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Judicial Fairness and Party Autonomy in International Commercial Arbitration

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ABSTRACT

The principle of party autonomy is a fundamental aspect of the arbitration process, granting specific contractual liberties to the parties involved. Notwithstanding its perceived attractiveness as an unrestricted entitlement, the arbitration concept has encountered various exemptions that have significantly limited its applicability in international commercial arbitration. The present study employs doctrinal analysis and theoretical conceptualization to scrutinize the principle of party autonomy in international commercial arbitration. The study analyzes the degree to which specific exemptions to the principle of autonomy, such as those related to public policy and natural justice, have curtailed the application of the principle in real-world scenarios where autonomy conflicts with considerations of justice and delocalization. The present study investigates the impact of exceptions on party autonomy in two legal systems: the Common law system in England and the Republic of Nigeria. The study aims to determine how these exceptions have impeded party autonomy.

Keywords*: Party Autonomy, Judicial, International Commercial Fairness, Public Policy.*

I. INTRODUCTION

Although the principle of party autonomy is commonly regarded as an unrestricted right, it has been subject to critical evaluation by both judicial and academic communities.[2] The principle of party autonomy is the guiding force regulating the arbitral process in a commercial dispute.[3] The principle confers upon the parties involved in a contract the authority to determine how their disagreement should be settled.[4] Additionally, it approves arbitration as a substitute and confidential method of resolving disputes. One of the primary reasons for opting for arbitration is the ability to exercise the prerogative of selecting the substantive law that will govern the contractual arrangement.

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[2] E. Tamara, 'An analysis of the Effect of Public Policy on Party Autonomy in International Arbitration' (2008) 11 CAR 1, 8.

[3] N. Blackaby and C. Partasides with A. Redfern and M. Hunter *Redfern and Hunter on International Arbitration* (Sweet & Maxwell, 6thedn 2015) 187

[4] H. Carlquist, 'Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration' [2007] Rapport 2006 1, 2.

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The entitlement is bestowed upon individuals through party autonomy, which is widely regarded as the fundamental framework of the arbitration procedure. Party autonomy enables the parties to customize their contractual arrangements according to their preferences.[5] Furthermore, the involved parties' capacity to waive the judicial system's authority and instead select arbitration reflects its integration within the doctrine of contractual autonomy.[6] In addition, it is common for states to acknowledge and uphold arbitral awards, thereby underscoring the significance of party autonomy and the increasing prevalence of international arbitration.[7]

II. PARTY AUTONOMY AND PUBLIC POLICY

Notwithstanding the inherent advantages, numerous instances exist where party autonomy is subject to limitations. An illustration that deviates from the norm pertains to public policy, which confers a right to every State to exercise absolute and enduring authority over its dispute resolution mechanisms.[8] Furthermore, the involvement of multiple conditions in international arbitration necessitates the consideration of the public policy of each respective State.[9] The lack of a standardized definition for the term 'public policy' can be attributed to the differing approaches to public policy across various states. As an example, the United Kingdom adopts a position that favors enforcement.[10] The assertion is demonstrated in the case of *R v. V*[11], wherein the petitioner endeavored to contest the enforcement of an arbitral decision on its inconsistency with the public policy of England. Nevertheless, the court determined that the award did not conflict with public policy. Consequently, the tribunal upheld the award.[12]

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[5] A. G. S. Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and An Assessment of Its Role and Extent' [2012] Yalova Üniversitesi Hukuk Fakültesi Dergisi 161; G Born and K Beale, 'Party Autonomy and Default Rules: Reframing the Debate Over Summary Disposition in International Arbitration' (2010) 21 ICC International Court of Arbitration Bulletin; S Abdulhay, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International 2004) 159.

[6] M. Zhang, 'Contractual Choice of Law in Contracts of Adhesion and Party Autonomy' (2008) 41 Akron L. Rev 123.

[7] The New York Convention – at present - has 156 member states with Andorra being the last state party acceding to the treaty in September 2015. G. B Born, 'International Commercial Arbitration' (Kluwer Law International 2nd edn, 2014) 158-59.

[8] A. G. S. Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and An Assessment of Its Role and Extent' [2012] Yalova Üniversitesi Hukuk Fakültesi Dergisi 161, 181; Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Article V (2) (b) (New York Convention).

[9] R. Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) 15 Transnational Law 323; C. M. V Clarkson and J Hill, *The Conflict of Law* (OUP, 4th edn 2011) 166.

[10] A. G. Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' [2000] The International Construction Law Review 159; *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401; [2000] QB 288; T. L Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards Under the New York Convention" (2007) 24 Journal of International Arbitration 9, 24

[11] *R v V* [2009] 1 Llyod's Rep 97.

[12] R. Merkin and L. Flannery, *Arbitration Act 1996* (Routledge, 5th edn 2014) 316; J Hill and A Chong, *International Commercial Disputes Commercial Conflict of Laws in English Courts* (Hart Publishing, 4th edn 2010)

Despite the United Kingdom's generally favorable attitude towards enforcement, it deviated from this stance in the case of ***Soleimany v. Soleimany***[13] by declining to enforce an award due to public policy considerations. The English court refused to recognize the award because illicitly transporting carpets was deemed a violation of the law in Iran. Hence, the court's decision to not enforce the award can be considered prudent as a ruling in the opposite direction may potentially undermine the fundamental principles of the English legal framework. In circumstances where a contract violates the basic principles of a State, it is within the purview of national courts to decline enforcement of said contract.

III. PARTY AUTONOMY AND NATURAL JUSTICE

Another constraint on party autonomy pertains to the principle of natural justice, which comprises two components.[14] Initially, every party must receive a fair and unbiased hearing devoid of partiality. Secondly, both parties must be allowed to present their respective cases before an arbitral tribunal. The principle of natural justice confers upon parties the right to be treated equally. Article 18 of the UNCITRAL Model Law on Commercial Arbitration 1985 (with amendments adopted in 2006) establishes the two components of the natural justice principle, which require that the parties be treated equally and that each party be afforded an unlimited opportunity to present their case.[15] Although there is significant overlap between the two principles, it is crucial to maintain their distinctiveness owing to their unique attributes.[16]

The measure guarantees that all parties can receive a just trial and that partiality does not permeate the arbitration proceedings. If a party is prohibited from presenting their case but is treated equally in all other aspects, it would still be considered a violation of the principle of natural justice. This is because the party in question would not have had the chance to present their argument as a party in opposition.

One of the fundamental tenets of arbitration is to guarantee parity of treatment among parties, thereby enabling them to consent to the mutual implementation of the arbitral proceedings. According to Dursun, using provisions that contradict equal treatment should be avoided as they oppose the principles of natural justice.[17] Article 15(2) of the International Chamber of

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[13] *Soleimany v Soleimany* [1998] 3 WLR 811

[14] J. P. Gaffney, 'Due process in the World Trade Organization: the need for procedural justice in the dispute settlement system' (1998) 14 Am. U. Int'l L. Rev. 14, 1173; S Greenberg, C Kee, and J. R Weeramantry, *International commercial arbitration: an Asia-Pacific perspective* (Cambridge University Press, 2010) 280.

[15] United Nations Commission on International Trade Law (UNCITRAL), *Model Law on Commercial Arbitration* 1985 (with amendments as adopted in 2006), Article 18.

[16] D. Caron, L. Caplan and M. Pellonpaa, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2006) 29.

[17] A. G. S. Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and An Assessment of Its Role and Extent' [2012] Yalova Üniversitesi Hukuk Fakültesi Dergisi

Commerce Rules on Arbitration (ICC Rules) stipulates that the arbitral tribunal must conduct its proceedings fairly and impartially.[18] According to academics Derains and Schwartz, Article 15(2) employs the terminology above instead of "equal treatment" due to potential inequity in certain circumstances.[19] Therefore, it may be more advantageous to administer equitable and unbiased treatment to the parties, as proposed earlier, rather than striving for complete equality to prevent any instances of inequality.

The arbitral process is supported by additional principles such as *nemo judex in causa sua*, which signifies that no individual can act as a judge in their case. Furthermore, no party should be convicted without a chance to present their case, and each party has the right to be informed of the rationale behind the decisions made.[20] Hence, the arbitral award shall be invalid if any fundamental principle of natural justice is violated. The annulment of an award may occur in instances where there is proof of partiality on the part of the arbitrators. Critics contend that a party with unrestricted freedom poses a potential risk to ethical behavior, particularly when choosing arbitrators.[21] According to their assertion, corporate entities, acting as parties, could potentially be swayed by their economic motivations. Consequently, there exists a high probability that the appointed arbitrator will exhibit bias towards one party instead of rendering an equitable resolution to the conflict.[22] In the end, this impacts the efficiency of the arbitration process.

