonomy that must be activated and permitted to flourish in family justice. It is an impoverished and gendered conception of autonomy that is unrealistically opposed to an equally impoverished and gendered conception of vulnerability. I suggest that these two expressions of autonomy-as-justice may have the effect of re-constructing the problematic divide between public and private that feminist critics and judicially developed principle successfully challenged in family law years ago.*

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It is often said that the emotions, intimacy and intensely personal relationships associated with families make disputes about them particularly amenable to personalised, private decision-making. We want the law to respect our individual and relational choices about with whom we choose to live and/or rear children. And when our relationships end or change, we expect to have some say in the terms and consequences of that change. The law that forges the principles and processes by which we reach those terms and assess those consequences must therefore take some account of our choices and when appropriate support us to design and implement them. Yet there is also, on the other hand, more than one aspect of family living, which renders disputes about it *less* rather than more amenable to private, personalised decision-making.

The family is still one of the most gendered of social and legal institutions and 'doing' family<sup>1</sup> is about negotiating those familial relations constructed by 'choice' or otherwise. Whether traditional gender roles are reinforced in those negotiations or are subverted, they exist, they are noticed and they are often remarked upon in law even within non-normative families. Family law therefore can be argued to be about gendered familial roles; it is about mothers, fathers, husbands and wives, despite the law's belated recognition of non-normative families and its degendered language of 'partner', 'parent' and 'spouse'. Much of family law is thus about providing justice in determining the consequences of relations between gendered subjects in the privacy of the home. But in this way it is also about determining the consequences of those relations in public civil and political society. As the House of Lords said, for example, the justice of fairness in financial orders must be measured against social values including

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1 D Morgan, *Family Connections: An Introduction to Family Studies* (Polity Press, 1st edn, 1996).

non-discrimination and equality (*White v White*<sup>2</sup>) and as the President told us in *Re G*,<sup>3</sup> so must the meaning, or justice, of welfare. So, while family privacy is important, as is our freedom to choose how to live in and out of our families of choice, these manifestations of our choices cannot be detached from legal principles developed to take account of the public, social context in which they are made and experienced or from the social and political consequences they engender. Family law is about determining what it means, both privately and publicly, *to be* a mother, father, son, daughter, partner, husband or wife.<sup>4</sup> These meanings are as important socially as they are to the individuals concerned. For reasons of gender and generational justice, therefore, publicity and transparency in determining these meanings should *begin* in the family and not be banished from it. In the interests of justice we must ensure that emphasis on private decision-making does not return family living to its zone of privacy in which non-intervention by law approved a problematic status quo. Feminist critiques of this public/private divide brought family living into the public gaze decades ago; those lives and disputes about them must not, as a matter of policy, be buried again.<sup>5</sup> Thus, family law must strike a balance between the privacy of its concerns and their public nature.

Yet, in ‘private’ family law matters, fiscal austerity has linked with policy and legal preoccupation with and approbation of ‘autonomy’ to skew the balance. Husbands, wives, partners, mothers and fathers are encouraged to do family, in particular to resolve their legal disputes, privately, outside of the publicity and transparency of the courts and the principled justice the courts provide. This diversion toward private dispute resolution has the advantage, it is said, of both saving money (the state’s if not the individual’s), but also and primarily, of respecting the parties’ autonomy and encouraging them to take responsibility not only for making their own decisions but also for the consequences of those decisions. In this paper I would like to explore this new prioritisation of autonomy in family law. It has particular resonance in the context of family dispute resolution, but I think, also extends beyond that context. Autonomy has become more than one aspect of justice in the new, ‘modernised’ family justice system, it is becoming almost its very essence.

Autonomy-as-justice is expressed in two ways in the family justice system, even while they are linked. The first expression is structural and procedural. It relates to the creation of an autonomous system of dispute resolution that is separate from and runs parallel with the formal justice system. The second expression is conceptual and relates to assumptions about a particular kind of individual autonomy that must be activated and allowed to flourish in family justice.

### Part 1: Autonomy of process: the decreasing shadow of the law

In alternative dispute resolution (ADR), the autonomous system which seeks not the substantive justice of the law, but what Lord Neuberger called, quoting Thomas Main,<sup>6</sup> ‘individualized justice’,<sup>7</sup> we see the first expression of justice-as-autonomy. The then Master of the Rolls described ADR in civil justice as:

‘a relatively new form of justice, which, when compared with traditional litigation . . . involves far greater procedural flexibility and a far greater range of remedies than formal

2 [2000] 1 AC 596.

3 *Re G (Children) (Education: Religious Upbringing)* [2012] EWCA (Civ) 1233, [2013] 1 FLR 677.

4 F Olsen, ‘Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child’ in P Alston, S Parker and J Seymour (eds), *Children, Rights and the Law* (Clarendon Press, 1992), 209.

5 A Diduck and K O’Donovan, ‘Introduction: Feminism and Families Plus Ca Change?’ in *Feminist Perspectives on Family Law* (Routledge–Cavendish, 1st edn, 2006).

6 T Main, ‘ADR: The New Equity’ (2005–2006) 74 U Cin L Rev 329.

7 J Neuberger, ‘Equity, ADR, Arbitration and the Law: Different Dimensions of Justice’ (2010) 4th Keating Lecture, para 39.

adjudication. As a result, it is, in many cases, better able to achieve a just or fair outcome for the parties, provided that they both have the will to settle their differences. Fair here not because the outcome necessarily reflects the substantive legal merits of the underlying dispute but rather because the parties have both participated in a consensual process and reached a mutually agreeable resolution. It is a justice not based on a commitment to substantive justice's achievement.<sup>8</sup>

Autonomous dispute resolution of this type is an important part of any justice system. It offers the opportunity for individualised justice, which can provide a resolution tailored to meet the needs of the parties and also a potential public 'good'. It can, for example, serve public values like education in self-determination and respect for others.<sup>9</sup> The problem for many, however, is when the system distorts the balance between individualised justice and substantive justice and individualised justice becomes, in effect, the 'essence' of the system. Although it is particularly prominent in family justice, we see this trend across the civil justice system as a whole. Hazel Genn, in her Hamlyn observations on access to civil justice, wrote 'it is hard not to draw the conclusion that the main thrust of modern civil justice reform is about neither access nor justice. It is simply about diversion of disputants away from the courts. It is essentially about less law and the downgrading of civil justice'.<sup>10</sup>

Lord Neuberger made this point also. He criticised the Ministry of Justice view that: 'The civil and family courts are principally concerned with resolving private disputes between individuals or companies. These are not criminal cases', and its implicit point that the civil and family justice systems simply provide private benefits for individuals and no, or at least a very limited, public good.<sup>11</sup> In truth, he said, the civil and family justice systems, just like the criminal justice system, provide 'collective benefits for the society as a whole' through securing the rule of law. He said there is a danger which could arise if ADR became seen as the very essence of the civil justice system that 'stems from a failure to understand the fundamentally different roles which formal adjudication and ADR have'.<sup>12</sup> Here he writes again of the civil justice system, but his words are equally, if not more, applicable to the family justice system.

