

The High Court Division (Bangladesh) Verdict Acknowledging Mother as Legal Guardian of a Child and its Probable Impact on the Person and the Respective Society

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Abstract

Social values and laws, both require to evolve following better conscience and reason. Recently, the High Court Division of Bangladesh has ruled that mothers can be the sole guardian of children. Before this verdict, only fathers were considered as legal guardians in Bangladesh and it was a practice that an individual, a child or a student, will be identified by father's identity only. This paper shows that this verdict has not only provided an individual, in Bangladesh, with the opportunity to be identified only by mother's identity, in required cases, but also has created an opportunity to rethink about the idea of individual identity which may influence the perceptions of Bangladeshi society regarding identity, human dignity and gender relations.

Key Words: Children's right, Gender equality, Guardian, Human dignity, Individual identity, Law, Verdict.

Introduction

On 24 January, 2023, the High Court Division of Bangladesh declared that a mother can now be a sole guardian of a child. The verdict was delivered in response to a writ petition saying that every citizen of Bangladesh has the right to education and job under the constitution and mentioning only the mother's name when filling out the student information form would be sufficient. A student cannot be forced to mention his/her father's name against his/her will. The civil society of Bangladesh has marked this verdict as historical one considering this a step forward towards the establishment of women's rights and the attainment of gender equality. This paper aims to address the issue by focusing on the notion of naming, identity and personhood and to analyze how this verdict would facilitate in changing some perceptions and norms regarding the identity of a person that prevails in the Bangladeshi society.

The Path towards the Verdict

As per the media report (The Daily Star), back in April, 2007, Rajshahi Education Board refused to provide admit card to a Secondary School Certificate Examinee since she was not willing to mention her father's name. The girl was raised by her mother alone after

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her biological father left them without giving them recognition. Following this incident, on 2 August, 2009, three human rights bodies- Bangladesh Legal Aid and Services Trust (BLAST), Bangladesh Mahila Parishad and Nari Paksha jointly filed a writ petition citing public interest. On the next day, the High Court bench of Justice Syed Refat Ahmed and Justice Moinul Islam Chowdhury issued a rule asking why this discriminatory provision, which is an obstacle to access to human rights, equality and especially the right to education, should not be declared as contrary to law and unconstitutional. The HCD also ordered the authorities concerned to submit a report on the arrangements in place for students who are eligible to sit for a public exam but do not wish to disclose the name of their father. Later, on 6 June, 2021, Bangladesh Legal Aid and Services Trust (BLAST) filed a supplementary affidavit in court on behalf of the petitioners. After several hearings, on 24 January, 2023, the High Court bench of Justice Naima Haider and Justice Razik-Al-Jalil pronounced the judgment. This verdict is not only significant for ensuring one's right to education but also has created an opportunity to think differently about traditional naming procedures and one's personal identity.

The Notion of Identity and International Human Rights Declarations

The idea of identity is defined differently in various contexts. In this paper I am concerned with the idea of personal identity. Generally, personal identity is understood as individual identity (Brown & Wade, 2022). In this approach, one's identity is constituted of the qualities that make that person different than others. It is possible that one may be different from what s/he thinks to be. Some identity theorists have distinguished between individual identity and communal identity. Eekelaar (2018) shows that in the case of individual identity one's personal characteristics are the main focus while the communal identity is related to one's identification with external social networks, such as race, religion, nationality, etc. Among other perspectives on identity in the social sciences the idea of narrative identity is a prominent one which is about constructing an integral life story (McAdams & McLean, 2013). This form of identity is understood as dynamic because this involves one's understanding of his/her past, present and where he/she wants to be in future. Since, social, political and cultural factors influence one's understanding of his/her life, narrative identity is considered to be socially embedded.

Some theorists argue that it is important to link identity to genetic ties. They hold that a human being needs to know his/her genetic progenitors to be connected with them to have a better understanding of self. Velleman (2008) links parental responsibilities with genetics and claims that these responsibilities are not transferrable. But this view is criticized that there is no empirical data that proves the necessary connection between the genetic parents and human flourishing and such approach may create problem for human autonomy (Brown & Wade, 2022). However, if we consider the idea of narrative identity, an individual may feel that it is important to know about his/her biological parents to understand his past and to have a complete biography, i.e., identity.