IV. THE CONCEPTUAL FRAMEWORK THAT UNDERPINS PARTY AUTONOMY

The parties' freedom to shape their contractual relationship as they see fit is a fundamental aspect of arbitration, commonly called party autonomy. Nonetheless, this liberty is restricted. The concept of autonomy holds a prominent place within the framework of Western liberal philosophy. It constitutes a fundamental component of the legal and cultural traditions of the Western world. Immanuel Kant's (1724-1804) literary works are significant to the notion of autonomy, which was crucial in advancing liberty as the primary principle of Western civilization.[23] Scholars attribute the origins of the Kantian idea of autonomy to the works of

161,181; New York Convention, Article V (1) (b); Arbitration Act 1996, s 103 (2)(c) and UNCITRAL Model Law, Art 18.

[18] International Chamber of Commerce (ICC) Rules of Arbitration, Article 15(2).

[19] S. Greenberg, C. Kee, and J. R. Weeramantry, *International commercial arbitration: an Asia-Pacific perspective* (Cambridge University Press, 2010) 229.

[20] J. Ansari, 'Party Autonomy in Arbitration: A Critical Analysis' (2014) 6 Researcher 47, 51.

[21] The Legal 500, "Party Autonomy- Whither the Pendulum II" [2014] Tanzania, Litigation & Dispute Resolution 1.

[22] Ibid

[23] C. Taylor, 'Kant's Theory of Freedom' in Z. Pelczynski& J. Gray (*eds*), *Conceptions of Liberty in Political Philosophy* (Palgrave Macmillan 1984) 100.

Plato and Aristotle. Kant's framework reflects the theoretical spirit's capacity for logical self-governance in Platonic philosophy and Aristotle's acknowledgment of choice and rational deliberation as integral to leading a virtuous and ethical life.[24] The literature of Renaissance humanists and political scholars serves as the basis for Kant's notion of autonomy.[25]

Kant's perspective on autonomy as a moral concept was an evolution from the ideas of his predecessors. The individual believed that humans possess the cognitive ability to reason. Therefore, based on this premise, individuals are deemed capable of making decisions. Moreover, Kant's perspective posited that autonomy is a synthesis of rationality and liberty. The observation was that this practice allows individuals to exercise a generous amount of rationality.[26] In the modern era, Kant's concept has broadly influenced various fields, including philosophy and politics. The Kantian concept of autonomy is commonly cited as the basis for different fundamental rights in English, American, and European legal systems.[27]

Moreover, autonomy is a characteristic of the volition of people. The legislators are perceived as exemplary in ethics, as they rationally impose universal principles upon themselves without being constrained by moral determinism or driven by aesthetic impulses.[28] Moreover, Kant asserted that it is crucial to attribute free will to every rational person. The capacity for free will is a ubiquitous attribute lacking restrictions. Autonomy, conversely, refers to an unequivocal account of the conditions that shape an individual's existence. Thus, it possesses universality and unrestrictedness.[29] Autonomy refers to being self-governing and free from external control or influence.

Kantian autonomy is predicated upon the ability to make choices independently, particularly concerning heteronomous factors.[30] Nonetheless, as per Kant's perspective, this continues to be the only adverse construal of autonomy. As a manifestation of positive freedom, autonomy refers to the capacity to self-legislate.[31] Despite Kant's view that autonomy entails being free from all factors except for a reason, contemporary notions of autonomy do not necessarily share this perspective, as they do not emphasize reason as Kant did.

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[24] R. C. Bartlett and S. D. Collins 'Aristotle's Nichomachean Ethics' (Translation, The University of Chicago 2011) 30; C. D. C Reeve 'Practices of Reason: Aristotle's Nicomachean ethics' (Clarendon Press, 1992).
[25] A. W. Wood and G. D. Giovanni (eds), *Religion and Rational Theology* (Cambridge University Press, 1996); J B Schneewind, *The invention of autonomy: A history of modern moral philosophy* (Cambridge University Press 1998).
[26] C. M. Korsgaard, *Kant: Groundwork of the Metaphysics of Morals* (Cambridge University Press, 2012).
[27] A. Haemmerli, 'Whose Who? The Case for a Kantian Right of Publicity' [1999] Duke Law Journal 383-492; D. A. Strauss, 'Persuasion, Autonomy and Freedom of Expression' (1991) 91 Columbia Law Review 334.
[28] T. E. Hill, *Autonomy and self-respect* (Cambridge University Press 1991) 44.
[29] C. M. Korsgaard, *Kant: Groundwork of the Metaphysics of Morals* (Cambridge University Press, 2012).
[30] S. D. Warren & L D Brandeis, 'The Right to Privacy' [1890] 4 Harvard Law Review 193, 205.
[31] K. Treiger-Bar-Am, 'In Defense of Autonomy: An Ethic of Care' (2008) 3 NYUJL & Liberty 548.

According to Treiger-Bar-Am, perceiving the present-day concept of autonomy as synonymous with self-sufficiency is inappropriate. The fundamental aspect of autonomy, which serves as a prerequisite for independence, is commonly understood as the capacity for decision-making.[32] The principle of Kantian autonomy involves the advocacy for the well-being of others. Kant posited that it is the responsibility of each rational individual to fulfill a duty that encompasses not only refraining from deliberately depriving others of their happiness but also actively striving to promote the objectives of others.[33] According to Rawls, Kant's moral doctrine yields an ethical mutual respect and trust framework.[34] According to Kant, autonomy is acting under what we ought to do rather than what we desire to do.

Nonetheless, his ethical framework does not encompass the consideration of emotions. In the Kantian framework, the fulfillment of positive freedom duties is contingent upon actions carried out not based on personal inclination but because of moral duty. On the contrary, the obligation to demonstrate respect is a moral emotion internally generated using rational faculties.[35]

Moreover, Kant posits that autonomy denotes an individual's capacity to self-legislate when construed as positive liberty. The principle of autonomy is widely regarded as the categorical imperative. Kant justifies that an individual's actions are driven by their will. Therefore, the concept of free will confers a set of rules upon itself, which must apply to all.[36] Glendon and Post criticize autonomy as narcissistic and portray Kant this way.[37] Despite common perceptions that Kantian thought prioritizes the right over the good, Dworkin situates Kant within duty-based morality.[38] The essential social obligations enforced by positive freedom serve to counteract the criticisms directed toward Kantian autonomy. However, Murdoch critiques Kant's reliance on rationality in his moral framework.[39] Kant has been criticized for his theoretical proposition that moral worth is lacking in the right action motivated by inclination or sentiment, as opposed to the obligation that arises from reason.

Consequently, the concept of rationality extends beyond the individual level and encompasses a universal scope. Beck argues that Kant's theory is not adversely affected by the paradox of

[32] Ibid
[33] C. M. Korsgaard, *Kant: Groundwork of the Metaphysics of Morals* (Cambridge University Press, 2012).
[34] J. Rawls 'A Theory of Justice' (Harvard University Press, 2th edn 2005) 92.
[35] J. Glasgow, 'Kant's conception of humanity' [2007] Journal of the History of Philosophy 291-308.
[36] K. Treiger-Bar-Am, 'In Defense of Autonomy: An Ethic of Care' (2008) 3 NYUJL & Liberty 548.
[37] R. C. Post, 'The Social Foundations of Defamation Law: reputation and the Constitution' (1986) 74 California Law Review 691; M. A. Glendon, *Rights talk: The impoverishment of political discourse* (Simon and Schuster 2008).
[38] R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 3rdedn 1977) 150-183.
[39] I. Murdoch, *The Sovereignty of Good* (Routledge, 2ndedn 2001) 78.

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individualism and universality. Instead, that is the nature of the human condition.[40]

The concept of autonomy was further developed by philosophers who came after Kant. Hegel, a prominent philosopher from 1770 to 1831, incorporated the Kantian principle of autonomy into his philosophical framework. In a similar vein, he formulated a concept of self-determination that is synonymous with the notion of freedom.[41] Hegel formulated a theory of self-development by incorporating the idea of autonomy, whereby individuals endeavor to actualize their self-consciousness by pursuing the conceptions of freedom that are inherent in them.[42] Moreover, the notion of expression constitutes a crucial element within Hegel's framework of self-actualization. Hegel endeavored to unify the concepts of liberty and self-expression, building upon the expressivist framework established in the works of Herder.[43]

Siep observes that Hegel's understanding of autonomy does not align with the rigorous Kantian perspective. Hegel posits that the recognition of autonomy is contingent upon its manifestation within a specific mode of communal existence.[44] Hegel's perspective posits that autonomy is inherently inter-subjective and communal from its inception.

After presenting a historical overview of autonomy through examining Kant's writings, it is pertinent to assess the implications of autonomy when it intersects with justice issues. Hence, the discourse will shift towards critical legal scholars who believe that party autonomy should not be the primary consideration in ascertaining the parties' behavior. Instead, the argument posits that justice should take precedence over all other considerations, including the tenets of contract law. This is particularly evident when autonomy leads to inequitable outcomes, legitimizing judicial intervention.