'If the civil justice system simply provided a private benefit to individuals – the view which sees justice as no more than a part of the service sector of the economy rather than a branch of government – such an idea could, at least in theory, be right. If resolving disputes simply involved conferring private benefits ADR could properly lie at the heart of the civil justice system . . . The civil justice system is not however part of the service sector and confers more than simply private benefits . . . A civil justice system which had ADR at its heart, which placed too great a weight on it, whatever it might be, it would not be a civil justice system.'<sup>13</sup>

This, in my view, is precisely the fundamental error made in the modernised family justice system. ADR, in the pursuit of what Noel Semple<sup>14</sup> calls family law's 'settlement mission' has become the essence of the family justice system. It has resulted in the creation of a new, separate but increasingly primary system designed to provide individualised justice, at least partly because policy makers believe that resolving disputes about family matters confers only a private benefit for the individuals concerned.

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8 Ibid.

9 R Bush and J Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) *Ohio State Journal on Dispute Resolution* 27.

10 H Genn, *Judging Civil Justice* (The Hamlyn Lectures) (Cambridge University Press, 2010), p 69.

11 J Neuberger, 'Equity, ADR, Arbitration and the Law: Different Dimensions of Justice' (2010) 4th Keating Lecture, para 6.

12 Ibid, para 41.

13 Ibid, para 42.

14 N Semple, 'Mandatory Family Mediation and the Settlement Mission: A Feminist Critique' (2012) 24(1) *CJWL/RFD* 207.

'Disputes between parents about their children are private and the consequences of individual choice in this conception of the relationship between state and family, and they are not significant enough to warrant the full panoply of the family justice system.'<sup>15</sup>

We see here the Ministry of Justice view that engages both aspects of autonomy-as-justice. It constructs family law matters as private and the result of individual choice (the exercise of autonomy) and therefore as not sufficiently significant to engage the courts or the 'full panoply' of the justice system. They do, however, engage the autonomous family justice system in which justice is done by promoting further private, individual, autonomous choices. Positioning the state/family relationship in this way encourages and reveres autonomous decision-making then trivialises its consequences. It isolates 'private' family decisions from their public meaning, public consequences and from public concern. It renders irrelevant to them a meaning of justice based on principles other than autonomy.

The ground for this view of autonomous dispute resolution as family justice arguably is laid in the rhetoric in which legal disputes between family members have become less 'legal disputes' and more 'relationship problems'.<sup>16</sup> This reconstruction of family law disputes first sets the stage for and then vindicates law's supposed unsuitability in dealing with them. What were once claims for legal entitlements become non-justiciable, and become either moral claims residing, as Lady Hale said, in honour only,<sup>17</sup> or emotional claims thought best to be resolved by therapy or counselling to 'heal' the parties or their relationship.<sup>18</sup> Even in courts, 'the *de facto* priority' is not to make and enforce legal decisions, but rather, 'to resolve conflicts and encourage parents to put the past behind'.<sup>19</sup> And because this discourse also keeps family disputes firmly in the realm of the personal and private and therefore relevant only to the parties, resolving them has less to do with law and principles of justice, and more to do with individual behaviour modification or therapeutic techniques of problem solving.<sup>20</sup> Again, it may be true that for many families problem solving rather than law is appropriate,<sup>21</sup> but for many it is not. And of course, while exploring all avenues of dispute resolution is part of a court's role, it is problematic when all of those avenues lead away from formal law. In any event, there is a broader concern if individualised, therapeutic problem solving is said, as it is, to be a part of the justice system, but is not scrutinised, regulated or governed by the rules or objectives of that system, including the rule of law, equality, substantive fairness and due process. Instead, emotional and relational health seems to be the goal of a settlement in which the parties become educated, healthy and able to express (appropriately) their individual autonomy and thereby be freed from the formal system. This virtual de-legalisation of family disputes not only reinforces the previously discredited boundary between public and private, it expresses what Semple calls 'the informal and almost clandestine nature of the settlement mission'<sup>22</sup> in family law that is pursued on an ad hoc basis by almost all participants in the system, and is supported by the ideology of autonomy.

In contrast, understanding family disputes as matters to which substantive justice and the rule of law apply understands them as matters of both public and private concern. And so, while we may have disagreed with a court's interpretation of, for example, fairness or welfare in family

15 Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' (Consultation Paper CP12/10) (2010), para 4.19.

16 F Kaganas, 'Regulating Emotion: Judging Contact Disputes' [2011] CFLQ 63.

17 Lady Hale, 'Equal Access to Justice in the Big Society', Sir Henry Hodge Memorial Lecture 2011.

18 Kaganas (n 16 above).

19 Semple (n 14 above), p 235.

20 Kaganas (n 16 above).

21 Kaganas (n 16 above); J Eekelaar, 'Can There Be Family Justice Without Law?' in M Maclean, J Eekelaar and B Bastard, *Delivering Family Justice in the 21st Century* (Hart Publishing, 1st edn, 2015), ch 19.

22 Semple (n 14 above), p 236.

justice, we knew what it was and we knew how the court got to that interpretation. We could challenge, criticise or support the process, the outcome and the way in which the law was developed. In contrast, the justice system's pursuit of the settlement mission, preferring conflict resolution to 'law' almost by default at all stages, may now shield it from much of this type of scrutiny.<sup>23</sup>

### **Commercial service providers – mediation**

Main<sup>24</sup> observed that ADR now has a similar place within the legal system that equity once had.

'ADR offers an alternative system for relief from the hardship created by the substantive and procedural law of formal adjudication. Moreover, the freedom, elasticity, and luminance of ADR bear a striking resemblance to traditional Equity, offering relaxed rules of evidence and procedure, tailored remedies, a simpler and less legalistic structure, improved access to justice, and a casual relationship with the substantive law. Alas, the dark side of ADR is also reminiscent of Equity: unaccountability, secrecy, an inability to extend its jurisdictional reach beyond the parties immediately before it, and a certain vulnerability to capture by special interests.'<sup>25</sup>

His words resonate on more than one level. The new autonomous family justice system encourages the use of private sector service providers whose practice exhibits the characteristics Main attributes above to traditional equity. Yet, mediators and members of the Institute of Family Law Arbitrators (IFLA) are businesses in a burgeoning new market in justice. They exemplify Lord Neuberger's description of the view 'which sees justice as no more than a part of the service sector of the economy rather than a branch of government'.<sup>26</sup> Indeed, these service providers see themselves as accountable to their clients or to the 'market' rather than to the courts. Unlike the lawyers who become involved in negotiating the private resolution of family disputes, mediators and arbitrators are not officers of the court.<sup>27</sup> Indeed, Lisa Parkinson approves of mediators' independence of the courts – their autonomy – and observes that mediators:

'are accountable through their professional body to the Family Mediation Council and in publicly funded cases to the Legal Aid Agency, ultimately also to the government and the taxpayer. Complaints procedures, client feedback via questionnaires and follow-up consumer studies by independent researchers are all essential to monitor and evaluate the quality of service that mediators provide.'<sup>28</sup>

Because mediators, she says, 'offer a form of participatory justice that differs from formally imposed justice',<sup>29</sup> they therefore must remain independent of the judicial system.<sup>30</sup>

From its earliest days, feminist critics have warned of mediation's need to be attentive to the norms it purveys, to protecting women vulnerable to domestic violence and to ensuring a fair balance of power between parties and I will not rehearse them here.<sup>31</sup> Many of these concerns

23 Ibid.

24 Main (n 6 above).

25 Ibid, p 330.

26 Lord Neuberger (n 7 above).

27 J Doughty and M Murch, 'Judicial Independence and the Restructuring of Family Courts and Their Supporting Services' [2012] CFLQ 333.