It seems that different theorists have different interpretations of the idea of personal identity. However, the idea of children's identity has received importance in laws and humanitarian declarations. According to the article no 7(1) of UNCRC (UNICEF, 2023),

The child shall be registered immediately after birth and shall have the right from birth 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.

This declares that children are entitled not only to life, name and a state but also to their parents. Article 8(1) asserts that states are responsible to preserve and respect children's right to identity, name, nationality and family relations (UNICEF, 2023). The idea of identity in UNCRC seems to involve some elements of communal identity, namely nationality, and also connects identity with genetic ties by claiming that children's have the right to know and be cared for by their parents. Though, Article-9 in the declaration (UNICEF, 2023) has authorized the state and the legal parties involved to ensure children's wellbeing if they need to be separated from their parents, in case of a divorce or for any other reason, the statements in UNCRC seems to connect children's identity to the idea of an ideal family and parenthood.

In the preamble of UNCRC and in the WFD (2023) family is considered prior to the state and defined as the fundamental social unit which is formed by the union between a man and a woman. It is also supposed that family is the cradle of life and the base of a society. WFD also expresses its concern about the decline of values regarding family and marriage and holds that human civilization cannot sustain without upholding the value of a family and providing the children with a proper family environment. A family is considered as the key to the formation of children's identity. It seems evident that the humanitarian declarations tag identity with genetic ties.

But we don't live in an ideal world in which ideal parenthood and social orders are maintained. Children are often abandoned by their own parents and families. We cannot deprive our children, who are not the offspring of legitimate couples, war children or the children of rape victims and the children of sex workers, of identity, the right to education and the right to live a decent life afterwards. Unfortunately, it seems that, the humanitarian declarations consider only the rights of children who are born out of socially approved relationships; not the rights of all children. The conceptualization of identity in these documents prioritize genetic ties as the key determinant of one's identity.

Laws Regarding Children's Naming, Identity and Guardianship in Bangladesh

Bangladesh is a signatory of UNCRC and UDHR. In Bangladesh legal decisions regarding children's custody and guardianship are guided by Family Courts Ordinance (1985) and Guardians and Wards Act (1890). Custody and guardianship are considered two different matters. Custody is the possession of a child and guardian means a person having the responsibility to take care of a minor or of his property or of both. Both mother and father can be the custodian and guardian of children if considered and proved to be fit for the responsibility. When a child is born here the parents are obliged to

register the birth and need to mention the names of both parents. Since, Bangladesh is a Muslim majority country, Islamic values and traditions are also respected here. Thus, family laws that regulate marriage, divorce, inheritance of property, children's identity, custody and guardianship respect the international humanitarian declarations as well as upholds the Islamic values. In cases concerning the follower of other religions Islamic values and laws are not consulted. According to the Islamic law both mother and father can get the custody of a child considering the age of the child but it seems that we focus much on father's identity and recognition regarding the issue of naming and identity of children (Fmassociatesbd, 2023). That is, father's identity is considered important for the identity of a child and father's name must be mentioned in all documents and certificates that can be related or awarded to a child or an individual. It is a common practice here, regardless of class and religion, that children carry their father's family name and are addressed and identified by that name. No matter what, a child or an individual has to be attached to their father's name. If one is not willing to maintain this norm and hesitates to mention his/her father's name, this is considered a matter of shame and the society refuses to accept that individual as a respected member of it and to provide certain facilities (this is exactly what happened in the case that led to the historical verdict). An individual was often forced by the society to carry his/her father's name to be treated properly in various spheres of life even if the biological father had disowned or harmed the person mentally or physically. The reason seems to be the patriarchal mindset and the perception of identity that prevails in the society of Bangladesh. As in international declarations like UDHR and UNCRC, the family laws and the society in Bangladesh also connects identity with genetic ties but used to emphasize much on father's name and identity.

