Gender, Power and Justice: An Ethnographic Study of a Union Parishad-led Arbitration Councils in Rural Bangladesh

Zahidul Islam Biswas, Bangladesh Supreme Court

Available at: https://works.bepress.com/zahid/11/
Gender, Power and Justice:
An Ethnographic Study of a Union Parishad-led
Arbitration Councils in Rural Bangladesh

Thesis submitted to the Jawaharlal Nehru University
in fulfillment of the requirements for the award of the degree of

DOCTOR OF PHILOSOPHY

MD. ZAHIDUL ISLAM

Centre for the Study of Law & Governance
Jawaharlal Nehru University
New Delhi - 110067, India

2012
CHAPTER SIX

Summary and Conclusions

Introducing the theme

The process and outcome of administering ‘justice’ in the Arbitration Council System is different from those in the regular Courts. The emphasis in deciding the cases in Arbitration Councils is not on the ‘pre-existing laws’ and ‘precedents’ but primarily on the ‘statements’ of the justice-seekers and ‘eyewitnesses’ who provide persuasive evidence corroborating the ‘statements’. This research undertaken in the present study found that this distinct adjudication process makes the system a suitable site for the interplay of gender and power relations of the actors involved in the decision-making in the system. On the one hand, the justice seekers in the Arbitration Council system are husbands and wives – the men and women – who occupy different positions in the society in terms of economic, social, or political status and power. On the other hand, the people who act as adjudicators in Arbitration Councils are the local elites, elected members of the local government body, or anybody chosen by the parties. They also occupy different positions in the above-mentioned terms. Thus, an Arbitration Council becomes a body of people who are unequal in terms of sex, gender, and power. The experience during this study suggests that in the absence of proper legal guidance as to the investigations, enquiry, or production and acceptance of evidence in the Arbitration Councils, these actors in Arbitration Councils use all their legal ideas, wisdom, local social and cultural norms as well as all possible power resources and instruments to shape the decisions. Thus, the justice in the Arbitration Councils is the outcome of the complex interactions of the gender and power relations of the parties involved in a dispute. This ethnographic study has laid bare how the gender and power relations interact in the decision-making in the system. This chapter summarises the whole thesis and key findings of the study.
Central concerns of this study

Before delineating the central concerns of the study, it is necessary to highlight on the functions of the Arbitration Councils. As has been discussed elaborately in chapter 1, the Arbitration Council System was introduced by the Muslim Family Laws Ordinance (MFLO) in 1961 to address some of the crucial matrimonial problems of the Muslims, which the traditional Muslim laws and the traditional justice systems were unable to resolve. The Ordinance made legal provisions to address those problems, and created the Arbitration Council system to deal with the matrimonial disputes involving dissolution of marriage, polygamy, maintenance, and dower 1 among Muslim populations in both rural and urban areas of Bangladesh. Since then it has been functioning in the grassroots level with the local government authorities called Union Parishad.

The whole function of the Arbitration Council System can be explained in six stages. (1) Application to form an Arbitration Council: A case starts in the Arbitration Council through an application by any party to the Chairman of a Union Parishad to form an Arbitration Council. (2) Formation of the Arbitration Council: After having an application, the Chairman registers it as a case, and directs the parties to nominate their representatives to form an Arbitration Council. Upon nomination of the representatives, an Arbitration Council is formed. (3) Hearing of the case: In this stage, parties are heard, evidences and witnesses are examined, and investigation, in needed, is made. (4) Decision-making: Based on the evidences, a case is analysed and issues are determined to reach a decision. (5) Revision of the decision: At this stage, any party dissatisfied with the decision may apply for revision of a decision. (6) Enforcement of the decision: The first decision or the revised decision of the Arbitration is enforced.