28 L Parkinson, 'The place of mediation in the family justice system' [2013] CFLQ 200, p 212.

29 Ibid.

30 Ibid, p 214.

31 See for example, R H Mnookin, 'Divorce bargaining: The Limits on Private Ordering' (1985) 18 *U of Michigan Journal of Law Reform* 1015; P E Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40 *Buffalo Law*

have been acknowledged. Screening for domestic violence is now standard practice and mediators are attuned to power imbalances between the parties. Many mediators have developed innovative ideas of 'best practice' that acknowledge mediator accountability for norms in both process and outcome and for 'empowering' parties equally.<sup>32</sup> While some suggest that these shifts in mediation practice and philosophy are still 'works in progress',<sup>33</sup> their recognition means that mediation's goal of helping the parties to construct their own individualised private justice<sup>34</sup> – justice-as-autonomy – makes sense. That goal may also make sense to many parties to whom both the process and the outcome feel 'just'. But for many neither the process nor outcome is just. For them, justice-as-autonomy may permit processes that fail to balance power appropriately<sup>35</sup> and/or outcomes based upon 'retrograde norms that the formal justice system would not countenance'.<sup>36</sup> And again, it is not offering mediation as one dispute resolution option that is the problem, it is the justice system's active and unreserved promotion of justice-as-autonomy in mediation that is my concern.

There is another concern about mediation becoming the essence of family justice. Critics suggest that despite new reflective practice among some mediators, some may continue to fail to examine the normative basis from which they pursue their goal of party empowerment as independent, individualised, participatory justice. Bastard<sup>37</sup> suggests, for example, that mediation process may be actually linked to particular outcomes. He notes that the mediation project reflects the current preference for a specific model of couple and family relationships, one that is ruled by negotiation, cooperation and reflection. In this sense, mediation and co-parenting go together and their success is interlinked. The norm of the substantive outcome is reflected in the process and vice versa. Without awareness of this link, mediation's claim to facilitate party empowerment and individualised justice may be compromised.

Similarly, Irvine<sup>38</sup> challenges the claim that mediators practise a form of pure party empowerment by way of mediator neutrality in which the mediators stay silent and norms come from the parties themselves. He suggests this form of mediation, which he terms the 'norm-generating' model of mediation, is 'mere rhetoric' and in reality may be the least frequently practised model of mediation. He identifies two other models, which he calls norm educating and norm advocating, and says these may be practised more frequently. The consequence, according to Irvine, is that mediators encourage particular results, without taking responsibility for them. He concludes by urging mediators to examine their own values and engage in reflective practice.<sup>39</sup> Otherwise, what we have is a large number of disputes being regulated according to unstated and sometimes unconscious values and norms that are invisible to the parties, in both process and outcome, yet for which they are nevertheless to take responsibility.

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Review 441; M Shaffer, 'Divorce Mediation: A Feminist Perspective (1988) 46 *University of Toronto Faculty of Law Review* 162; A Bottomley, 'What is happening to Family Law? A Feminist Critique of Conciliation' (1989) 8 *Can J of Family Law* 61; T Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545.

32 See for example Bush and Folger (n 9 above); C Irvine, 'Mediation and Social Norms: A Response to Dame Hazel Genn' [2009] *Fam Law* 351.

33 Semple (n 14 above), see also R Hunter, A Barlow, J Smithson and J Ewing, 'Mapping Paths to Family Justice: matching parties, cases and processes' [2014] *Fam Law* 1404.

34 See Parkinson (n 28 above), p 212.

35 See Bush and Folger (n 9 above) pp 29–32, Semple (n 14 above), Hunter et al (n 33 above); J Eekelaar and M Maclean, *Family Justice the Work of Family Judges in Uncertain Times* (Hart Publishing, 2013); A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice Briefing Paper and Key Findings* (University of Exeter, University of Kent and ESRC, 2014).

36 A Macklin, 'Multiculturalism Meets Privatisation: The Case of Faith-Based Arbitration' (2013) *International Journal of Law in Context* 9, 343.

37 B Bastard, 'Family mediation in France: A new profession has been established, but where are the clients?' (2010) 32(2) *Journal of Social Welfare and Family Law* 135.

38 C Irvine, 'Mediation and Social Norms: A Response to Dame Hazel Genn' [2009] *Fam Law* 351.

39 He is not alone in this. See also H Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social and Legal Studies* 221 and Bush and Folger (n 9 above).

Even where mediators do not mediate they have a clear gatekeeping role in the family justice system in the now mandatory Mediation Information and Assessment Meetings or MIAMs,<sup>40</sup> although Parkinson prefers the term ‘gate opening’.<sup>41</sup> The overall role of the MIAM is not always clear however, especially in the context of a decline in the uptake of mediation services since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).<sup>42</sup> Robey sees the MIAM as ‘a key plank in the government’s drive to encourage couples to use family mediation’, and as intended ‘ideally [to] represent[s] the first stage of an ongoing mediation process that lasts several weeks’.<sup>43</sup> The Ministry of Justice agrees and commissioned research to determine what MIAMs need to achieve if they are to ‘maximise conversion to effective mediation’.<sup>44</sup> Barlow et al, however,<sup>45</sup> would prefer to see the MIAM as what they would re-term a Dispute Resolution Information and Assessment Meeting or DRIAM, a type of triage in which all potential means of resolving family legal disputes are explored in an effort to identify the most appropriate for the parties. The alternatives would include, as equally legitimate means of resolving family disputes, court adjudication and other forms of court intervention such as First Hearing Dispute Resolution Appointments (FHDRAs), along with mediation, solicitor negotiation, collaborative law and private arbitration. As it is now, however, MIAMs required by the Children and Families Act 2014 and the Family Proceedings Rules, and conducted by mediators, are intended to maximise the uptake of mediation and mediators are ‘increasing their marketing activity to bolster their business’.<sup>46</sup> In MIAMs we see the symbiosis of government policy, the rules of court and the business of the market to maintain the privacy and autonomy of family disputes and their resolution.