Bentham is a prominent critical legal theorist in this discourse. He is commonly recognized as the progenitor of utilitarianism and is credited with originating the maxim "the greatest amount of happiness for the greatest amount of people."[45] The maxim pertains to an individual's responsibility to make a decision that aligns with the aforementioned utilitarian principle once they have comprehended the consequences of their actions.[46] Moreover, Bentham facilitated the utilization of the principle as the basis of a unified and comprehensive ethical framework

[40] L.W. Beck, *A Commentary on Kant's Critique of Practical Reason* (University of Chicago Press 1960) 196.
[41] G. W. F. Hegel, *Philosophy of Right* (S. W. DydetrBatoche Books Kitchener 2001) 21-24; H. A. Reyburn, *The Ethical Theory of Hegel* (Clarendon Press 2002) 31.
[42] C. Taylor, 'Kant's Theory of Freedom' in Z. Pelczynski& J. Gray (*eds*), *Conceptions of Liberty in Political Philosophy* (Palgrave Macmillan 1984) 100.
[43] Ibid
[44] R. R. Williams*, Hegel's Ethics of Recognition* (University of California Press 1997) 81.
[45] A. Davies, 'Jeremy Bentham (1748-1832): The Utilitarian Foundations of Collectivism' (1995) 15 Libertarian Heritage 1, 9.
[46] R. D. Milo, 'Bentham's principle' (1974) 84 Ethics 128-139.

that hypothetically pertains to all facets of existence.[47] According to Singer, no all-encompassing or definitive ethical system was unequivocally established based on a single fundamental ethical principle before this time.[48] Bentham's utilitarianism aimed to reform traditional moral perspectives rather than provide clarification or justification for them.

Moreover, Bentham's utilitarianism can be perceived as a hedonistic philosophy, prioritizing the augmentation of individual happiness and pleasure as its primary aim. Singer, a contemporary advocate of utilitarianism, espoused a distinct methodology. The individual in question espoused the philosophy of preference utilitarianism, which prioritizes maximizing personal preference fulfillment.[49] Singer's introduction of the principle of uniform consideration of interests is presented as evidence, as it differs from Bentham's conventional utilitarian principle. According to Singer, the optimal results within the framework of utilitarianism are recognized as those that promote the overall well-being of the individuals impacted. This contrasts with solely focusing on factors that increase happiness and reduce pain.[50]

Furthermore, in alignment with the constructivist perspective, Bentham espoused the principles of legal positivism, which do not adequately safeguard individual autonomy or personal rights. Instead, it is believed that the legislative body's power should not be limited to anything less than complete and total. Therefore, it is argued that legislative power limitations should not be present.[51] Furthermore, concerning Bentham's perspective on law, examining his insights on morality yields pertinent information. Bentham exhibited a limited capacity for accommodating most ethical discourse.

Consequently, Bentham's statement exhibits a characteristic level of acidity as he asserts that when Xenophon was composing History, and Euclid was instructing Geometry, Socrates and Plato were engaged in peddling nonsensical ideas under the guise of imparting moral and intellectual knowledge.[52] This approach expanded to encompass discussions regarding natural law and natural rights. Bentham's perspective on natural rights can be succinctly encapsulated by his renowned statement, "Natural rights is a mere absurdity: natural and inalienable rights, a rhetorical absurdity, absurdity on stilts."[53] Bentham advocated for this perspective, positing that

[47] E. Dardenne, 'From Jeremy Bentham to Peter Singer' (2010) 7 Revue d'études Benthamiennes.
[48] P. Singer, 'Ethics' in *Encyclopaedia Britannica* (Chicago, 1985) 627-648.
[49] P. Singer, *Practical Ethics* (2nd edn, Cambridge University Press, 1993) 14.
[50] Ibid
[51] A. Davies, 'Jeremy Bentham (1748-1832): The Utilitarian Foundations of Collectivism' (1995) 15 Libertarian Heritage 1, 9.
[52] R. B. Louden, "Toward a Genealogy of 'Dentology'" (1996) 34 Journal of the History of Philosophy; B C Parekh, 'Jeremy Bentham: critical assessments' (1993) 1 Taylor & Francis.
[53] J. Bentham et al, *Rights, representation, and reform: Nonsense upon stilts and other writings on the French Revolution* (Oxford University Press, 2002).

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governments were inadequate in upholding the standards necessary to adhere to the tenets of natural rights.[54] Bentham's assessment of Blackstone's depiction of natural law was akin to his portrayal of it as an illusory and formidable abstraction.[55] Bentham's objection to natural law did not stem from the natural lawyers' endeavor to formulate a legal theory grounded in philosophical principles. However, it can be argued that the theoretical underpinnings proposed by natural lawyers were non-existent.[56]

Nevertheless, contemporary legal positivists hold divergent perspectives from the views. Bentham's legal observations are undeniably a component of his broader utilitarian perspective. Bentham espoused the perspective that laws were necessary for the attainment of happiness and the mitigation of pain.[57] Bentham's perspective on law is derived from a fundamental theoretical standpoint, which aligns him with natural lawyers and distinguishes him from contemporary legal positivists. Furthermore, Bentham's endorsement of the positivist notion that an unjust law is still considered a law does not necessarily imply that such a law would retain its validity. Bentham asserted that due to the ambiguous nature of the concept of natural law, specific individuals may find it contradictory to a written text or religious scripture.[58] Bentham noted that the notion would lead to a predisposition to coerce an individual to resist any legislation that he found objectionable. Bentham's observation suggests that the consequences of such an action would not result in a mere misunderstanding of legal or theoretical principles but rather a significant failure in both political and practical realms.[59]

Applying Bentham's observations to arbitration and its associated elements raises significant concerns. What measures can be taken by the arbitral process to maximize the overall happiness of all parties involved? By whom is this perspective required to be endorsed? Are the arbitrators the ones in question? If this is the case, what is the mechanism by which they can implement Bentham's proposals? If the arbitrators were to espouse Benthamite ideology and endeavor to optimize the well-being of all parties involved, what methods would they employ to quantify this metric? Although it may seem desirable to the parties involved, the proposed solution is not

[54] G. H. Smith, 'Jeremy Bentham's Attack on Natural Rights' (*Libertarianism.org*, 26 June 2012) available at <http://www.libertarianism.org/publications/essays/excursions/jeremy-benthams-attack-natural-rights> [accessed on 18-05-23]

[55] J. Bentham, 'Introduction to the Principles of Morals and Legislation (1780/89)' in J. H. Burns and H. L. A. Hart and F. Rosen (eds) (Oxford, 1996) 226-32.

[56] C. Barzun and D. Priel 'Toward Classical Legal Positivism' (2015) 101 Virginia Law Review 849.

[57] J. Bentham, 'Introduction to the Principles of Morals and Legislation (1780/89)' in J. H. Burns and H. L. A.Hart and F. Rosen (eds) (Oxford, 1996), 'The business of government is to promote the happiness of the society, by punishing and rewarding.' See also J. R. Dinwiddy (*ed*), *Bentham on Private Ethics and the Principle of Utility in Radicalism & Reform in Britain, 1780-1850* (The Hambledon Press, 1992) 329.

[58] J. Bentham, 'Introduction to the Principles of Morals and Legislation (1780/89)' in J. H. Burns and H. L. A. Hart and F. Rosen (eds) (Oxford, 1996) 74.

[59] C. Barzun and D. Priel, 'Toward Classical Legal Positivism' (2015) 101 Virginia Law Review.

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feasible. The legal system is founded upon the principle of justice. This approach contrasts with considering the satisfaction of all parties involved. Therefore, it appears irrational and impractical to implement the proposals put forth by Bentham.

