

Flygtningenævnets baggrundsmateriale

Bilagsnr.:	1144
Land:	Afghanistan
Kilde:	Afghanistan Independent Human Rights Commission (AIHRC)
Titel:	Children without Legal Identity in Afghanistan Orphanages
Udgivet:	1. oktober 2020
Optaget på baggrundsmaterialet:	5. februar 2021



۱۶ جوزا ۱۳۸۱

کمیسیون مستقل حقوق بشر افغانستان
د افغانستان د بشر د حقونو خپلواک کمیسیون
AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION

CHILDREN WITHOUT LEGAL AFGHANISTAN ORPHANAGES

MIZAN 1399 (OCTOBER 2020)

Given the situation of the country, the situation of children is deteriorating day by day and the number of vulnerable children and those at risk is increasing. In addition to this issue, there is a group of children in government and non-governmental orphanages who do not have an ID card. A group of these children, unfortunately, do not have a parent and relatives, however, another group of them have relatives, but their relatives do not come to the orphanages to visit the children.

The right to identity is one of the basic rights of individuals. This right protects an individual's significant personal and identifiable attributes and social relationships. The right to identity "encompasses relatively static personal attributes, such as biographical data and physical traits, [and] it also extends to an individual's outward expression and the establishment of a web of significant social relations, such as ties to family members, cultures, or religion."¹ The right to identity includes an individual's name, personal relationship data, such as father's name and family name, cultural identity, and social relationship, among others.

The right to identity is one of the most important rights of the children. Both national and international human rights law protects the right to identity of the individual in general and the right to identity of the children in particular. Legal protection of this right imposes both positive and negative obligations on the government; positive obligation means to protect the individual's right to identity and take necessary measures to prevent others from interfering with the individual's identity, and negative obligation means to refrain from any type of infringements of the right to identity.

Despite the fact that laws oblige different institutions such as family and health institutions to register child's identity upon birth, it is an unfortunate fact that about 58% of children under the age of fifteen are not registered in the country.² However, non-registered (invisible) children are not the only children lacking legal identity. There are many incidents' that can impact a child's identity complicating their identification and right to have their identifiable personal data and social relationship. Abandonment of children by their parents and children affected by armed conflict are the other two common causes of a child's lack of legal identity in the country. The first surveys carried out by the IHRC in Afghanistan show that at least 67 children (including boys and girls) are living in various public orphanages with no proven identity or parentage affiliation. However, the actual number should be much higher.

This report discusses children's right to identity as set out in national and international documents, examines the impact of lack of formal identity on the development of a child's personality, and proposes a range of legal solutions to address such issues.

Protection of children's right to identity under International documents

United Nation's Convention on Rights of the Children (UNCRC) is the core international document protecting children's right to identity. Article eight of the Convention states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

¹ Theodore McCombs and Jackie Shull González, *the Right to Identity*, The International Human Rights Law Clinic (Berkeley School of Law, 2007).

²² Save the Children, *Civil Society Alternative Report; The Combined State Party Report (The Second to Fifth Periodic Report) for Afghanistan on the Convention on the Rights of the Child* (July 2019).

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.³

This article imposes a positive obligation on each State Party to protect children's right to identity and also a negative obligation to prevent any action that might result in infringement of this right of children. But the most important part related to our discussion is the second paragraph of the article. This paragraph imposes a positive obligation on the government to take all necessary measures to provide the child with the right to identity if the child has been deprived of it.⁴ According to this provision, in case where a child is identified with no identity, the government is under an international obligation to address the issues "speedily" in order for the child to restore her/his identity.

The right to identity is further protected by the Convention from all kinds of discrimination based on the child's identity.⁵ The convention also protects the right of children to have parentage affiliation, culture, religion and language.⁶ These protections are granted regardless of whether or not they live with their families.⁷ The Convention states that the child has the right "to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents."⁸ These are the key obligations of each State Party with regard to all children within their territory. Under the Convention, it is the responsibility of the Afghan Government to address the issue of the children deprived of identity without delay.

Protection of the right to identity under domestic law

While many domestic laws protect individual's right to identity in general and children's right to identity in particular, the Constitution of Afghanistan fails to incorporate rules to protect citizens' right to identity. While Article 54 of the Constitution protects the family as "fundamental pillar of the society," and grants the child with some protection,⁹ no specific rule on the protection of children's identity is established under the Constitution. Such a failure to protect the right to identity, one of the most important and basic rights of the citizen's, may give it a weaker position compared to other rights protected under the Constitution.