### **Commercial service providers – arbitration**

The autonomous family justice system also includes private arbitration. Private arbitration of family law disputes promotes primarily the autonomy of process, although the courts and some practitioners have suggested that, like mediation, it also promotes the parties’ autonomy by supporting them to make their own decisions about how to resolve their disputes and ‘more importantly, be bound by them’.<sup>47</sup> Members of the Institute of Family Law Arbitrators, formed in 2012, are subject to the regulatory and disciplinary codes of the Chartered Institute of Arbitrators (CI Arb), which on its website defines itself as ‘a leading professional membership organisation representing the interests of alternative dispute practitioners worldwide’. According to its Royal Charter, the primary object of CI Arb is ‘to promote and facilitate worldwide the determination of disputes by arbitration and alternative means of private dispute resolution other than resolution by the court (collectively called “private dispute resolution”)’.<sup>48</sup>

Members of the Institute must apply the law of England and Wales, but the process they use and the decisions they reach are confidential. Indeed confidentiality is one of arbitration’s

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40 Doughty and Murch (n 27 above). The Children and Families Act 2014 made attendance at a MIAM mandatory for all separated couples who wish to make a court application to resolve all children and or financial issues, unless one of the exemptions applies. The primary exemptions relate to domestic violence and bankruptcy. See also Practice Direction 3A, November 2015.

41 Parkinson (n 28 above).

42 A Bloch, R McLeod and B Toombs, ‘Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings’ (Ministry of Justice Analytical Series, 2014).

43 J Robey, ‘Mediation Matters: Hopes and fears for the next five years’ (2015), found at: [www.familylaw.co.uk/news\\_and\\_comment/mediation-matters-hopes-and-fears-for-the-next-five-years#.VkufmN\\_hC3U](http://www.familylaw.co.uk/news_and_comment/mediation-matters-hopes-and-fears-for-the-next-five-years#.VkufmN_hC3U).

44 Bloch et al (n 42 above) p 3.

45 Barlow et al (n 35 above); see also A Diduck, ‘Justice by ADR in private family matters: is it fair and is it possible?’ [2014] Fam Law 616.

46 Bloch et al (n 42 above), p 14.

47 S Kingston and J Thomas, ‘What’s the alternative: arbitration facts’ [2015] Fam Law 814, at 816.

48 This may be found at: [www.ciarb.org/guidelines-and-ethics/royal-charter-by-laws-and-regulations](http://www.ciarb.org/guidelines-and-ethics/royal-charter-by-laws-and-regulations).

selling points and is mandated in the IFLA Rules. As the President said in *W v M (TOLATA Proceedings: Anonymity)*:<sup>49</sup> ‘Where parties are agreed that their case should be afforded total privacy there is a very simple solution: they sign an arbitration agreement’.<sup>50</sup>

However, not all arbitrations are conducted by members of the IFLA. Outside of the IFLA, parties in arbitration can agree on any law they want to be applied to their situation, including the law of another jurisdiction or religious law. Unless the parties or one of them later seek a court order confirming the terms of the arbitral award, the courts will not examine it. And even where courts are asked to confirm the arbitral award, one might be forgiven for thinking that they will scrutinise it before confirming the arbitral award as a consent order. In *S v S*,<sup>51</sup> however, the President of the Family Division confirmed that notwithstanding the actual outcome of the award, the fact that the parties agreed to subject their dispute to arbitration meant that the award should determine the order a court subsequently makes, whether by way of consent or even if one party challenges it. In support of his conclusion, the President quoted Sir Peter Singer, former Justice of the High Court Family Division, and a founding member of the IFLA: ‘Where the parties have bound themselves to accept an arbitral award of the kind provided by the IFLA scheme, this generates a single magnetic factor of determinative importance’.<sup>52</sup> Importantly, the President saw choice and party autonomy as the foundation for his view: ‘This after all, reflects the approach spelt out by the Supreme Court in *Radmacher*. . . . In the absence of some very compelling countervailing factor(s), the arbitral award should be determinative of the order the court makes’.<sup>53</sup> Regardless of one’s view of *Radmacher*’s<sup>54</sup> approach to autonomy, lest one think that parties negotiating to arrive at mutually agreed terms manifests their autonomy in a way that their agreeing to be bound by whatever decision an arbitrator makes does not, the President went on: ‘There is no conceptual difference between the making of an agreement and agreeing to give an arbitrator the power to make the decision for them’.<sup>55</sup>

This is a striking interpretation of the *Radmacher* decision. It extends the autonomy principle from allowing the parties themselves to decide their matters, to allowing them to give up any role in the decision. Here, we have the President of the Family Division endorsing, on the grounds of party autonomy, a private, for profit, dispute resolution system that runs separate but parallel to the court system. The fact that it is privately funded and therefore available only to some, and is staffed by what could be seen as a self-regulated bench, accountable only to its own professional organisation and the parties who hire it, and whose decisions are confidential and reviewable by courts only on the narrowest of grounds,<sup>56</sup> appears unimportant.

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49 [2012] EWHC 1679 (Fam), [2013] 1 FLR 1513.

50 *Ibid*, para [70].

51 *S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257.

52 *Ibid*, para [19].

53 *Ibid*.

54 *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534, which in the context of giving effect to prenuptial agreements, highlights the importance of respecting the parties’ autonomy.

55 *Ibid*. The President has since then released Practice Guidance on the procedure to be followed where arbitral awards are to be reflected in a court order (23 November 2015). The Guidance applies to arbitrations conducted under the Arbitration Act 1996 and which are decided only in accordance with the laws of England and Wales. It reiterates the President’s view from *S v S*: ‘where the parties are putting the matter before the court by consent, . . . it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order’ (para 12). Where the order is opposed, *S v S* is also referred to: ‘The court will no doubt adopt an appropriately robust approach, both to the procedure it adopts in dealing with such a challenge and to the test it applies in deciding the outcome . . . The parties will almost invariably forfeit the right to anything other than a most abbreviated hearing; only in highly exceptional circumstances is the court likely to permit anything more than a very abbreviated hearing’ (para 17).

56 L Ferguson, ‘Arbitration in financial dispute resolution: the final step to reconstructing the default(s) and exception(s)’ (2013) 35:1 *Journal of Social Welfare and Family Law* 115.



Where the court in *S v S* was not interested in scrutinising the justice of the outcome of the arbitral award, in *AI v MT (Alternative Dispute Resolution)*<sup>57</sup> the court seemed little concerned with the justice of the process adopted by the arbitrator. In *AI v MT* the parties wished all of their divorce-related matters, finances and care of their children to be referred to an orthodox Jewish faith-based arbitration. Baker J reserved his jurisdiction to scrutinise the arbitral outcome, based upon his duty to promote the welfare of the children.