Karl Marx is a pertinent critical legal theorist in the discourse on autonomy. The proposal posits that the presence of bourgeois or civil rights is a significant marker of a deep-seated societal divide.[60] A dichotomy exists between civil society, characterized by pervasive material inequality and self-centered assertion, and the political State, where citizens are legally recognized as free and equal.[61]

Furthermore, the purported entitlements of humanity advantaging people's experience provided that they are regarded in isolation from their particular identities. Moreover, according to Marx, the manifestation of rights not only reflects the societal divide but also serves to reinforce it. The State's legitimacy is derived solely from its role as the protector of human rights. However, its establishment and entitlements can strengthen the values and interests of civil society and self-centered individuals.[62]

Nevertheless, a scholar scrutinizing Marx's ideas contended that his critique of bourgeois rights lacks inherent qualities. The argument progresses by delving into the fundamental normative principles of radical egalitarianism and identifying the contrasting "binarisms" between formal and substantive freedom.[63] The beliefs are then situated within a teleological conception of History, which is currently regarded as primarily dubious. Therefore, there is a need to assess the contemporary relevance of Marx's critical examination of rights. It raises doubts about the outcome when his critique is detached from the liberal historiography in which it was originally situated.[64]

Autonomy and justice have been the subject of considerable debate among numerous commentators. While some contend that the preeminence of parties' autonomy should be upheld, Bentham and others hold a divergent perspective. In situations where autonomy hinders matters of justice, particularly in cases where autonomy leads to unjust outcomes, judicial intervention becomes imperative. This seems to be a viable result. Nevertheless, it is essential to acknowledge that it ultimately constrains the parties' autonomy. The scope of arbitration is

[60] K. Marx, 'A contribution to the Critique of Hegel's Philosophy of Rights' [1844] *DeutschFranzösischeJahrbücher*.
[61] K. Baynes, 'Rights as critique and the critique of rights: Karl Marx, Wendy Brown, and the social function of rights' [2000] Political Theory 451-454.
[62] R. C. Tucker, 'Philosophy & Myth in Karl Marx' (Transaction Publishers, 3rd edn 2001) 14.
[63] K. Baynes, 'Rights as critique and the critique of rights: Karl Marx, Wendy Brown, and the social function of rights' [2000] Political Theory 451-454.
[64] J. Elster, *An Introduction to Karl Marx* (Cambridge University Press, 1986) 6.

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limited to specific issues. Against this backdrop, a proponent of self-governance would be deemed a violation of the liberties of the involved parties.

Conversely, proponents of equity contend that judicial involvement is an essential consequence of autonomy encroaching upon matters of fairness. Hence, given that the law primarily focuses on upholding justice, is it imperative to consider factors such as the autonomy of the affected parties? In addressing this inquiry, it is necessary to determine the definition of party autonomy within the context of the arbitral proceedings. As previously stated, the principle of party autonomy is fundamental to the arbitration process. Hence, in cases where justice is a determining factor, arbitration's essential aspect will be jeopardized.

V. PARTY AUTONOMY AND JUDICIAL MEDDLING

The principle of party autonomy is subject to limitations in instances where it encumbers matters of justice. Some analysts contend that autonomy ought to take precedence over all other considerations. They argue that the involved parties should be given the authority to act according to their discretion, given that the contract ultimately belongs to them. Nevertheless, proponents of critical legal theory, such as Bentham (1748-1832), contended that justice should prevail and take precedence over contractual jurisprudence under any circumstances.[65] This applies particularly to scenarios where autonomy results in inequitable outcomes, thereby warranting judicial intervention.

Bentham posited that an individual ought to contemplate the ramifications of their actions and subsequently opt for a course of action that maximizes the overall happiness of the most affected individuals.[66] Bentham advocated for a legal philosophy known as legal positivism, which does not prioritize the protection of individual autonomy or rights. Instead, it posits that the supremacy of the legislature ought to be unconditional, thereby precluding any curtailment of legislative power.[67]

Furthermore, Bentham regarded natural rights as "anarchical fallacies" because of his conviction that governments could not fulfill the standards mandated by the principles of natural rights.[68] Consequently, he declined to support the concept of human rights and expressed the

[65] A. Davies, 'Jeremy Bentham (1748-1832): The Utilitarian Foundations of Collectivism' (1995) 15 Libertarian Heritage 1, 9.
[66] R. D. Milo, 'Bentham's principle' (1974) 84 Ethics 128-139.
[67] A. Davies, 'Jeremy Bentham (1748-1832): The Utilitarian Foundations of Collectivism' (1995) 15 Libertarian Heritage 1, 9.
[68] G. H. Smith, 'Jeremy Bentham's Attack on Natural Rights' *(Libertarianism.org,* 26 June 2012) available at <http://www.libertarianism.org/publications/essays/excursions/jeremy-benthams-attack-natural-rights> [accessed on 15-06-23].

view that justice was a less significant attribute of utility.[69] Bentham expressed his preference for evaluating the efficacy of the law over the concept of natural rights, which he deemed as "nonsense on stilts."[70] The applicability of Bentham's perspective on maximizing overall happiness to the context of arbitration remains uncertain. Is it appropriate for arbitrators to optimize the advantages of every party involved and consider all of their requirements? Ideally, this would be the optimal approach.

Nonetheless, the legal framework is not designed to guarantee the maximization of the happiness of every single person. Instead, the structure of the concept is based on the principle of justice, which is not necessarily correlated with the State of happiness. Thus, it seems unfeasible for arbitrators to provide what Bentham proposes.

Moreover, delocalization serves as the foundation for the doctrine of party autonomy. As arbitration evolved into a mechanism for resolving disputes independent of national legal systems, it acquired several new characteristics. The phenomenon under consideration is primarily characterized by its "delocalization," which denotes its ability to operate within the legal frameworks of multiple states without being bound to any one of them or serving the interests of international trading.[71] The phenomenon of delocalization serves as a protective mechanism, guaranteeing the separation of the arbitral proceedings from the domestic legal framework of the jurisdiction where the arbitration is seated.[72] According to Roy Goode, the rise of delocalization can be attributed to the opposition towards the perceived over-involvement of the judiciary in party autonomy.[73] Concerns about excessive interference drove this opposition and have contributed to the entrenchment of party autonomy as a fundamental principle.

Notwithstanding the increasing popularity of delocalization in arbitration, fully delocalized arbitration remains a remote possibility.[74] According to Mann and Collins, a prevalent phenomenon exists in most legal systems where opposition to delocalization is common in

[69] H. L. A. Hart, *Essays on Bentham, Jurisprudence and Political Theory* (Clarendon Press 1982) 51.
[70] D. Martin, 'Legal Positivism: Hart, Bentham and Kelsen' (2014) 1 The Carrington Rand Journal of Social Sciences 78, 80.
[71] D. Janićijević, 'Delocalization in International Commercial Arbitration' (2005) 3 Law and Politics 63.
[72] M. Pryles, 'Limits to Party Autonomy in Arbitral Procedure' [2008] International Council for Commercial Arbitration 1, 6.
[73] R. Goode, 'The Role of The Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 Arbitration International 1, 21.
[74] W. Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 International & Comp. L.Q. 21; M. Mustill, 'The New LexMercantoria: The First Twenty Five Years' (1988) 4 Arbitration International 86; M. Mustill & S. Boyd, 'The Law and Practice of Commercial Arbitration in England' [1989] Arbitration International 66-68.

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practical terms.[75] Moreover, Redfern and Hunter contend that delocalization lacks practical utility. The authors suggest that the efficacy of the arbitral process could be enhanced through the implementation of control by the national legal system of the seat of arbitration and the laws of the State in which the award is being enforced.[76]

Consequently, this can be rationalized as an outcome of party autonomy, which provides diverse liberties to the parties involved in the contract. Therefore, it is crucial to maintain an equilibrium between the jurisprudence of contract law and the parties' autonomy. It would be unreasonable to separate the arbitral process from national laws and not adhere to this requirement. In addition, it should be noted that the independence granted to the involved parties is not unrestricted and thus subject to mandatory legal provisions and guidelines established by governments and public policy.[77] Various challenges may arise before, during, or after the arbitration process, which may require assistance from the domestic courts. Instances may occur wherein a party may initiate legal proceedings despite the existence of an arbitration agreement. In such circumstances, it becomes incumbent upon the court to intervene and ascertain the existence and validity of an arbitral agreement.

Furthermore, in cases where an arbitral clause gives rise to ambiguity, the involved parties may seek clarification from the court, as demonstrated in the *Dalimpex Ltd and Janicki case*.[78] At the time of the dispute, the arbitral institution that had been chosen was defunct. The court was presented with a request for clarification regarding whether the arbitral clause permits the successor body of the initial institute to adjudicate the dispute. The court granted permission to the involved parties to initiate arbitration proceedings.

The significance of court support lies in its ability to utilize its unique powers, which are not granted to arbitral tribunals. In essence, the judiciary can ensure the facilitation of a successful hearing and the proper execution of awards, particularly in cases where the tribunal has dissolved after the issuance of the award.

As a result, judicial intervention is often necessary to preserve the integrity of the arbitral process and to avoid any potential miscarriage of justice.[79] Based on the context, it can be

[75] F. Mann, 'England Rejects "Delocalized" Contracts and Arbitration' (1983) 33 International & Comp L.Q 193; L. Collins, 'The Law Governing the Agreement and Procedure in International Arbitration in England, Contemporary Problems in International Arbitration' [1986] Contemporary Problems in International Arbitration 126-138.

[76] N. Blackaby and C. Partasides with A. Redfern and M. Hunter *Redfern and Hunter on International Arbitration* (Sweet & Maxwell, 6th edn 2015) 187.

[77] A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (OUP 2007).