1 In Islamic law, dower is a sum of money or other property to be paid to the wife by the husband in consideration of the marriage, and it symbolizes husband's respect to the wife. However, once declared by the husband, dower becomes a right, and the wife may sue the husband for getting the unpaid dower. For details, see chapter 1.
The laws of the system show that there are legal provisions to guide the functions of each of these stages. There are specific provisions for the composition of the Arbitration Council. An Arbitration Council composed of the Chairman and a preventative of each of the parties to a case before it. Both parties can select their representatives to the Arbitration Council by their own choice. The representatives also play the role of decision makers. However, there is not law to guide the hearing of the cases. The law empowers the Arbitration Councils to follow the way as it thinks fit for hearing of the cases.

The legal provision as to the decision-making is clear. All decisions of the Arbitration Councils are required to take by majority, and where no decision can be so taken, the Chairman takes the final decision. However, the most important thing is that the substantive aspect of decision-making is quite vague. Except in the case of polygamy, there is no clue that which law will be followed in determining rights and responsibilities of the parties. It otherwise shows that it also depends on the decision of the adjudicators in the Arbitration Councils.

It is argued that this flexibility in the procedure of adjudication in the Arbitration Council System aims to empower the people to address their matrimonial disputes in an informal and friendly way. In practice, the flexibility of the adjudication procedure is abused by the powerful people and the patriarchal society against the women, and the poor and disadvantaged people. Naturally, in the absence of any specific procedural law during the hearing of cases, or substantive laws in decision-making, the flexible procedure of adjudication tends to be abused by the powerful people. It becomes more vulnerable to injustice in the absence of oversight and monitoring authorities. Though there is a little scope for revision of certain kinds of decisions, there is no specific mechanism for monitor of the functions of the Arbitration Councils. Consequently, the Arbitration Council system provides enough and unchallenged scopes for the interactions of the gender and power relations of the parties, making the women and poor people vulnerable to injustice. Therefore, the impact of the system on access of the women and disadvantaged people to justice is tremendous. Yet, the literature review presented in the second chapter shows, this important area of concern is largely under-researched.
In this context, this study attempted to unfold the social-legal and cultural frameworks of gender and power, which influence the process of access to justice through in the Arbitration Council System. It specifically sought to explore three aspects of the system. *First*, to explore the bodies of substantive law used in the Arbitration Council, i.e., the bodies of law that determine the parties’ rights and responsibilities; to examine their consistency with the state-laws, and the relationship between these bodies of law and gender. *Second*, to explore the bodies of the procedural law followed in the Arbitration Council during hearing and adducing evidence etc, and the relationship between these bodies of law and gender. *Third*, to explore the ways the parties in the Arbitration Councils exercise power, and the instrumental modes of the exercise of power.

**The theoretical design**

In order to explore these aspects of the Arbitration Council System, it was first necessary to explore the nature of relationship amongst these specific phenomena – gender, power, and justice – in the society in general, and in the rural society Bangladesh in particular. Therefore, chapter 2 attempted to review the conceptual frameworks of them, and it made these things adequately clear. Accordingly, this study conceptualised gender in terms of gender roles and relations. It conceptualised gender roles as those behaviours, tasks, and responsibilities that a society considers appropriate for men, women, boys, and girls. It conceptualised the ‘gender relations’ as the ways in which a society defines rights, responsibilities and the identities of men and women in relation to one another. Chapter 2 also discussed about the different points of view on ways of construction of gender in the society, and different social and institutional structures that nurture specific types of gender roles. It thus made clear that gender roles and relations create differences in men and women’s acts, rights, and responsibilities, which, consequently, create inequality between them. The inequality, in turn, gives birth to and perpetuates different forms of power.

Chapter 2 then focused on the power perspective. It revealed that there are various conceptions of power in the society; hence, there are various faces, relationships, typologies of power. There are also various ways to analyse the power
relations. It made an important thing clear that the relations of power may be explained in different ways, but gender always comes as a source, or an instrument, or a result of such an exercise of power.