In the result, the court approved the New York Beth Din's outcome concerning both financial and residence and contact matters. First, it found the financial award between the spouses to be 'unobjectionable'<sup>58</sup> and on that basis confirmed it. Here we have some minimal judicial scrutiny of outcome, although 'unobjectionable' is a far cry from 'fair', the objective in English law. In any event, the court was not concerned that it had little information about the process adopted by the Beth Din, including the evidence it considered. It knew only that 'the parties agreed and accepted that the financial agreements set out in the schedule may be contrary to legal advice from their English solicitors, their respective barristers having not been instructed to provide any advice on the financial matters'.<sup>59</sup> The court was not troubled by the award's implicit departure from principles of fairness developed in English law or to examine the evidence upon which that departure was made. Second, while the court was satisfied that the welfare of the children was preserved by the Beth Din's outcome, it had no information about the process for achieving it, such as whether principles important to English law such as the wishes and feelings or rights of the children were considered.<sup>60</sup>

Baker J stated that there was no precedent for family arbitration in 2010 when he made his order referring this matter to the New York Beth Din, but that since then, 'the Rubicon has been crossed and an arbitration scheme in matrimonial finance cases [referring to the IFLA] is now established'.<sup>61</sup> The IFLA does not yet arbitrate children's matters, although the scheme will be extended in July 2016 to cover children arrangements.<sup>62</sup> But, it was in July 2014 that the first steps toward private arbitration of children issues were taken. Verdan et al<sup>63</sup> comment upon what they understood to be the first use of Early Neutral Evaluation (ENE) in a private law children dispute. At the First Hearing Dispute Resolution Appointment the parties were unable to resolve the issues and agreed to instruct an ENE to 'assist the parties in reaching an agreement or determine the case' and to be bound by the determination of the evaluator.<sup>64</sup> Like arbitration, the ENE process is flexible and in the control of the parties. In this case the procedure was to 'broadly mirror' the procedure in FPR 2010, including the evaluator 'hearing evidence or argument (as may be agreed) as in a contested court hearing'.<sup>65</sup> There is no mechanism in place to appeal the decision of the evaluator and in these circumstances the authors expect that 'the court will uphold the decision where it follows an impartial

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57 [2013] EWHC 100 (Fam), [2013] Fam Law 373.

58 Ibid, para [37].

59 Ibid, para [25].

60 T Tolley, '“When binding is not binding and when not binding, binds”: An analysis of the procedural route of “non-binding arbitration” in *AI v MT* [2013] CFLQ 484.

61 [2013] EWHC 100 (Fam), [2013] Fam Law 373, para [31].

62 C Smith, 'Arbitration scheme to resolve private children disputes' [2016] *Law Society Gazette* (11 February 2016) at: [www.lawgazette.co.uk/practice/arbitration-scheme-to-resolve-private-children-disputes/](http://www.lawgazette.co.uk/practice/arbitration-scheme-to-resolve-private-children-disputes/).

63 A Verdan, H Nosworthy, D Eaton and K Kelsey, 'Early Neutral Evaluation in Private Law Children's Disputes: The Way Forward?' at: [www.familylaw.co.uk/news\\_and\\_comment/early-neutral-evaluations-in-private-law-children-disputes-the-way-forward#.Vvkz87t\\_hC3U](http://www.familylaw.co.uk/news_and_comment/early-neutral-evaluations-in-private-law-children-disputes-the-way-forward#.Vvkz87t_hC3U).

64 Ibid, p 1.

65 Ibid, p 2.

adjudication following a recognised process where the objective is to achieve a fair result'<sup>66</sup> and conclude that 'there is considerable potential for the use of ENEs within private law children disputes'.<sup>67</sup>

This celebration of the burgeoning market in private family adjudication may not be surprising, but is, in my view, curious if not alarming. The advantages it is said to offer are speed (although *AI v MT* took 18 months), cost saving (that is, for the state as the parties must pay for the venues, the decision-makers and the legal advice they are encouraged to have throughout), flexibility of procedure (which can be seen alternatively as lack of procedural safeguards) and confidentiality (or lack of public scrutiny of the norms and principles on which decisions are reached). At the same time it does little to counteract what are said to be the disadvantages of court-based adjudication: adversarialism and imposition of a decision not of the parties' own making. If arbitration in any way promotes party autonomy it is the autonomy of those who can afford financially to opt out of the formal court system in which principles of justice are applied and are open to public scrutiny.

As Lord Neuberger reminded us, we must be clear about whether mediators and arbitrators are providing a service or are providing justice and what the difference may be between the two. And as Main observed, we must be wary also of ADR's 'vulnerability to capture by special interests'.<sup>68</sup> Finally overall, there are as Doughty and Murch<sup>69</sup> highlighted, not only constitutional issues about the judicial role, judicial independence and the separation of powers, but there are issues also about the apparent faith in the market to provide justice and the corresponding lack of faith in the state to deliver it.

### **Legal advice or legal information?**

Lawyers have a peculiar place in the family justice system. On the one hand they violate both understandings of autonomy. First of all they represent the law, which as we have seen is anathema to family problems, and second they offer advice which clients are meant to follow, rather than information upon which individuals can base their personal choices. When autonomy is justice it makes sense that law and lawyers are demonised formally. Barlow et al note,<sup>70</sup> for example, the Ministry of Justice materials that 'rely on anti-lawyer and anti-court stereotypes', for example referring to 'big legal fees' and 'long drawn-out court battles' in their promotion of mediation.<sup>71</sup> At the same time, however, and on the other hand, lawyers are regarded neutrally for those who have exercised their autonomy appropriately by opting out of the formal system and engaging the parallel one.

Many arbitrators and some mediators recommend that parties engage lawyers as they proceed through the autonomous justice system. This private expense is regarded as an appropriate exercise of party autonomy. In contrast, as we have seen, lawyers are discouraged throughout the formal justice system, even while some parties, who are able to afford to hire a lawyer, resist that message and retain one anyway. The formal message is curious as the empirical evidence is clear that legal advice has a great part to play in encouraging settlement in the formal system<sup>72</sup> whether in partisan or collaborative negotiations or FHDRAs. As the Action Committee on

66 Ibid, p 3.

67 Ibid, p 4.

68 Main (n 7 above).

69 Doughty and Murch (n 27 above).

70 Barlow et al (n 35 above); see also Eekelaar (n 21 above).

71 Barlow et al (n 35 above), p 32.

72 See for example, M Maclean and J Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart Publishing, 2009) and J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000).

Access to Justice in Civil and Family Law Matters in Canada observed, legal advice is crucial in the whole spectrum of dispute resolution and its availability on legal aid ought to be increased.<sup>73</sup> Yet, for the autonomous individual who insists upon engaging the formal system, lawyers are seen as part of the problem and not the solution.