[78] *Dalimpex Ltd v Janicki* [2003] 64 O.R (3d) 737 (Ont. CA).

[79] H. C Alvarez, N. Kaplan and D. W. Rivkin, 'Model Law Decisions: Cases Applying the UNCITRAL Model

inferred that although complete delocalization is not feasible, a modified and pragmatic version can be achieved. In this modified manifestation, domestic statutes and judicial bodies have succumbed to legislative and/or practitioner influence to embrace a more lenient stance towards arbitrations conducted within their territorial confines.[80] Nevertheless, this result harms the fundamental tenets of arbitration, specifically, the principle of party autonomy.

VI. CONSTRAINT OF PARTY AUTONOMY

Upon receiving an arbitral award from a tribunal, the prevailing party is faced with an additional challenge of enforcing the award. Arbitral awards can only be enforced by the national courts of a given State. As per the provisions of Article III of the New York Convention, every State that has entered into a contractual agreement is legally bound to acknowledge and enforce the decisions made by an arbitration tribunal. States must ensure the implementation of the award in compliance with their established regulations and protocols.[81] Consequently, it is the responsibility of the enforcing party to petition the courts in the jurisdiction where the non-prevailing party holds its assets to issue an order to confiscate assets equivalent in value to the award.[82]

In addition, Article IV of the New York Convention requires that the party seeking to enforce the award furnish the court with both the arbitration agreement and the arbitral award.[83] Nevertheless, the award can be declined recognition and enforcement. Enforcement of an award is subject to the condition that the opposing party can provide evidence about one of the comprehensive grounds outlined in Article V (1) of the New York Convention.[84] Furthermore, the court can decline enforcement based on the issue of arbitrability of the award, as stipulated in Article V(2)(a) of the New York Convention.[85] As per Article V(2)(b) of the New York Convention,[86] recognition of an award may be declined based on public policy.[87] The inclination towards public policy is not a recent development. The case of *Richardson v Mellish* articulated the notion that public policy is highly unpredictable and inconsistent, and once one attempts to

Law on International Commercial Arbitration (1985-2001)' [2003] Hong-Kong Law Journal 65.

[80] S. Greenberg, C. Kee, and J. R. Weeramantry, *International commercial arbitration: an Asia-Pacific perspective* (Cambridge University Press, 2010) 79.

[81] New York Convention 1958, Article 3.

[82] A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 408.

[83] New York Convention 1958, Article 4.

[84] Article V (1) New York Convention 1958. The grounds are found in Article V (1) (a) incapacity and invalidity (b) violation of due process (c) scope of jurisdiction (d) irregularity in the composition or procedure and (e) award set aside, suspended, or not binding.

[85] Article V (2) (a) New York Convention 1958.

[86] 88 Article V (2) (b) New York Convention 1958.

[87] A. J. van den Berg 'The New York Convention of 1958: An Overview' (2014) 39 Yearbook Commercial Arbitration 1.

harness it, the ultimate destination is uncertain. The statement is typically invoked as a last resort when alternative arguments have been exhausted.[88]

Therefore, it can be argued that public policy is a critical mechanism that empowers domestic courts to reject the enforcement of an arbitral award deemed valid under normal circumstances.[89] Moreover, the concept of public policy has been criticized as being one of the most ambiguous and varied concepts in legal scholarship.[90] The formulation and implementation of public policy is a multifaceted process encompassing both substantive and procedural dimensions at the national level. The exact nature of the notion varies depending on the legal, social, and moral traditions of a given locality at a specific moment.[91]

Moreover, the parties involved in a contract are afforded several liberties in their choice of arbitration. Several states allow parties to arbitrate per their preferences by granting them the autonomy to devise a remedial process tailored to their needs. However, it is possible that the State, which provides support for the arbitration, may intend to uphold the integrity of its legal system or protect the interests of third parties.[92] Thus, party autonomy remains subject to public policy considerations as expressed through the heteronomous provisions of specific arbitration laws or *lex arbitri*.[93]

Incorporating an autonomous public policy exemption is disconcerting, given that the six exceptions delineated under Article V are predicated on public policy concepts. Therefore, if the exception for public policy merely reiterates the preceding defenses, it can be deemed a superfluous provision. As a result, several academics have asserted that the purpose of this defense is to function as a final recourse in situations where alternative defenses are irrelevant.[94] Furthermore, including a comprehensive provision of this nature may have resulted in excessive involvement of the judiciary, thereby diluting the fundamental purpose of the Convention and diminishing the impact of domestic laws.

However, the exception has been construed in a limited manner. The jurisprudence of

[88] *Richardson v Mellish* [1824] All ER Rep 258, 266.
[89] S. Sattar, 'Enforcement of Arbitral Awards and Public Policy: Same Concept Different Approach' (2011) 8 Transnational Dispute Management 4.
[90] J. G. de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21 Law and Pol'y Int'l Bus 389, 393.
[91] S. Perloff, 'The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration' (1992) 13 University of Pennsylvania J. Int'l Bus. L 323, 328.
[92] W. W. Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 International and Comparative Law Quarterly 21, 22.
[93] S. Perloff, "The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration" (1992) 13 University of Pennsylvania J. Int'l Bus. L 323, 328.
[94] J. G. de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21 Law and Pol'y Int'l Bus 389, 416.

participating States suggests that the public policy exception and the other six defenses are typically interpreted restrictively by domestic courts. This pertains to the fundamental objective of the Convention.[95] However, we note that violating public policy regulations can serve as a basis for the annulment of awards in any given jurisdiction. Nevertheless, upon examining the case law on the implementation of arbitral awards, we discovered that the public policy exception rarely results in denying enforcement.[96] This is because numerous states distinguish between domestic and international public policy.[97] Therefore, courts will only decline enforcement in cases where this distinction is made. The reason for this is that conflict would otherwise be inevitable. This issue concerns the tension between the aspiration to uphold global arbitration awards and the imperative to refrain from granting judicial authority to implement awards that contravene domestic public policy.[98]

In addition, it is necessary for either a significant flaw in the arbitration process or the actual decision to be present for domestic courts to refuse enforcement on the grounds of public policy considerations. In the case of *German Seller v. German Buyer*[99], the Munich Court of First Instance did not enforce the arbitral award due to the tribunal's failure to investigate its jurisdiction before resolving the dispute. One of the parties contended that with the expiration of the limitation period, the tribunal lacked the authority to adjudicate the dispute.

Consequently, the court determined that the action constituted a significant breach of procedural regulations, resulting in the rejection of the award's enforcement on public policy grounds.[100] The absence of a widely recognized definition of public policy poses a risk of expanding the scope for the non-enforcement of an award. However, most national courts have adopted a restrictive approach toward the public policy defense. This aligns with the Convention's objective of promoting enforcement.[101] Furthermore, *Parsons and Whittemore Overseas Co.*[102] presented an acknowledged explanation. The U.S. Second Circuit Court of Appeals upheld the enforcement of an arbitral award against an American business, stating that the public policy defense of the Convention should be interpreted in a limited manner. The denial of enforcement

[95] T. E. Carbonneau, *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds* (Chicago: University of Illinois Press 1989] 42, 67.
[96] A. J. van den Berg, 'Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few' [1999] Arbitration in the Next Decade, ICC Special Supplement 75, 86.
[97] *Kersa Holding Co v Infancourtage* (1996) 21 Yearbook of Commercial Arbitration 617-26, CA.
[98] A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 425.
[99] *German Seller v German Buyer* [1980] Yearbook of Commercial Arbitration 260.
[100] A. Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 425.
[101] M. L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Oxford University Press, 2012) 228.
[102] *Parsons &Whittemore Overseas Co., Inc.,* v*Societe Generale de l'Industrie du Papier* 508 F 2d 969 (2d Cir 1974).

of foreign arbitral awards is limited to cases where such enforcement would contradict the fundamental principles of morality and justice by the forum State.[103]

Although most states tend to adopt a narrow interpretation of the public policy defense, there exists a possibility for it to be employed in a localized manner to protect domestic political interests. In instances where a State chooses to implement this strategy, it poses a challenge to the efficacy of the Convention. As an illustration, in 1995, the Turkish Supreme Court opted not to uphold an International Chamber of Commerce (ICC) decision. The Zurich tribunal applied Turkey's substantive law and the Zurich region's procedural law.[104] The Turkish Court contended that the arbitrator's failure to use Turkish substantive and procedural law violated Turkish public policy. Notwithstanding its flawed nature, it is worth noting that there existed no discernible material difference between the procedural law of Turkey and that of Zurich. However, the Turkish court declined to enforce the decision based on public policy considerations.