Identity is composed of an individual's name, family name, date and place of birth, and nationality under domestic law. ¹⁰ There are sufficient safeguards under national statutory law for protection of the children's right to identity, such as positive and negative obligations of the government. For instance, Article 15 (1) of the Law on Protection of Child's Rights states, "a child at the birth has the right to have an identity."¹¹ This paragraph grants a powerful protection to the child's identity and obliges the government and related entities to give the child her/his identity. Article 16 provides protection to the child's right to identity against actions that might result in infringement of that right.¹² Unlike the Constitution, fortunately, statutory laws have been very explicit in the protection of individual's right to identity. Within

³ United Nations Conventions for Rights of Children.

⁴ *Id.*

⁵ *Id.*, art. 2.

⁶ *Id.*, art 30.

⁷ *Id.*, art. 20.

⁸ *Id.*, art. 7.

⁹ See The Constitution of Afghanistan, art 54.

¹⁰ The Civil Code, art. 47; Civil Registration Law, art 3(2); Law on Protection of Child's Rights, art. 3(21)

¹¹ Law on Protection of Child's Rights, art. 15(1); See also Law on Protection of Child's Rights, art. 17(9)

¹² See Law on Protection of Child's Rights, art. 16.

domains of the legislative documents, child's right to identity has been protected with specific provisions.

Findings of the Commission

AIHRC regularly monitors the human rights situation of children in other centers, including orphanages. The result of the Commission's monitoring shows that a number of children do not have an ID card.

Recently, AIHRC's Children's Rights Unit monitored public and private orphanages in 25 provinces of the country and recognized children without legal identity. Most of these children are in Herat province.

Monitoring findings from five orphanages in the province, including Khwaja Abdullah Ansar Public Orphanage for girls, and boys, Khana-e-Mohabbat Private Orphanage, Imam Mohammad Baqir Private Orphanage and Kowsar Private Orphanage, show that 414 children (323 boys and 91 girls (between the ages of (2-17) years are covered.

Of these, 150 children had no ID card and the other 39 children (29 boys and 10 girls) were unidentified children who had not been visited by their relatives since they were handed over to orphanages by government agencies and the public.

Eleven people were identified in Kabul, eight in Balkh, one in Ghazni, one in Samangan, two in Sar-e Pol, two in Kandahar and three in Nangarhar provinces. A total of 67 children, including 53 boys and 14 girls, live in orphanages.¹³

Although regional and provincial offices have raised the issue at CPAN provincial meetings, unfortunately at the provincial level, advocacy has not been successful and no action has yet been taken on the identity of these children.

The following table provides detailed data on children without a legal identity in public and private orphanages in the country:

No	Province	Public / private orphanage	Total number of children in the orphanage	Number of children without identity	Girls	Boys
1	Herat	Khwajah Abdullah Ansar public Orphanage for Girls, Khwajah Abdullah Ansar public Orphanage for Boys, Khana-e-Mohabbat Private Orphanage, Imam Mohammad Baqir Private Orphanage and Kowsar Private Orphanage	414 children (323 boys and 91 girls)	39	10	29
2	Kabul	Private Orphanage of Hazrat Mohammad PBUH	56 children (25 girls and 31 boys)	0	0	0
3	Kabul	Public Orphanage of Tahiya-e-Maskan	150 boys	9	0	9

¹³ -Gardez, Daikundi, Kunduz, Ghor, Uruzgan, Faryab, Helmand, Badakhshan and Bamyan offices have reported no cases of children without identity in the orphanages they cover.