Instead of legal advice which compromises their autonomy, family members are encouraged to access online ‘hubs’ which provide information about separation and divorce, cohabitation and child support, for example, rather than advice about claiming legal entitlements. And based upon this information, individuals are meant to choose ‘not-law’ over law.<sup>74</sup> Private decision-making is presented as the rational and responsible choice and recourse to law only as the last resort when private ordering fails.<sup>75</sup>

Whether or not information hubs are effective in directing people’s choices away from law is questionable, however. Reece<sup>76</sup> examined ‘Advicenow’, a government information hub that offered legal information for cohabitants on the assumptions not only that the information it provided would influence people’s behaviour, but also that that behaviour should be changed. She noted that while the ‘hub’ may have achieved some limited success in informing people, it made little headway in influencing their behaviour. Expectations of the responsible, autonomous cohabitant to act upon information and exercise his or her autonomy by making the ‘right’ choices seemed to commit Barlow and Duncan’s ‘rationality mistake’;<sup>77</sup> people did not always act according to the logic of economics or law, they often acted in accordance with imperatives of their own lives. Yet this failure of information to influence behaviour may not be the point. Reece questions the assumption that it should and suggests that often, ‘cohabitants’ recalcitrance may be something to celebrate.<sup>78</sup> Similarly, in the context of another online information ‘hub’ Eekelaar wonders:

‘when the UK website, Child Maintenance Options, proclaims: “There are no laws that say how parents should arrange child maintenance” and that the “most important thing about family-based arrangements . . . is that you and the other parent can decide between yourselves what, when and how you will both support your child” is this suggesting that the parents are completely free to bargain over whether one of them needs to perform that obligation?’<sup>79</sup>

Finally, not only do they presume a particular problematic type of individual autonomy, and a particular expression of justice in exercising it, these information hubs serve another purpose. They, combined with the LASPO and MIAMs, are part of the dominant message that family disputes are not really legal disputes. They are part of the system’s strategy to promote the privatisation, individualisation and delegalisation of family disputes, and in effect encourage the majority away not only from the courts, but from law. This diversion is worrying in the context of recent legal statements that created new legal principles of gender and generational justice in family law. In promoting justice-as-autonomy in an otherwise law-free environment, usually in money, property and child-related matters, these principles can be disregarded and it will be primarily women and children who are disadvantaged.<sup>80</sup> As Lady Hale wrote,

73 Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (2013), p 14.

74 Eekelaar (n 21 above), pp 344–345.

75 A Diduck, ‘Autonomy and Vulnerability in Family Law: the missing link’ in J Herring and J Wallbank, *Vulnerabilities, Care and Family Law* (Routledge, 2014), p 104.

76 H Reece, ‘Leaping without Looking’ in R Leckey, *After Equality: Family Sex, Kinship (Social Justice)* (Routledge, 2014).

77 A Barlow and S Duncan, ‘New Labour’s Communitarianism, supporting families and the “rationality mistake”: Part 1’ (2000) 22(1) *Journal of Social Welfare and Family Law* 23; see Reece, *ibid*, p 129.

78 Reece, *ibid*.

79 Eekelaar (n 21 above), p 353.

80 Diduck (n 75 above); see also Eekelaar (n 21 above), p 348.

encouraging autonomy in making prenuptial agreements that fall outside the guiding principles established by law, including those concluded without legal advice, ‘may serve to benefit only the strong at the expense of the weak’.<sup>81</sup> Similarly, writing about the US system’s drive toward mediation, Robert Bush and Joseph Folger<sup>82</sup> observe that critics have long seen the privatisation of legal disputes ‘as a kind of cynical ploy, designed to shift into a disaggregating forum the very kinds of cases likely to benefit from judicial resolution, given the progressive trends in legal doctrine that had [recently] emerged’ and that ‘ADR mechanisms were tantamount to a “con game” where parties were “nickel and dimed” into deals that gave away hard won rights for themselves and others’.<sup>83</sup>

In sum, we see developing an autonomous dispute resolution system for families that is increasingly separated from the courts and from the law which those courts protect and represent. While procedures that support private decision making must be a part of any healthy justice system, it is their centralisation as the ‘heart’ of the family justice system that worries me. And this delegalisation of family disputes is curious in the light of the LASPO’s clear acceptance that law and lawyers provide safeguards to parties both in terms of outcome and procedure; lawyers help to ensure a fair balance of power and protection in achieving legal entitlements. It is precisely for this reason that the LASPO permits the ‘vulnerable’ family disputant state-funded access to lawyers and to courts. Here we see the link emerging between the two aspects of autonomy I introduced above. Autonomous dispute resolution is promoted for the autonomous subject because justice for that subject means simply protecting and reinforcing his or her autonomy. The vulnerable and therefore not-autonomous subject on the other hand, needs the safeguards of formal, substantive law and is therefore permitted access to non-private justice. Apart from the problematic definition of vulnerable and its other, autonomy, which I will examine in the next section, we must wonder why the vulnerable (and arguably the rich) are deemed the only deserving recipients of this social good.

## Part 2: Autonomy of the individual

As Herring wrote in 2010, ‘autonomy has achieved a “sacred status” not only among lawyers, but within wider society’.<sup>84</sup> In family justice this means, as we have seen, that ‘the state’s role is limited to assisting parties to reach an agreement’<sup>85</sup> and aims simply to educate the parties to make their own best decisions: ‘individuals should have the right information and support to enable them to take responsibility for the consequences of their relationship breakdown’.<sup>86</sup> While it is entirely appropriate that the justice system supports parties who wish to and are able to reach agreements, whether by mediation or otherwise, the autonomy it assumes and encourages for those parties to make decisions about their relationships is a particular kind of autonomy that may not reflect the circumstances of their lives.

Here is the second expression of autonomy-as-justice in family law. But, the individual autonomy assumed and encouraged in the family justice system is problematic. First, it is abstract or ‘theoretical’. As McLachlin J (as she then was) recognised in the Supreme Court of Canada decision *Miron v Trudel*, one’s freedom to choose one’s family relations – in this case to

81 *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534, para [135].

82 Bush and Folger (n 9 above).

83 *Ibid*, p 6.

84 J Herring, ‘Relational Autonomy and Family Law’ in J Wallbank, S Choudhry and J Herring, *Rights, Gender and Family Law* (Routledge, 1st edn, 2010), ch 12, p 257.

85 *Ibid*, p 259.

86 House of Commons Library Note: Financial Provision Orders on the Breakdown of a Relationship SN/HA5655 (22 July 2010), para 4.

marry or to cohabit without marriage – exists in theory only, in practice reality is sometimes otherwise.<sup>87</sup> The autonomy presumed by the family justice system is the abstract autonomy of liberalism.