Nonetheless, it appears that the utilization of public policy defense in this manner is a harmful application aimed at reaching a more favorable conclusion to the Turkish court.[105] Despite this, many national courts have interpreted Article V(2)(b) in a manner that allows for judicial intervention solely in cases where there is a potential threat to international public policy matters.[106] The Convention represents the emergence of uniformity and the independence of parties over narrow-mindedness and variety.[107] After analyzing the public policy defense and the pro-enforcement position adopted by numerous states, it is pertinent to shift focus toward the constraints imposed on party autonomy by the defense.

The following section will examine the stance that specific states adopt regarding utilizing the exception. This holds significant relevance to the ongoing discourse as it offers insights into the influence of particular state approaches to party autonomy and the extent to which the exception effectively restricts the principle practically.

VII. THE ENGLISH PUBLIC POLICY EXCEPTION

English Courts have hesitated in refusing to enforce an arbitral award because it contradicts

[103] Ibid
[104] M. Kerr, 'Concord and Conflict in International Arbitration' [1997] Arbitration International 121, 140.
[105] M. L. Moses, 'The Principles and Practice of International Commercial Arbitration' (2ndedn, Oxford University Press, 2012) 228.
[106] A. J. van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 391.
[107] S. Perloff, 'The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration' (1992) 13 University of Pennsylvania Journal International Business Law 323, 328.

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public policy.[108] Hence, the courts have tacitly acknowledged the notion of international public policy through a restrictive interpretation of the exemption.[109] This phenomenon is exemplified in several instances. Colman J argued in the English Commercial Court case of Westacre Investments[110] that enforcing a foreign arbitral award, which may be considered illegal in the State of enforcement but is legal under the law of the contract and the *lex arbitri*, is still possible.[111] The court determined that the public policy of discouraging instances of international commercial corruption was outweighed by the public policy of upholding international arbitral awards, as per the factual circumstances of the case.

Following this, Colman J stated that it is not suitable within the framework of the Convention to request the enforcement court to reexamine the same issue in the context of a public policy submission.[112] The Court of Appeal concurred with Colman J's assessment, wherein Waller LJ, citing *Lemenda Trading Co Ltd*,[113] upheld that it was challenging to comprehend why actions falling outside the scope of universally condemned activities should garner the attention of English public policy. This is particularly applicable when the agreement is not enforced within the jurisdiction of the English court.

In addition, it is noteworthy that the court system employs a distinct methodology when faced with international arbitration awards as opposed to those of domestic origin. The English courts will decline to enforce a domestic award founded on an unlawful act, as it contradicts public policy.[114] In cases involving foreign arbitral awards, the courts consider the resolution of any illegality or breach of public policy. Under specific conditions, the courts may also consider the effects of illegality or infringement on the curial law, the law of the place of enforcement, or the appropriate law of the contract. As a result, the English courts have addressed the matter of public policy on a case-by-case basis, leading to a lack of uniformity in their methodology.[115] As an illustration, the court in the case of *Soleimany v Soleimany*[116] made an uncommon decision by refusing to uphold an arbitral award. To comprehend the rationale behind the

[108] N. Blackaby and C. Partasides with A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (Sweet & Maxwell, 6th edn, 2015) 623.
[109] O. Ozumba, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency' [2009] CAR 6.
[110] *Westacre Investments v Jugoimport-SDPR Holding Co Ltd* [1998] 2 Lloyd's Rep 111.
[111] A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 426.
[112] *Westacre Investments v Jugoimport-SDPR Holding Co Ltd* [1998] 2 Lloyd's Rep 111.
[113] *Lemenda Trading Co Ltd v African Middle East Petroleum Co* [1998] 1 QB 448.
[114] *David Taylor & Sons ltd v Barnet Trading Co* [1953] 1 WLR 562.
[115] A. G. Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' [2000] The International Construction Law Review 159, 163. See the approach taken in *Soleimany v Soleimany* [1998] 3 WLR 811; *Westacre Investments v Jugoimport-SDPR Holding Co Ltd* [1998] 2 Lloyd's Rep 111 and *Omnium deTraitment et de Valorisation SA v Himarton Ltd* [1999] 2 All ER (Comm) 146.
[116] *Soleimany v Soleimany* [1998] 3 WLR 811.

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refusal, it is crucial to apprehend the factual details of the case. A father and son entered into an agreement to engage in the illicit exportation of Persian carpets from the State of Iran. The applicable law chosen for arbitration was Jewish Law, and the proceedings were initiated in England. The prevailing party endeavored to execute the arbitral decision via the legal system of England. Nevertheless, under English law, a contract based on an unlawful act is deemed unenforceable. In contrast, Jewish jurisprudence recognizes the validity of such agreements and precludes a party from evading responsibility solely based on the corrupt or unlawful nature of the principal agreement.[117]

Contrastingly, English courts would decline to enforce a foreign arbitral award lawfully granted when the contract was deemed unlawful, according to English law and the law of the State of enforcement. English courts would decline enforcement when they determine that the legal validity of the contract under the relevant law is considered irrelevant. Following that, the arbitral tribunal issued a decision that was, in reality, incapable of being enforced in the jurisdiction where it was most likely to be requested for enforcement.[118] The High Court reviewed the circumstances under which public policy considerations that nullify the primary agreement could also invalidate the arbitration clause, as seen in the case of *Beijing Jianlong*.[119] Moreover, the concerns raised in the case of *Beijing Jianlong* pertain to enforcing the principle of separability, which stipulates that the arbitration provision must be considered entirely distinct from the principal agreement.[120]

In *Beijing Jianlong*, the court judicially reviewed the arbitration clauses to determine whether they could be distinct from the illicit agreement. The court considered the potential endorsement or concealment of unlawful behavior in evaluating the application of the arbitral clauses.[121] The claimants argued their position by invoking the public policy principle articulated in the legal

[117] 119 A. Cohen, *An Introduction to Jewish Civil Law* (Feldheim Publishers, 1991) 186-7.

[118] A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 426. Nevertheless, the narrow construal of the exception was once again reiterated in *Protech Projects Construction (Pty) Ltd* v *Al- Kharafi& Sons* [2005] EWHC Arb LR 671. Langley J emphasized that s 68(2)(g) of the Arbitration Act 199 could only be utilized in severe circumstances. Furthermore, he expressed that public policy under English law could only be evoked in cases where the suspected conduct is comparable to an act that is "unconscionable or reprehensible" and additionally where the applicant experienced "substantial injustice."

[119] *Beijing Jianlong Heavy Industry Group v Golden Ocean Griup Ltd &Ors* [2013] EWHC 1063.

[120] *Harbour Assurance v Kansa General International Insurance* [1993] 1 Lloyd's Rep 455. The doctrine of separability is also included under s7 Arbitration Act 1996: "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement." See also Article 16(1) UNCITRAL Model Law and P Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' [2013] Journal of International Arbitration 513.

[121] J. Carter and H. Kennedy, 'English High Court Addresses Separability of Arbitration Clauses' (*DLA Piper* 26 June 2013), available at <https://www.dlapiper.com/en/uk/insights/publications/2013/06/english highcourt-addresses-separability-of-arb/> [accessed 4-4-23].

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precedent of *Foster v Driscoll*.[122] According to the ruling in Foster, English law does not permit the enforcement of a contract if the parties' mutual intention is to engage in activities that violate the domestic laws of the foreign State where such activities are being carried out.

The argument put forth by the claimants in the *Beijing Jianlong* case contends that including arbitral clauses in the transaction was a crucial aspect utilized to provide and conceal illicit guarantees. Consequently, this implies that the illegal activities also tainted the said clauses. According to their argument, the arbitral clause ought to be deemed unenforceable on this basis, similar to the multiple ancillary agreements in the *Foster case*. Notwithstanding, the defendants contested the matter and contended that the separability doctrine, as validated in the case of *Harbour Assurance*, ought to be utilized.[123] Hence, the court was tasked with determining whether the public policy principle, which invalidates the primary agreement, similarly resulted in the invalidation of the arbitration provision.

The English judiciary exhibited a predictable inclination toward favoring arbitration. Applying the doctrine of separability revealed that the arbitral clause possessed autonomy from the principal agreement. The invalidity of the agreement did not affect the arbitration provision. This demonstrates the English courts' readiness to uphold arbitral provisions, even in instances where a breach of public policy renders the primary agreement null and void.[124] Since the middle of the 20th century, England's stance on the public policy exception has remained consistent. English law's position in favor of enforcement demonstrates the severity required for the exception to be employed in cases involving public policy violations. This observation suggests that the infrequent utilization of the exception results in a negligible effect on party autonomy. This indicates that the defense of public policy does not significantly restrict party autonomy, contrary to initial perceptions. Although it cannot be asserted with certainty that this approach is the optimal course of action, advocating for the enforcement of arbitral awards nonetheless reinforces the principle of party autonomy. This is a favorable development as it allows for a certain degree of adherence to the fundamental principles of arbitration.