In light of the theoretical discussion on power in chapter 2, this study conceptualised power as an action or a set of actions of an actor in an Arbitration Council upon the present, possible, or future actions of the other actors. This conceptualisation is founded on the conception of Michel Foucault. As has been discussed elaborately in chapter 2, Foucault explains that power does not exist as a distinct phenomenon or in a ‘concentrated or diffused form; rather it exists ‘only when it is put into action.’ Power is enshrined in relationships. What defines a relationship of power is, in the words of Foucault, that ‘it is a mode of action that does not act directly and immediately on others. Instead, it acts upon their action: an action upon action, on possible or actual future or present action.’ As Foucault explains, power always entails a set of actions performed upon another person’s actions and reactions. The exercise of power may involve violence, or consent, but that involvement never makes them constituent elements of power. They may be involved as instruments or results. According to Foucault, exercise of power is always strategic. The strategy of exercise of power works in three ways. First, the partners in a relationship fix the means of attaining their objective in a rational way. Second, they assume the possible actions of each other and the effects of the actions. Third, they chose a way of actions, which each of the partner thinks appropriate or stronger than the other’s choice.

In exploring how the parties in Arbitration Councils exercised power, this study was aided and guided by the findings of Robert A. Dahl, Peter Bachrach, Morton S. Baratz, and Steven Luke on the exercise of power – all of which have been discussed elaborately in chapter 2.

Robert A. Dahl, Peter Bachrach, Morton S. Baratz, and Steven Lukes explain the three ways of exercise of power. Robert A Dahl holds that power depends on resources or bases of power (opportunities, acts, or objects), means or instruments of power (threats or promises), the range or scope of power (B’s response to A), and the

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2 For this and other quotations used in this section, please see the references provide in chapter 2.
amount or extent of power (the probability of power being exercised successfully in conjunction with the means and scope of power). According to Dahl, these are the dynamics that affect the behaviour of both who exercises power and over whom the power is exercised.

Bachrach and Baratz extend Dahl’s approach and hold that exercise of power has an exclusionary aspect. In every human institution, there exist some dominant values, myths, rituals, institutional practices, established decision-making procedures, and rules of the game. From all these, some persons or groups attain gain and some persons or groups become handicapped. According to Bachrach and Batarz, it is exclusionary aspect of power, which sustains a form of bias that favours the values, myths, rituals, and institutions of a dominant group relative to the others. Thus, by mobilisation of bias, issues of interest of a person or group could be suppressed, left out, or even destroyed by another person or group, and hence that issue may never come to a decision making stage. Steven Lukes extends the approaches developed by Dahl, Bachrach and Batarz, and holds that the power is exercised in another way too. That is, a person exercises power over another not merely by direct action or by creating barriers to participation but also by influencing, shaving, or determining his very wants.

Thus, from the findings of Robert A. Dahl, Bachrach, Batarz, and Steven Lukes, this study conceptualised that power might be exercised in Arbitration Councils too in three ways. First, in a direct way as explained by Robert A. Dahl; second, in a passive way as explained by Bachrach and Batarz; and third, in an indirect way as explained by Steven Lukes. While these conceptions of three ways of exercise of power was guiding light in exploring the exercise of power in Arbitration Councils, Max Weber’s typologies of power was very useful for this study in understanding the resources and instruments of the exercise of power.

As has been elaborately discussed in chapter 2, Max Weber defines power (macht) as the ‘probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests’ and makes two big divisions among the various types of power. A division includes those types of power that are considered as domination; the other
division includes those types of power that are based on sheer force and coercion. Weber outlines three major types of legitimate domination, i.e., authority: (a) legal, (b) traditional, and (c) charismatic. The legal authority can emerge and develop in various ways, for instance, through the systems of convention, laws, and regulations developed in any society. Traditional Authority is the type of authority where the traditional rights of a powerful and dominant individual or group are accepted, or at least not challenged, by subordinate individuals. These could be (i) religious, sacred, or spiritual forms, (ii) well established and slowly changing culture, or (iii) tribal, family, or clan type structures. Charismatic authority is a quality of an individual personality, which can be a driving and creative force, and which can surge through traditional authority and established rules. However, what Max Weber explains as types of power becomes resources, bases, or dynamics of power as per the understanding of power in this study.