‘[It is] premised on the myth of a pre-existing equal playing field on which each individual has equal freedom, power and capacity to express it . . . This autonomy is not necessarily impervious to dependency or structural and social conditions but when these are not rendered irrelevant in its mythical ideal expression they are taken to revoke, or at least to damage, the subject’s autonomy.’<sup>88</sup>

As others have explored elsewhere,<sup>89</sup> many policy and legal reforms in the last two decades have displayed a pre-occupation with a form of neo-liberalism promoting ‘privatisation’ and individual responsibility, whose ‘other’, or opposite, seemed to be dependency. Families and family members were to take responsibility for themselves and dependence on the state was deplored and stigmatised. Since then, this remoralising of responsible behaviour<sup>90</sup> has continued; incapacity benefit and housing benefit for those under the age of 25 are characterised by the Prime Minister as ‘something for nothing’,<sup>91</sup> and most forms of dependence continue to be stigmatised.<sup>92</sup>

Sommerlad observes in this rhetoric an evoking of ‘two ideal types – the responsible citizen and the welfare parasite’<sup>93</sup> that informs the reconfiguring of the social order. In the new social order, social responsibility means freedom from the state and the concurrent presumption that dependence on the state is to be penalised. But we can also discern a shift in that policy rhetoric. While the social ideal remains individual responsibility, that responsibility is now to be achieved by exercising individual autonomy. Given that autonomy is framed in a discourse of freedom,<sup>94</sup> equality, dignity, choice and respect,<sup>95</sup> and now justice, it is difficult to argue against it. The discourse of autonomy thus adds value to the old individual responsibility rhetoric; it is easier to defend politically and philosophically. And concurrently in the new discourse, some dependence, by some people, may now be tolerated. If one is classed as ‘vulnerable’, one’s dependence or lack of autonomy is excused and the role of the law and the state has become to remedy that condition to help the individual to achieve autonomy.<sup>96</sup>

And so, in the same way that individual responsibility may now be recast as autonomy, dependence may now be recast as vulnerability.<sup>97</sup> Vulnerability connotes a state for which the individual is not so obviously to blame. ‘ “[T]he vulnerable” tend to be constructed . . . as those who are less accountable for their circumstances or actions’.<sup>98</sup> By deploying the language of vulnerability rather than irresponsibility or dependence, government can humanise cuts to

87 [1995] 2 SCR 418, para LXXIII.

88 Diduck (n 75 above) p 101.

89 See for example Diduck (n 75 above); F Williams, *Rethinking Families* (Calouste Gulbenkian Foundation, 2004); H Sommerlad, ‘Access to Justice in Hard Times and the Deconstruction of Democratic Citizenship’ in M Maclean, J Eekelaar and B Bastard, *Delivering Family Justice in the 21st Century* (Routledge, 2015).

90 See for example, S Day Sclater and C Piper, ‘Re-moralising the family? Family policy, family law and youth justice’ [2000] CFLQ 135; M Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press, 2004); Williams, *ibid*.

91 The Rt Hon David Cameron MP, ‘Welfare Speech’ (Cabinet Office and Prime Minister’s Office, Bluewater, Kent, 25 June 2012): [www.number10.gov.uk/news/welfare-speech/](http://www.number10.gov.uk/news/welfare-speech/), accessed 24 May 2013.

92 N Fraser and L Gordon, ‘A Genealogy of Dependency: Tracing a Keyword of the US Welfare State’ (1994) 19(2) *Signs* 309.

93 Sommerlad, n 89 above.

94 As in the US, see Fineman (n 90 above).

95 As in Canada, see *Quebec (Attorney General) v A* [2013] SCC 5.

96 For further discussion and development of these ideas, see Diduck (n 75 above).

97 *Ibid*.

98 K Brown, ‘Re-moralising vulnerability’ (2012) 6(1) *People, Place & Policy Online* 41, 42.

previously universal benefits; benefits are targeted now at the vulnerable who are constructed as ‘those who have less “agency” in the development of perceived difficulties in their lives’.<sup>99</sup> As Kate Brown observes:

‘As spending cuts are made, drawing on notions of vulnerability offers a rhetorical means of reassuring the public that those who need and deserve services the most will not be affected, thereby bolstering the moral and economic credentials of the government.’<sup>100</sup>

And:

‘These politics of vulnerability focus attention on the individual and distract attention from the structural forces which expose the different vulnerabilities people experience at different times and in different ways that exacerbate disadvantage.’<sup>101</sup>

But the category ‘vulnerable’ is much smaller than the category ‘dependent’; it includes only those classed as vulnerable in law and policy statements and therefore everyone not so classed is deemed autonomous. In this way, the politics of vulnerability ‘implicitly emphasise . . . self-regulation and individual “responsibilisation” ’.<sup>102</sup> In family law matters the label ‘vulnerable’ is restricted primarily to the incompetent (those judged incompetent under the Mental Capacity Act 2005) or those deemed to be incompetent: children, the elderly or victims of domestic violence. It is only they who deserve the now targeted assistance or intervention of ‘law’. And, if it is possible, the purpose of that legal intervention is to help them to attain or regain their autonomy, to ‘activate’ them as capable citizens, unbound by structural constraint.<sup>103</sup>

This new discourse of autonomy/vulnerability both gives life to and enables the parallel systems of family justice that I have been discussing. In the new dual system, state support for the law in family courts is minimal. It is reserved for the small class of the vulnerable, and its role according to the ‘guiding principles’ of the Family Justice Review, should ‘be focused on protecting the vulnerable from abuse, victimisation and exploitation’,<sup>104</sup> according to Ryder J, ‘to give them the means necessary to enable them to participate “on a level playing field”’;<sup>105</sup> to be ‘provided with an effective means of exercising their autonomy’.<sup>106</sup>

In this view the courts have no role in protecting the ‘autonomous’ who it seems are either invulnerable to abuse, victimisation or exploitation, or are thought to have brought these evils upon themselves and are thus to be responsible for resolving them privately. And of course this theme continues in the LASPO in which the ‘vulnerable’ in family justice are either children or victims of domestic violence. As Eekelaar notes, ‘potential loss of legal entitlements is not sufficient’.<sup>107</sup> Family law, therefore, seems to be reserved for the vulnerable. For the autonomous, there is freedom from law, or as McLaghlin, Chief Justice of Canada called it in the context of upholding as justifiable discrimination the exclusion of cohabitants from legal protections applicable to married partners, ‘a state-free zone’.<sup>108</sup>

In this way the autonomous are steered toward ADR or not-law: the parallel ‘justice’ system that is itself autonomous, private and personalised and is designed to promote and protect both

99 Ibid.

100 Ibid, p 45.

101 Ibid, p 48.

102 Ibid.

103 Ibid.

104 Ministry of Justice, *Family Justice Review* (Final Report, November 2011) Annex A, 182.

105 Ryder, ‘The Autonomy of the Citizen in the Context of Family Law Disputes’, Conkerton Memorial Lecture 2008, 4.

106 Ibid, p 9.

107 J Eekelaar, ‘“Not of the Highest Importance”: Family Justice under threat’ (2011) 33 *Journal of Social Welfare and Family Law* 311, 312.