Nonetheless, certain states do not embrace a pro-enforcement position. Subsequently, the discourse scrutinizes the states that have recurrently utilized the public policy exception. This study will analyze the Nigerian approach to analyze how exceptions can restrict party autonomy comprehensively. This is pertinent to the discourse as it offers a perspective on the reasons

[122] *Foster v Driscoll* [1929] I KB470.
[123] *Harbour Assurance v Kansa General International Insurance* [1993] 1 Lloyd's Rep 455.
[124] J. Carter and H. Kennedy, 'English High Court Addresses Separability of Arbitration Clauses', *DLA Piper*, International Arbitration Newsletter, 26 June 2013.

behind Nigeria's frequent utilization of the exception, in contrast to the United Kingdom.

i. **Public Policy Exception in Nigeria**

Prior to adopting the Arbitration and Mediation Act 2023,[125] the primary sources of the public policy exception to the enforcement of foreign arbitral awards in Nigeria were the Arbitration and Conciliation Act (1988)[126], Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), and Foreign Judgment (Reciprocal Enforcement) Act (1960).[127]

In Nigeria, the enforcement of foreign arbitral awards can be sought under the Arbitration and Mediation Act, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),[128] or the Foreign Judgment (Reciprocal Enforcement) Act (1960). It is important to note that one of the reasons for which enforcement may be denied is if it is deemed to be against Nigeria's public policy. The 2023 Act, 1958 Convention, and 1960 Act do not define the term "public policy" or specify the extent of its applicability. The crux of the matter is that a foreign arbitral award violates Nigeria's public policy if and only if the competent court(s)[129] declare it so.

Although the Nigerian Courts have yet to define the term "public policy" within the context of international arbitration, the Supreme Court of Nigeria provided insight into its meaning and implications in the case of *Okonkwo v. Okagbue*[130]. The Nigerian Supreme Court defined public policy as:

> The term' public policy' means the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is regarded as injurious to the public interest.

The definition mentioned above has been utilized in subsequent legal cases such as *Total (Nig.) Ltd v. Ajayi,*[131] *Statoil Nigeria Limited v. Inducon Nigeria Limited,*[132] and *Conoil Plc v. Vitol*

[125] The Law was enacted in 2022 and became effective in 2023.
[126] Cap A18 Laws of the Federation of Nigeria 2011.
[127] Cap F35 laws of the federation of Nigeria 2011.
[128] Popularly referred to as 'the New-York Convention'.
[129] The relevant court herein would be either High Court of a State, High Court of the Federal Capital Territory or the Federal High Court, depending on which would naturally have had jurisdiction based on the subject matter of the case, had it been a domestic matter and not been referred to arbitration.
[130] [1994] 9 NWLR 301 S.C.
[131] [2004] 3 NWLR 270 C.A.
[132] [2021] 7 NWLR 1 S.C.

S.A.[133] *Conoil Plc v. Vitol S.A.*[134] is a valuable case example, given that it pertains to the enforcement and official recording of a foreign award for enforcement.

The preceding analysis reveals that although the primary sources of the public policy exception in Nigeria do not provide a clear definition of the term or specify its scope of application, the courts have attempted to address this gap. However, the definition adopted by the courts is not entirely satisfactory, as the term "injurious to the public interest" remains overly broad and indeterminate. The Court of Appeal, in the case of *Limak Yatirim Enerji Uretim Isletme Hizmetleri VeInsaat A.S. & Ors v. Sahelian Energy & Integrated Services Ltd*,[135] affirmed the decision of the High Court of the Federal Capital Territory. The High Court had declined to enforce a foreign arbitral award based on public policy. The award was rendered pursuant to a contract that did not conform to the requirements of the National Office for Technology Acquisition and Promotion (NOTAP) Act 1979. The present study established the existence of a public policy exception in the commercial arbitration practices of Nigeria. Consequently, it becomes imperative to delve into the subsequent constraint on party autonomy, namely the principle of natural justice.

VIII. THE PRINCIPLE OF NATURAL JUSTICE

The paper consistently depicts international commercial arbitration as a widely utilized method of alternative dispute resolution. Nevertheless, it has been evidenced that national courts are frequently designated to reexamine arbitral awards, particularly concerning recognition and enforcement. Hence, a primary objective of court review is to verify that the arbitration process aligns with the fundamental tenets of natural justice. The principles are founded upon the overarching legal principle customary among societies deemed to be civilized.[136] The UNCITRAL Model Law and the New York Convention have duly authorized the application in question.[137]

The concept of natural justice has its roots in the tradition of English common law and is expressed through the Latin phrases "*nemojudex in causasua*" and "*audi alter ampartem*." Marks J expounded upon the branches of the principle of natural justice in the case of *Gas & Fuel Corporations of Victoria*.[138] One essential requirement for an adjudicator is to maintain

[133] [2012] 2 NWLR 50 C.A.
[134] [2012] 2 NWLR 50 C.A.
[135] [2021] LPELR-56408(CA)
[136] D. Brady, 'Review of Arbitral Awards for Breach of Natural Justice: An Internationalist Approach' [2013] International Arbitration 1, 3.
[137] UNCITRAL Model Law Article 18 and New York Convention Article V(1)(b): "Recognition and enforcement of the award may be refused…if…the party against whom the award was made was…unable to present his case."
[138] *Gas & Fuel Corporations of Victoria v Wood Hall Ltd & Leornard Pipeline Contractors Ltd* [1978] VR 385.

impartiality and avoid any form of bias. The second requirement is that the involved parties must receive sufficient notification to have the opportunity to present their arguments.[139] Marks J elaborated that the two limbs could potentially possess subsidiary divisions. As a result, it is imperative to emphasize that the primary tenet is that the administration of justice should not only be executed but also be perceived as being executed. Furthermore, the subdivisions of the second aspect pertain to the principle that every party involved in a dispute must be granted an impartial trial and an equitable chance to present their arguments.[140] Furthermore, Fisher J expressed in *MethanexMotunui Ltd v Spellman* that if the parties involved in a contract choose to use arbitration as a means of dispute resolution, but also explicitly state that they do not intend to adhere to the principles of natural justice, this would result in a lack of coherence.[141] Arbitration is a formal process that involves the resolution of a dispute in accordance with established principles of natural justice, resulting in a binding decision.[142]

Notwithstanding its private nature and contractual basis, the enforceability of arbitration outcomes remains contingent upon fundamental principles of procedural equity. Hence, there exists a policy conflict between the purported autonomy of the arbitral organization and the requirement for judicial oversight to ensure compliance with the fundamental obligations of due process. The resolution of this conflict necessitates careful consideration of the theoretical underpinnings of arbitration and the principles of natural justice.[143] Blackaby and Partasides assert that in addition to party autonomy, equality of treatment is a salient characteristic of international commercial arbitration.[144] Notwithstanding their fundamental role as prerequisites of the different arbitral institutions, the principle of natural justice and its implications operate as a constraint on the autonomy of the parties involved. Furthermore, it is impermissible for parties to contravene the principle of natural justice by formulating their agreement in a way that repudiates it. As an example, in cases where the involved parties have mutually agreed within the contractual agreement that only one party shall be granted the opportunity to present their case before the arbitral tribunal, such a provision may be deemed null and void by a court of enforcement.

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[139] *Marks J. in Gas & Fuel Corporations of Victoria v Wood Hall Ltd & Leornard Pipeline Contractors Ltd* [1978] VR 385 at 396.
[140] *Marks J in Gas & Fuel Corporations of Victoria v Wood Hall Ltd & Leornard Pipeline Contractors Ltd* [1978] VR 385 at 396; *SohBeng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86.
[141] *Methanex Motunui Ltd v Spellman* [2004] NZLR 95 (HC) at 50.
[142] D. Brady 'Review of Arbitral Awards for Breach of Natural Justice: An Internationalist Approach' [2013] International Arbitration 1, 3.
[143] D. Brady 'Review of Arbitral Awards for Breach of Natural Justice: An Internationalist Approach' Laws 521: International Arbitration [2013] 1, 7.
[144] N. Blackaby and C. Partasides with A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (Sweet & Maxwell, 6th edn, 2015) 366.

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Nevertheless, this contradicts the parties' expressed desires, which are determined by their autonomy to choose. The constraint serves as a restriction on the ability of parties to exercise autonomy and undermines its efficacy. The UNCITRAL Secretariat, in its report leading to the Model Law, recognized the challenge of balancing the parties' freedom to determine the procedure with the legal system's interests in recognizing and enforcing it. This issue was deemed delicate and complex. The House of Lords' expression of the natural justice principle in the case of London Borough of Hounslow[145] suggests a limited construal of the principle. The principles of natural justice hold significant importance and possess a broad scope of application. However, it is imperative to restrict them within appropriate boundaries and prevent them from becoming unrestrained.[146] In essence, this implies that the applicability of natural justice is limited to a specific set of circumstances. The principle of natural justice is a fundamental component of the arbitral process. Any breach of this principle will render the arbitral award null and void.