Though the family laws in Bangladesh allows mothers to be the custodian of a child if the father proves to be unfit for being the custodian, the child had to carry his/her father's name to be identified and to be recognized by the society before the verdict was delivered. The new verdict acknowledging mother as the legal guardian and recognizing children's wish to be identified by their mother solely has opened the horizon for many who are not willing to carry their father's name and to be identified accordingly for various reasons. This verdict also has acknowledged the effort and struggle of mothers who are single and performed the parental responsibilities alone. The aim of this verdict obviously is not to deprive fathers from performing their responsibility and being acknowledged as guardian of their children. This law only aims to provide a child or an individual the freedom of not mentioning one of his/her parent's name or identity according to his/her wish.

I have already discussed that both CRC and Family Laws in Bangladesh seems to assume an ideal situation while considering children's identity and connecting identity with genetic ties. In the patriarchal societies children's identity is mostly constructed by father's name and identity. But we live in a world in which we have to deal with broken families, insincerity of parents, children of sex-workers, war children and rape-children.

Thus, it is a concern how we can provide a child with an identity that will do justice to his/her existence.

I have discussed, earlier, that a child had to mention and carry his/her father's name to get access to the basic rights, like the rights to education and social recognition, and to avail facilities available in Bangladesh. But there were and there are cases in which a child doesn't get any recognition or support from the father. The mother alone raises the child and the father even doesn't show any concern about it. In this type of situations, often, it feels like an insult and pain to the child to be recognized by the name of the biological father. Mother's identity solely was not considered acceptable by the society and some institutions that provide basic facilities had prejudices (before the verdict was delivered) about the sole mentioning of mother's name. It is not the case that mothers never deny of their duties. But it never became a problem if the child doesn't mention his/her mother's name since father was considered a legal guardian. It is not easy for a child whose parent are not considered legal couples to get access to education and to be treated with dignity as other children of the same state and society. A child who is born out of a rape incident, a child of a sex worker, a child whose biological father has disowned him/her are also not considered to be a part of the mainstream society. In spite of their emotional attachment to the child, considering the unpleasant consequences the child would face, mothers, often, feel obliged to terminate the pregnancy or to sending their children away -for adoption or to the orphanages, and to hide their own identity from the children for long. The new verdict has created an opportunity to ensure the rights of children disowned by the biological father, rape babies and children of sex workers. Since, mothers are now legally acknowledged as the guardian of children, by law mentioning only mother's name (if the child wishes so) is acceptable, children's identity may not be jeopardized with patriarchic prejudices anymore. This verdict will serve the interest of all children who have the right to be treated with dignity and have the same value of the adults in every possible situation.

However, people of Bangladesh have shown mixed reaction regarding the issue. Some have appreciated this verdict as a keeper of mother's and children's right and some have criticized this verdict by claiming that this will give a favor to the illegitimate children, so to speak. In the following section I am going to focus on the connection between individual identity and human existence and the tag of 'illegitimate child'.

Identity, Human Existence and Human Dignity

According to the UNCRC a child is considered to have the value of an adult human being. Thus, a child has the same right and dignity as of a human being. Being human requires the recognition of his existence. The notion of human existence is not defined only in terms of being in certain space. The idea of human existence is a complex one that involves various factors.

Who is existent as a human being? -this remains the main concern for the existential philosophers. Among them Jean Paul Sartre (2007) has provided an elaborated and well

accepted explanation of human's existence. Sartre's view includes the idea of human freedom, autonomy and responsibility. According to Sartre, human beings are condemned to be free (Sartre, 2007). It is the consequence of our freedom that we are responsible for our thoughts and actions. A human being is not defined by his shape, color or size. One becomes existent as human being by practicing his/her freedom; by thinking and acting freely. One can look like a human but would not become existent and identified as a human until s/he understands her/his freedom and act upon it. The idea of freedom in Sartre's philosophy involves responsibility towards others. It may feel sometimes 'the other' is an obstacle to freedom. But Sartre (2007) holds that we are not only responsible for ourselves but also for others. The way we act, the way we become. One cannot be considered as an existent human being until he acts freely and takes the responsibility of his actions (Sartre, 2007). It seems that Sartre relates human identity and existence with the characteristics of being free and being responsible.