108 *Quebec (Attorney General) v A* [2013] SCC 5, para 443.

its own autonomy and the autonomy of its users. This is not to say that some of the autonomous do not do their best to use formal law. The state cannot bar litigants in person or the rich from the courts if, after having done its best to deter them, those individuals still choose to use the formal system. But they are often castigated for doing so; they face admonitions from judges about wasting money or damaging their children's welfare.

This understanding of vulnerability and of the importance of law to protect the vulnerable and/or activate their autonomy may be realistic in many situations, but it is the universality of the assumptions and categorisations that is striking. Vulnerability and autonomy are constructed in unrealistic and almost fetishised ways, reinforcing their opposition.

'Why, for example, are domestic violence victims presumed to be vulnerable? Many if not most are, but equally many may not see themselves in this way. Why are primary caretakers of children or other adults not presumed to be vulnerable? Care responsibilities can have a significant impact upon one's financial security and prospects, one's bargaining power and freedom to make choices about how to arrange one's life. And apart from these crude classifications, neither the domestic violence victim, the child, nor the carer is either exclusively autonomous or vulnerable. It is more likely each is both, as is the person cared for, the non-primary carer, the worker and the non-"victim".'<sup>109</sup>

It seems that family justice policy does not acknowledge that 'the fact that one occupies a position of vulnerability need not deprive one of agency; and conversely, the fact that one acted in a way that appears autonomous does not mean that one's autonomy was not in fact circumscribed or impaired by experiences of vulnerability'.<sup>110</sup>

Macklin<sup>111</sup> illustrates a similar autonomy/vulnerability dualism in her review of private ordering in family law in the context of Canadian debates about faith-based family arbitration. The province of Ontario amended its Arbitration Act in 2006 to prohibit faith-based arbitration in family matters, primarily on the basis that Sharia would be harmful for women. The province remained unconcerned about other forms of private ordering in family matters. In this context, Macklin draws our attention to what she calls the 'encultured' subject who is assumed to require formal legal protection and therefore not be able to submit to Sharia, and contrasts her with the liberal subject who does not.

'The encultured subject is regarded as intrinsically impaired in her capacity for consent because of her cultural embeddedness (and not because of contingent vulnerabilities, like immigration status or poverty). Conversely, her secular counterpart is recognised as an autonomous subject, unencumbered by the cultural influences upon her, or at least able to critically reflect upon and detach from them.'<sup>112</sup>

The Arbitration and Mediation Services (Equality) Bill, introduced in the House of Lords in 2015,<sup>113</sup> makes similar assumptions about vulnerable/encultured versus autonomous/liberal subjects. This Bill, like the Ontario law before it, deflects concern away from the system that coerces private ordering premised on an autonomy for some that precludes the possibility of simultaneous vulnerability, and presumes therefore no need for the protection 'law' offers. At the same time, it presumes the vulnerability (without simultaneous autonomy) of others like domestic violence victims and encultured women who therefore need law's norms of equality

109 Diduck (n 75 above), p 104.

110 R Hunter, C McGlynn and E Rackley, 'Feminist Judgments: an Introduction' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments from Theory to Practice* (Hart Publishing, 2010), p 22.

111 Macklin (n 36 above).

112 Ibid, pp 359–360.

113 This Private Member's Bill had its first reading in the House of Commons on 11 February 2016; its second reading is scheduled for May 2016.

and fairness. Yet, as Macklin's discussion of the SCC's *Hartshorne* decision, Canada's *Radmacher*, demonstrates, enforcing the 'autonomy' of the secular, liberal subject might just as easily result in a perverse kind of justice – that as she says, 'instantiate[s] norms that might otherwise appear as retrograde or inegalitarian'.<sup>114</sup>

The autonomy/vulnerability dualism in family justice is thus both descriptively and normatively problematic. More than that, however, like other dualisms in liberalism, the autonomy/vulnerability dichotomy is gendered.<sup>115</sup> This is the second difficulty I see with this expression of justice-as-autonomy. While the actual autonomous or vulnerable person is not always sexed male and female, the vulnerable side of the dichotomy is marked as feminine and the autonomous side as masculine.<sup>116</sup> Vulnerability is weakness, passivity and connection; autonomy is freedom, action and strength. In this light, the system's active pursuit and promotion of autonomy in, indeed *as*, family justice raises yet another and more fundamental feminist concern. It elevates an impoverished 'male' idea of autonomy not only to default subject status but also to the default 'neutral' standard of justice. And its 'other', an equally impoverished 'female' idea of vulnerability, becomes a deficit that requires a remedy, usually in the form of protection, beneficence, or ultimately and ideally, assistance in achieving/activating the valued male form of autonomy. In my view, the system's endorsement in this way of autonomy-as-justice in family disputes is profoundly gendered and may undo for many the recent advances made by formal law in women's and children's well-being.

## Conclusion

As family living is becoming more fluid, diverse and complex, there is more need than ever for family law to take seriously its roles both in facilitating an individual's choices in the recognition of that diversity and supporting the legal claims those choices may engender. Justice in this situation means, as Dingwall says, law supplying a framework for and being a party in regulating the exercise of power in personal relationships and child rearing in a way that 'reflects a basic set of assumptions about what is equitable in contemporary society'.<sup>117</sup> The question, as Eekelaar concludes, 'is not whether law is a sufficient condition for family justice, but whether it is a necessary one'.<sup>118</sup> I worry therefore about the marginalisation of law or of some legal norms from the new framework of the family justice system, in favour of only one – an impoverished and gendered understanding of autonomy. The 'it is up to you' idea of justice is devoid of a theory of power and uses the sophisticated and seductive language of autonomy to return family living and therefore family justice to the private sphere where the risks and often realities of structural and individual inequality are not the law's concern. It dramatically reduces the role of the court from protector of basic principles of fairness, to protector only of a gendered form of autonomy.

While it is necessary to offer families a range of private and public options to resolve their disputes and an increased coordination of services including perhaps a type of 'DRIAM' or triage,<sup>119</sup> do we who are concerned about family justice want the dominant message to families to be that their relations are always purely private and of no concern to the state or the law? Do we want to tell them that either justice has no place in their disputes or that justice means only

114 Ibid, p 358.

115 See Diduck (n 75 above) for further discussion.

116 See also R Hunter et al, n 110 above.

117 R Dingwall 'Divorce Mediation: Should We Change Our Mind?' (2010) 32 JSWFL 107, p 114.

118 Eekelaar (n 27 above), p 352.

119 See, for example, the newly established Family Solutions Court at the Central Family Court in London which houses together a contact centre, a pro bono scheme, facilities for mediation and MIAMs, a CAB, a personal support unit and a Separated Parents Information Programme.



whatever they, the parties, say it means? It seems to me that we must provide a system for those cases that can and should settle and for those cases that cannot and should not settle. But crucially, we also must provide a system with values and transparently developed principles that are made public and speak to those families who are not even in dispute at all and who are simply going about the business of 'doing family'.