4	Kabul	Public Orphanage of Alawuddin	105children (55 girls and 50 boys(	2	2	0
5	Parwan	Public Orphanage of Parwan	90 boys	0	0	0
6	Ghazni	Public orphanage of Ghazni	50 boys	1	.	1
7	Ghazni	Male and female Nests of Samar	70boys and 40 girls	0	0	0
8	Ghazni	Private Orphanages of Hazrat Mohammad PBUH and Hakim Sanaee	Hakim Sanai (160 boys) and Hazrat Mohammad (33 boys and 7 girls(	0	0	0
9	Panjsher	Private Orphanage of Hazrat Mohammad P.	30children (3 girls and 27 boys(	0	0	0
10	Logar	No orphanage	0	0	0	0
11	Kapisa	No orphanage	0	0	0	0
12	Maidan Wardak	No orphanage	0	0	0	0
13	Balkh	Public Orphanage	96	8	0	8
14	Samangan	Public Orphanage	82	1	0	1
15	Jawzjan	Public Orphanage	50	0	0	0
16	Sar-e-Pol	Public Orphanage	62	2	1	1
17	Jawzjan	Private Orphanage	49	0	0	0
18	Kandahar	Private Orphanage-2 Sheikh Zayed Vesna	1467	2	1	1
19	Nangarhar	Public Orphanage of Fatemata-Zahra	288	0	0	0
20	Nangarhar	Public Orphanage of Alnadwa	390	0	0	0
21	Nangarhar	Public Orphanage of Khog Kor	370	1	0	1
22	Nangarhar	Public Orphanage of Imam Bukhari	300	2	0	2
23	Nangarhar	Mir Mohammad Yousof Orphanage	75	0	0	0
24	Konar	Narang Orphanage	113	0	0	0
25	Konar	Asadabad Orphanage	300	0	0	0
26	Konar	Nangam Orphanage	212	0	0	0
27	Konar	Said Jamaluddin Afghan Orphanage	456	0	0	0
Total			5475	67	14	53

The Problem and its Effects

This is not the first report on the situation of children without a legal identity in Afghanistan, a study by Save the Children in 2019 indicated that around 58% of children under the age of

5 do not have legal identity.¹⁴ The issue of children without a legal identity has not been specific to Afghanistan. Many other countries suffer from similar instance where, at times, more than a half of children either do not carry a legal identity or their identity is not clear.¹⁵

The lack of legal identity can be attributed to the fact that most of these children are either affected by armed conflicts or abandoned by their families.¹⁶ In reality, this poses several problems as to how children's filiation and legal identity can be confirmed. Identity and filiation are essential for the future of the children. Children may face several challenges in their lives until legal identity is given to them. We will mention some of the most critical challenges that children may face if they do not have a legal identity.

The Right to be connected to a culture, religion, and language

Every child has an established right to be linked to a culture, religion, and language. This right, which holds a special place in multi-cultural states, has been protected under important international documents that protect the children's right. Article 30 of the UNCRC provides, "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language."¹⁷ This substantially protects minorities' cultural, religious, and linguistic rights. This is an important protection that safeguards the children of minority groups against all types of discrimination and subversion.

The Right to Education

Another basic right of each individual protected under the Constitution and other statutory law is the right to education for every citizen, especially children.¹⁸ Education is one of the basic needs of any individual and specifically children. In countries with high illiteracy rates, such as Afghanistan, the state should take all necessary measures to ensure that all individuals, specifically children, enjoy the right to education. The right to education requires all necessary identity documentation. Apparently, an individual with no identity will not be able to pursue her/his formal education. Lack of legal identity is one of the main impediments to the children's right to education.

Discrimination against children without identity

It is a well-known fact that every community suffers from various forms of discrimination in one way or another; for example, ethnic and gender-based discrimination are two types of discrimination that are common in the Country. The Constitution of the Afghanistan provides all citizens with basic protection against all forms of discriminations to all citizens, including identity-based discrimination. Lack of identity affects children as an individual without

¹⁴ For this citation and more on the situation of children without identity read: Save the Children, *Civil Society Alternative Report; The Combined State Party Report (The Second to Fifth Periodic Report) for Afghanistan on the Convention on the Rights of the Child* (July 2019).

¹⁵ For more information read; The United Nations Children's Fund (UNICEF) *The State of Worlds Children, Excluded and Invisible* (2006).

¹⁶ This is my understanding of the issue. The copy of the report IHRC sent to me did not indicate the root cause. Please amend if contradict IHRC's findings.

¹⁷ UNCRC, art. 30 & 20. See also *id.* art 8; United Nations (OCHA), *Guiding Principles on Internal Displacement*, principle 23(2).

¹⁸ The Constitution, art. 43; Law on Protection of Child's Rights, chapter seven.

affiliation and makes them vulnerable to several types of identity-based discriminations. Such discrimination which at least appears as bullying, intimidation and denial of opportunity can ruin the child's whole life. To protect children from such discrimination immediate steps must be taken to establish children's identity.

Children's personal characteristics and social relationship

Growth is one of the most important stages of life that can affect the future of a child. Identity plays an important role in this stage. Identity gives the child a sense of belonging to family, culture, and society. Such sense of belonging is important in the early stages of life. In fact, identity ensures that the child's personal characteristic, historical background and relationships are protected. Understanding the background forms the basic parts of a child's personality and personal characteristics.