The next focus of chapter 2 was on the concept of justice. The discussion made it clear that the concept of justice is a relative one and based on a society’s culture – social, legal, political, or religious. While everyone agrees that justice is by definition giving people what they deserve there are little agreement on what they deserve. This measurement or evaluation of what people deserve may be quite different by different people based on their moral political and cultural outlooks. Hence, there are various contested and conflicting conceptions of justice, each emphasizing on certain principles, criteria, or contents of justice. For example, some emphasize one principle over other, e.g., liberty over equality; equality of capabilities, opportunities and resources instead of equality of welfare. There are some conceptions based on ideologies too, for example socialist or Islamic conception of justice. There are also conceptions of justice based spatial jurisdiction, for example, community justice, local justice, national justice, and global justice. However, while exploring the relationships of gender and power with justice, this study did not conceptualise the justice in terms of any principle or quality. By justice, it meant the ‘decision’ or the outcome of the adjudication process of the Arbitration Councils.

After discussing the three concepts separately, chapter 2 then explained the linkage between gender, power, and justice. As it explained, gender roles and relations, by way of determining different behavioural patterns, cultural norms for male and
female, as well as by attributing unequal rights and responsibilities to them, create inequality in power relationships in the society. Similarly, the inequality in power relationships perpetuates and reinforces gender inequality. Both the gender and power inequalities give birth to various forms of deprivation and vulnerability, hence injustice, in the society. Therefore, both the gender and power phenomena are closely linked to the concept of justice.

Research methodology and limitations encountered in the study
Gender and power are spread over the whole network of the society and they are neatly interwoven in every sphere of human life - social, economic, political, and cultural. Therefore, it is difficult to explore adequately how the gender and power relations work in dispensing justice in a small institutional framework like the Arbitration Council System. However, it was hoped that much of the aspects would be understandable through the voices, expressions, and linguistic usages of the people who are involved with the system, and through the local customs, rituals, and community norms within which the adjudication processes functions. Therefore, the ethnographic methods of collection of data were considered suitable for this study. It used several methods, tools, and techniques, including the observation of the Arbitration Councils, interviewing the parties to the cases, and informal discussion with the adjudicators in the Arbitration Councils. The details of the research approaches and data collection techniques have been described in chapter 3.

The ethnographic fieldwork for this study was conducted in Kansat Union of the District of Chapainowabgonj in between May 2010 to June 2011. During the 14 months long fieldwork, the researcher of this study participated and observed the proceedings of 50 cases of the Arbitration Councils. He, however, was able to observe the whole trajectory of some 30 cases. Some cases had started before he entered the field first time, and some were still running when he left the field. However, this study presented only 16 select case studies in chapter 4. As explained in chapter 3, the Arbitration Councils in Kansat Union used to hear the cases of ‘restitution of conjugal rights’, which was not under its legal jurisdiction. Nevertheless, the researcher observed all those cases too in order to gain the better understanding of the decision-
making in the Arbitration Councils. However, for the purpose of the analysis, he considered only 16 cases, which the Arbitration Councils could legally deal with.

During the fieldwork, the researcher of this study experienced two specific problems, which could be presented as two limitations of the study. First, the study intended to collect data from the natural setting of the Arbitration Councils. During the observation of the Arbitration Councils’ proceedings, the researcher was present in the sessions, and his presence made the adjudicators alert about their roles in decisions making. It is alleged that sometimes the adjudicators dictate, command, and control the justice seekers and the witnesses in terms of giving statements, putting evidences, and making decisions. But during the observation of the hearing of the Arbitration Council proceedings, the researcher found that everything was smooth. In most of the cases, the plaintiffs presented their statements, produced evidences, or argued their cases without interference from any adjudicators or anyone. It signified that their behaviours were a bit controlled, not natural, because of the presence of the researcher. This has a significant impact on the quality of the ethnographic data collected during the observation.