In cases where violations of natural justice are brought before national courts for review, it is advisable for said courts to reassess the validity of the challenge. The Federal Court of Appeals for the Ninth Circuit, in the case of *Kyocera Corp*[147], articulated that the United States Federal Arbitration Act[148] aims to uphold due process while avoiding unwarranted public interference in private arbitration proceedings.[149] Regarding this matter, it should be noted that although the parties involved in a contract may agree to waive their entitlement to a public hearing, they are not authorized to waive their entitlement to a just hearing. The conditions for a fair hearing were evaluated in *Jakob Boss Sohne K.G.*[150], during which the former European Commission of Human Rights conducted a review. The research indicates that by opting for arbitration, the parties have waived their right to have their dispute resolved in the civil courts, which would have resulted in a public resolution. Nonetheless, the Commission conveyed that such an occurrence did not entail an absolute exemption from the responsibilities of a State as stipulated by the European Convention of Human Rights (ECHR).[151] Consequently, Germany was obligated to fulfill its responsibilities pertaining to the recognition and implementation of the award. Consequently, the national courts maintain a certain level of authority and assurance

[145] *Hounslow v Twickenlaw Garden Developments Ltd* [1971] 3 All ER 326.
[146] *Hounlow v Twickenlaw Garden Developments Ltd* [1971] 3 All ER 326, The House of Lords, 346-7.
[147] *Kyocera Corp. v. Prudential-Bache Trade Services Inc* 341 F 3d 987, 997 (9th Cir 2003).
[148] United States Federal Arbitration Act 1925.
[149] *Kyocera Corp. v. Prudential-Bache Trade Services Inc* 341 F 3d 987, 997 (9th Cir 2003).
[150] *Jakob Boss Sohne KG v Federal Republic of Germany*, Application No 18479/91.
[151] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 03-03-23]

regarding the fairness and accuracy of the arbitral process. An award that fails to uphold a party's entitlement to a just hearing is extremely unlikely to be executed by a domestic court, and thus, susceptible to legal contestation.[152]

Most current laws and regulations require that the arbitral tribunal conducts its proceedings in a manner that is fair and impartial,[153] and that ensures equal treatment of the parties involved.[154] The stipulations bear a striking resemblance to the principles commonly recognized as "natural justice" in England and "due process" in the United States. The English High Court conducted a review in *Petroships Pte Ltd of Singapore*[155] to determine whether a mere technical violation of due process requirements is a sufficient basis for rejecting an award. The court opined that the provision of Section 68 of the Arbitration Act 1996[156] reflects the widely accepted notion that the court should be empowered to rectify serious lapses in adherence to the procedural requirements of the arbitral process. Nevertheless, the court additionally asserted that a technical infringement of the due process mandate was not obligatory. Hence, the court can only act when there is a significant presence of injustice.[157]

Moreover, Sun suggests that comprehending the concept of natural justice is significantly less challenging than implementing it.[158] The applicant in *Koh Bros Building*[159] filed for an interim award, which was met with opposition from the respondent on the grounds of res judicata. During the preliminary hearing, the respondent presented further objections which were accepted by the arbitrator, without affording the applicant a chance to reply. The court determined that the arbitrator had breached the fundamental principle of natural justice by neglecting to afford the applicant a chance to present its argument.[160] Likewise, in the case of Raoul Duval[161], the petitioner alleged that the respondent had employed the tribunal's chairman

[152] A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 386.
[153] English Arbitration Act 1996, s 33(1) (a).
[154] UNCITRAL Model Law, Articles 34 and 18. In *MethanexMotunui Ltd v Spellman*, case no CL3/03, the High Court of New Zealand warned against ignoring the statutory safeguards that were encapsulated in the UNCITRAL Model Law. It was found that when the contracting parties had entered into a voluntary arbitration agreement, they had accepted all of the compulsory stipulations of UNCITRAL Model Law, as contained into New Zealand law, including Article 34. As such, the court understood that any contractual exclusion of a right to reconsider an arbitrator's award for violation of natural justice would be futile.
[155] *Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam* [2001] 2 Llyod's Rep 348.
[156] English Arbitration Act 1996, s 68.
[157] A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 386. A similar conclusion was held by the Supreme Court of Italy in *Conceria G De Maio & F snc (Italy)* v *EMAG AG (Switzerland)* [1996] 21 Yearbook Commercial Arbitration 602-6.
[158] C. L. Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.199.
[159] *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063.
[160] K. H. Shahdadpuri, 'The Natural Justice Fallibility in Singapore Arbitration Proceedings' (2014) 26 Singapore Academy of Law Journal 562, 574.
[161] *Raoul Duval v MerkuriaSucden* [1996] Rev Arb 411.

after the issuance of the arbitral award. The Court of Appeals of Paris investigated and determined that the arbitrator did not possess complete impartiality. Consequently, the award was declined due to the illegitimate establishment of the tribunal. Notwithstanding the established right of a party to receive fair hearing and impartial treatment, it is crucial to examine the influence of the principle of natural justice on party autonomy.

As previously stated, the principle restricts the exercise of party autonomy. This phenomenon is demonstrated when the involved parties cannot waive the components that constitute the principles of natural justice. The case of Jakob Boss Sohne K.G. established that while parties were not allowed to waive their entitlement to a just hearing, they could renounce their entitlement to a hearing that is open to the public. This ultimately gives rise to certain concerns. Arbitration is fundamentally premised on the principle of party autonomy, which confers certain freedoms to the parties involved. However, the limitation of such freedoms by declining parties suggests that they are not absolute.

Against this backdrop, it can be argued that the principle of natural justice possesses both positive and negative implications. One of the functions of this mechanism is to protect the involved parties by guaranteeing impartial treatment and affording them the chance to present their arguments.[162] Conversely, it limits the parties' autonomy by making the previously discussed aspects of the principle the focal point of the arbitration procedure. This phenomenon gives rise to a particular form of stress.

After analyzing the natural justice principle and its components, it can be inferred that although it holds great importance, it does impose restrictions on the autonomy of the parties involved. Consequently, the efficacy of the preceding is impeded. The preservation of parties' autonomy is a fundamental characteristic of the arbitration process. The selection of arbitration over litigation is a deliberate decision made by the involved parties. Notwithstanding the party's liberty to exercise such autonomy, several critics challenge this notion, positing that it should not supersede all other considerations. The importance of justice ought to be upheld, particularly in situations where the exercise of autonomy leads to unjust outcomes.

IX. Conclusion

Arbitration has experienced a steady expansion over the past centuries, with prominent philosophers, including Aristotle, promoting the benefits of arbitration in comparison to litigation. Furthermore, the concept of party autonomy originated during the sixteenth century,

[162] S. Greenberg, C. Kee & J. R. Weermantry, *International Commercial Arbitration, An Asia Pacific Perspective* (Cambridge University Press 2011) 15.

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when Dumoulin postulated that the will of the parties to be involved in a contract is supreme. The development of party autonomy has emerged as a crucial element in contract law and holds a central position in the field of arbitration. This phenomenon can be attributed to the fact that the principle is founded upon the self-governing volition of the involved parties, who possess the liberty to conduct the arbitration proceedings in a manner of their choosing. The present study delved into the discourse surrounding the concept of party autonomy and its evolution in the modern realm of arbitration. The study analyzed the genesis of arbitration and its evolution into an integral component of contemporary dispute resolution. The principle's nature was emphasized, as it held significant relevance to the ongoing debate. It is imperative to acknowledge the significance of matters such as freedom of contract, as it enables a more profound comprehension of the underlying principle and its implications. The study conducted a comprehensive analysis of the constraints on party autonomy, revealing that a significant number of jurisdictions have adopted a restrictive interpretation of the public policy exception. Consequently, it was proposed that the exception ought to extend beyond purely hypothetical justification. Therefore, it is imperative to apply it in cases where the implementation of an arbitral decision would lead to the disregard of unjust or improper outcomes. Moreover, it can be argued that the principle of natural justice served as a safeguard for both parties involved in the arbitration process. Nevertheless, it curtailed the efficacy of party autonomy by encroaching upon the parties' liberty to enter into contracts, thereby restricting the principle. Therefore, it can be inferred that the principle of party autonomy is not entirely unrestricted. Although it may be desirable, certain issues cannot be easily resolved. Constraints on party autonomy have been present since its inception and are expected to persist. Despite not being the optimal circumstance for advocates of self-governance, it seems to be the current reality. It is suggested that there should be a reduction in restrictions on party autonomy to the greatest extent feasible. This would facilitate the preservation of parties' autonomy at a significantly elevated level.

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