Social relationship

Identity also affects children's social relationship. Social behavior and social connection of each individual are closely linked to their identity. Who we are and who we relate to plays a key role in connecting with others in society. Family and relatives play a key role in individual's social relationships and behavior. These relationships are important in close-knit societies like Afghanistan. Each individual will face great difficulty defining himself/herself outside the context of the family and society she/he relates to in general. A child without identity may define himself/herself as an individual not belonging to the society, which can have a significant impact on her/his personality in the early stages of personal and psychological development.

Statutory Law and Court Procedures

Children without identity (Majhoolul Howya) are defined as an individual, alive or dead, whose identity cannot be confirmed when found.¹⁹ The Law on the Protection of the Rights of the Child and the Guardianship Law, however, defines a child without identity as a child whose filiation is not established (unclear). While the Law on the Protection of the Rights of the Child and the Orphanages Law do not provide any specific details on how to determine the identity of the child without identity, Article 6 (3) of the Guardianship Law obliges the Ministry of Labor Affairs (MoLSAD) to report the children without identity who are registered in orphanages or other social entities to the Civil Registration Office, so that their identity could be established.²⁰

The Law on Civil Registration imposes obligation on any real or legal persons to report any child without identity to the related police office.²¹ The report will then be sent to the relevant Civil Registration Office and then to the authoritative court.²² The court and Civil Registration Office will, together, after forensic medicine screening and DNA analysis, give the child a name and identity.²³ However, there is no clear provision in the law about the procedure for establishing identity through forensic medicine. How DNA analysis help if no sample of the child's parent's DNA is available? Does DNA analysis require a claimant of filiation? How can

¹⁹ Civil Registration Law, art 3(9).

²⁰ The Guardianship Law, art 6(3)

²¹ Law on Civil Registration, art 18.

²² *Id.*

²³ *Id.*

DNA analysis generally help the process of identification without a comparable sample? Will a general analysis of the DNA establishing ethnic and geographical affiliation be sufficient to establish a child's relationship with a particular cultural and ethnic background and thus his or her culture-based identity? The law is also not clear on how to name a child. What other information will be added to the necessary personal information required for the child's identity, such as father's name, mother's name, family name, ethnic background, language, religion, date of birth, place of birth and so on?²⁴

The law generally states very briefly about the rules for the identification of the children without identity, the procedure is ambiguous, and the law does not provide details of the procedure for identification. Unfortunately, there are no rules or at least Mutahidul Mal that specify the process of establishing the identity of these children. The de facto jurisdiction over these matters lies with the Elimination of Violence against Women Division (Diwan) of the Primary Courts. Based on analogy, this issue relates to guardianship and falls under the jurisdiction of Elimination of Violence against Women Division (Diwan). The court decides on the matter through a judicial protocol (Mahzare Qazayi) based on the conclusions of members of both Civil Registration Office and the judges of the court. The court will then issue a qarar tasmia, so that a name will be given to the child. Based on "qarar", the related Civil Registration Office will create a Kunda (the base for identity) for the identity of the child. Most of the data entered into the system depend on where the child was found. Her/his birth place is assumed to be the place where she was found. His/her ethnicity also depends on the same place where she was found. His/her religion is assumed to be Islam and his/her date of birth is also specified. This is most probably based on the Hanafi jurisprudence. Under Hanafi fiq, the Laqit relates to where he/she was found and his/her religion will also be decided based on the religion of the place she was found.²⁵ The child's name is given and entered into the system, but it's still not clear how the names of his/her father and grandfather will be established.

Children without identity under Sharia Law

In the Shari'a, the issue of children without identity is interpreted as laqit, which means an abandoned child whose parents are unknown. Laqit (abandoned found) under the Fiq cover three predominant discussions; child's filiation, religion, and property. Of the three discussions, the issue of filiation (Nasab) is related to our topic, because it is a way to establish the identity for a child who does not have one.