Second limitation involved the researcher’s interactions with the women justice-seekers. Due to the social norms, it was sometimes difficult to get them alone to talk about various aspects about their cases. These women were also not much easy to talk about their things to an outsider, the researcher; sometimes they were not quite articulated, which limited the width of collection of data on some cases.

The third limitation of this study is the one, which is inherent in all ethnographic study. As has been discussed in chapter 3, an ethnographer cannot capture all the aspects or all the details of her research object/problems. She just tries to capture various data holistically. However, how holistically she will be able to capture data depends on her intellectual capacity, and training. Therefore, there may be many things unnoticed, unobserved, unexplained, and untraceable. Based on those escaped or untapped phenomena, it is possible to give a contesting explanation, or an explanation alternative to what the first ethnographer presented. This ethnographic study is the result of what and how this researcher has observed, perceived, and understood the study subjects and objects during the fieldwork and during the time of interpretations.
and writing. However, it is always possible to contest the explanations and the analysis presented here.

**Major findings of ethnography based interactions and investigations**

The findings of this study provide answers to the three main research questions, which kick-started the investigations made in this study. The findings were presented in chapter 4 and 5. Chapter 4 presented the findings in an indirect way. This chapter described the decision-making process of 16 cases in Arbitration Councils, and narrated the stories behind the cases in order to explore the gender and power aspects of the decision-making. Then, chapter 5 presented the findings directly and systematically. It answered the research questions by analysing the whole body of data collected during the fieldwork, including the case studies presented in chapter 4.

Out of the 16 cases presented in chapter 4, 8 cases involved claims for the maintenance of the wife. It was found that the Arbitration Councils could not provide any remedy in 4 cases of out these 8 maintenance cases. In the other 4 cases, the Arbitration Councils made orders to send the wife to the husband, but did not make any provisions for maintenance. Only 2 cases involved dower. In one case, an order was made to send the wife to the husband, but no order was made as the claim of dower. In the other case, the Arbitration Council could not provide any remedy, but advised the plaintiff to go to a higher court for remedy. There were two cases polygamy, where the defendant husbands of the cases married for the second times. In one of the polygamy case, the Arbitration Council could not provide any remedy, but in other case, the Arbitration Council made an order, which was not effectively enforced. Both of the two applications for second marriage were settled in shalish, and the Arbitration Councils endorsed the shalsih’s decisions. There were 2 cases related to notice of divorce. One notice of divorce was revoked, but the other was not, hence the divorce of one of the coupes was made effective. Thus, the 16 case studies presented a complex scenario of how the decisions are manufactured in the Arbitration Councils. It revealed that each party to a case used law, the gender roles and relations, and power arrangements in the society in order to influence and control the system, defeat the opposite party and secure their desired results from the justice system. This chapter
thus exposed the politics of gender, power, and law that work in the manufacture of justice in the Arbitration Councils.

Chapter 5 presented the research findings with necessary interpretations. As explained above, the first question attempted to explore the substantive laws used in the Arbitration Council and the gender aspects of the laws. The analysis of the data revealed that the substantive laws used in the Arbitration Councils in Kansat Union were more or less consistent with state-laws. The analysis also revealed that these substantive laws also create specific kinds of gender roles and relations, which result in the creation of specific kinds of power relations between the husbands and the wives. For example, law gives a husband the role of a maintainer of the wife, and getting maintenance from husband is a wife’s rights, for which she can sue against the husband.

The second research question attempted to explore the procedural laws relating to hearing of the cases. The data revealed that in Kansat Union, there were two patterns of hearing of cases, which are ex-parte hearing, and the full-fledged hearing. It was seen that the different extents of procedural laws were used in the two patterns. In both kinds of hearing, it was found that the gender roles nurtured by the society had played role in the procedure of adjudication in the Arbitration Councils also. For example, no parties to the cases had appointed any woman as their representatives or adjudicators in the Arbitration Council, which was a reflexion of the gender role in the society that women would be involved in household work only.

The third research question attempted to explore the ways of the exercise of power in the Arbitration Councils and the resources and instrumental modes of the exercise. The analysis revealed that the parties in Arbitration Councils had exercised power in all the three ways explained by Robert A. Dahl, Peter Bachrach, Morton S. Baratz, and Steven Lukes. Some parties to cases participated directly in the adjudication process of the Arbitration Councils and exercised all their resources to attain their desired justice. Some parties did not attend the Arbitration Councils’ proceedings preventing the cases to be solved effectively by the system. In some cases, the Arbitration Councils allowed the parties to use the shalish system to reach a
decision, and then endorsed the shalish’s decision, by which the Arbitration Councils exercised its power indirectly in dealing with the cases.

Chapter 4 and 5 thus laid bare the gender and power relations that worked during the decision-making in the Arbitration Councils. They also detected the legal, social, and cultural framework where the relations enshrined in. The whole relationship of gender, power, and justice in the Arbitration Councils can be explained in the following way:

There are two types of gender roles and relationships that work in the Arbitration Councils: (a) the ones specified by law, and (b) the ones created by traditions, family, society, religion, and culture. Legally specified gender roles and relations create different kinds of sources of power for men and women, which could be classified in the legal resources of power. The socially and culturally constructed gender roles and relationships too create different other kinds of resources of power for men and women, which could be classified in the traditional resources of power.

There are three types of power resources or bases of power used in the Arbitration Councils: (a) legal resources (b) traditional resources and (c) resources of coercive power. Legal resources include the legal frameworks for Arbitration Councils and other family laws on the issues. Family laws provide specific kinds of gender roles and relations, and different kinds of scope of exercise of power to the wife and husband in the Arbitration Councils.

Traditional resources include the family, socio-religious norms, and traditional social and legal culture. These resources create and nurture different kinds of gender roles and relations, and these roles and relations create different scope for exercise of power in the Arbitration Councils.

The coercive resources of power include the possession of wealth, political connection, and the ‘personality’ of the plaintiffs and defendants. The economic resources of power are dominantly captured by the men, hence, by the husbands, which created the more scope for them to exercise power in the Arbitration Councils.
The whole of the above findings could be presented with in the following diagram.

**Diagram 2:** The overall relationship of gender, power, and justice in Arbitration Councils

**Conclusions:**

The actual interactions of gender and power relations in the Arbitration Councils are quite complex. For example, when gender was an influential dynamic in the decision-making in the Arbitration Council, it is difficult to distinguish it as a separate phenomenon from the power phenomena. Gender roles and relationships were there in some form of power resources in all the three types of resources of power that worked in the Arbitration Councils. Therefore, a decision or judgment granting justice, in the Arbitration Council System was an outcome of exercises of power by the parties.
by using their all three types of power resources strategically. As a result, it is likely to
give birth to three different ideas about the quality of justice or more appropriately
‘illusory justice’. It may seem that an ‘appropriate justice’ has been provided; it may
seem that an ‘inadequate justice’ has been given; or it may give an idea that no justice
has been given to a victim, making the victim more vulnerable and in the mouth of
further injustice. In conclusion, there is no assurance that a decision of an Arbitration
Council will be a ‘just’ remedy for a victim of injustice in a matrimonial relationship.

This study thus exposed that the complex relationship of gender, power, and
law within the Arbitration Council System has serious implications for the access to
‘justice’ for the common people, especially for women and marginalized population in
rural Bangladesh.

This exploration will deepen understanding about how this justice system
works in a local rural milieu because it explores the local interactions, which take place
for a family based justice. However, it is also hoped that the exploration will help adopt
future strategies to tackle the gender and power based vulnerabilities to injustice in
matrimonial cases in rural Bangladesh, and thus will also contribute immensely in the
field of rural justice as well as in the theory of ‘access to justice’.