Under the discussion of filiation, Fiq covers the issue of to whom should the found child be related. Under the discussion of filiation, it is accepted based on the theory of Istihsan²⁶ that

²⁴ On a general rule on granting National Identity Card (*Tazkira e Tabiyat*) for an individual without-identity, article 19 of the Law on Civil Registration asserts that when a person without-identity recourses to the Civil Registration Office to get National Identity Card, the Office requires testimony of two individuals holding Afghan ID card and confirmation of related NDS department that he/she is an Afghan. If the person fails to provide those evidence, the issue will be decided by the decision of a commission composed of representatives of the Supreme Court, Ministry of Foreign Affairs, Ministry of Migration, Attorney General's Office, NDS, and Civil Registration Office.

²⁵ See Sheikh Burhanuddin Abi Al Hasan Ali Marghinani, AL-HEDAYA FI SHARHUL BEDAYA, chapter on *Laqit* (Second Volume); Allama Laknawi, SHARHUL WEQAYA, chapter on *Laqit* (Second Volume).

²⁶ *Istihsan* is the Hanafi theory of juristic preference. According to *Istihsan*, a *faqih* can abandon a rule of *sharia* that might result in rigidity or an unjust conclusion in favor of a more lenient *ijtihad* rule. For more read, Mohammad Hashim Kamali, PRINCIPLES OF ISLAMIC JURISPRUDENCE, chapter twelve 323-349 (1989).

the Nasab of the found child is established to the one who claims him/her, even if the claimant is the one who found the child (Multaqit). Such a claim does not require any evidence as Fuqaha argue that it is for the benefit of the child. However, if two persons claim that the child is their child, the filiation will be related to the one who provides evidence (Baina). If both claimants fail to provide evidence, then Fuqaha give priority to the one who preceded (Sabaqat) in finding of the child.²⁷

Under all these circumstances, once the filiation of the child is established, then the identity is established automatically as a corollary right. However, if there is no claim on the filiation of Laqit, almost all early jurisprudence books limit their discussions to establishing the guardianship of the child to individuals who found it or the State under Baitul Mal.²⁸ But, there is no discussion of how the identity of child will be established.

The discussion of Sharia is relevant here as per the assertion of the Article 130 of the Constitution. The court will need to use Hanafi jurisprudence as a gap filling reference in cases where laws are silent.²⁹

Recommendations

a) Procedural recommendations:

1. Differentiating between different categories of the children-without-identity, namely those abandoned, and those affected by the armed conflicts.
2. Finding the place where these children were found. Possibly searching for those individuals who found the child and searching for police registrations to see if the child has been reported or any incident is registered that can possibly be connected to the child.
3. Checking with Civil Registration offices in the area and also the courts if such cases are referred to them and what measures were taken.
4. Using social media and media to search for any relative of the child. This requires a subtle step taken by the IHRC to make sure that at the same time that the media search for the relatives of the child continues, that does not affect the future and the dignity of the child.
5. Establishing a comprehensive database for tracking children-without-identity. The database shall incorporate all necessary data from those children-without-identity who are found and the data from relatives who are seeking to find their lost ones
6. Advocating through the Rule of Law Council for the rights of these children and encouraging all other stakeholders to do their job to make sure the children do not suffer more than this.
7. Advocating for academic interventions by the academia and researcher in order to promote theoretical and scientific exploration of the subject matter in an interdisciplinary manner. This will lead in the improvement of the rights of these children and result in exploring more suitable and possible solutions.

²⁷ Arabic text consulted: Sheikh Burhanuddin Abi Al Hasan Ali Marghinani, AL-HEDAYA FI SHARHUL BEDAYA, Second volume, chapter on *Laqit*; Allama Laknawi, SHARHUL WEQAYA, second volume, chapter on *Laqit*; Imam As-Sarkhasi, AL-MABSOOT, 11th volume, chapter on *Laqit*.

²⁸ See supra note 27 material.

²⁹ The Constitution of Afghanistan, art. 130.

b) Legal Action:

1. Coordinating with related entities such as MoLSAMD and Ministry of Justice to unify the definition of who is an individual-without-identity through a legal action
2. Coordination with the Supreme Court and other related entities to help simplification of the procedure for establishing the identity for such children. The procedure must be more formalized, transparent, and simplified. The procedure must also protect all rights granted to the child, including the right to have name, family relations, and affiliation to his culture, religion, and language. This can be done through a Mutahid ul Mal by the Supreme Court as an immediate action.
3. Advocating for a regulation (Moqarara) in an effort to regulate the procedure of identification of children without an identity as well as affected children. The regulation could be achieved through a joint effort of the AIHRC, the Supreme Court, MoLSAMD, Civil Registration Office, UNICEF, and related national NGOs, led by AIHRC.