Immanuel Kant (1998) has considered rationality, freedom and autonomy to be the basis of human dignity. According to Kant, by virtue of rationality we acquire the dignity as human beings. He claims that,

Reason therefore relates every maxim of the will as universally lawgiving to every other will, and also to every action in relation to itself, and this indeed not for the sake of any other practical motive or future advantage, rather out of the idea of dignity of a rational nature which obeys no law but that which it gives itself at the same time (Kant, 1998).

Rational nature is dignified and human beings, as rational creatures, are entitled to dignity from their birth. Human beings are different than other creatures because they have dignity. Other things have price, and can be used. Since, human beings have dignity, we should treat each other as ends not as means. No matter what, one's dignity should not be violated. It seems that the international laws have failed to cover the normative value of each human person, though these laws aim to ensure human dignity, which is considered significant in Kant's philosophy (Teson, 1992).

A human child, who is given the same value as an adult in UNCRC, in this consideration is also free and becomes existent and acquires identity through various practices in different stages of life. A child, at certain stage, can understand who is protecting and caring for him/her. S/he feels love and respect to the caregiver and grows a sense of responsibility towards that person. Accordingly, s/he takes the decisions related to her/his life and identity. It feels nothing wrong to carry and mention the name of the mother and father if the child finds them responsible and caring. But there are other possibilities to consider, since we don't live in an ideal world. If one of the parents does not fulfil the responsibility to the child, it may feel hard for the child to carry the name and being identified and associated by the name of that person. This also violates her/his dignity by putting her/him under certain obligation. The recent HC verdict seems to provide a child with the freedom to be identified by the name of a parent whom s/he chooses and be treated as a dignified individual. This verdict has also given an opportunity to the

children of rape victims and sex-workers to carry and to be identified by the name of their mothers (in possible cases), to be considered as dignified persons, and to get access to the available facilities and basic rights.

Parent's Sexual Morality, Sufferings of the Children and Probable Consequence of the Verdict

I have mentioned earlier that the netizens of Bangladesh have expressed mixed reactions to the verdict acknowledging mothers as the legal guardian of a child. Since, this verdict also has approved that mother's name solely is enough to get registered for any exam, some people on social media network like Facebook has expressed their concern about the possible consequence of this verdict. They claim that, this will reduce people's respect and obedience to the sexual morality that prevails in the society and also disrespects Muslim sentiment and Islamic law. This law will mostly benefit the 'illegitimate child'. But it seems that this goes against the Islamic spirit. It is not allowed in Islam to humiliate or discriminate a child or person for the crime he is not responsible for (The *Quran*, 6:16). Though the sexual relation without marriage is prohibited in Islam, a child born out of such intercourse has the same dignity as any other child in the society. If the name of the father is unknown then the child is allowed to carry his/her mother's name and inheritance. But if the father is known then he is bound to give the child a name and inheritance.

Watson (2018), in her paper "The Illegitimate Family", has claimed that even in illegitimacy, there is a family- a child, a mother and a father. The relationship between the father and the mother in this case is not accepted by the law or by the social, cultural values and hence the relationship and the child born are considered illegitimate. The decision of mating is not made by the child. It takes the involvement and decision of two adults. Therefore, the question of legitimacy can be raised against the relationship of the adults but not about the legitimacy of the child and his/her existence. It seems like in this type of cases children are being punished for the decisions of their parents.

But, in Bangladesh, the children who are born out of rape of their mothers or a false or unregistered marriage that was disowned by the man afterwards are not treated well and are deprived of identity and social dignity. The same goes for the children of the sex-workers. In these cases, children are being punished for the crime they haven't committed. Though there are laws (*Nari O Shishu Nirjatan Daman Ain*, 2000) regarding the identity right of the rape-borne children, the social stigma regarding them prevails in Bangladesh. It has been claimed by many that the new verdict paves the way for those who has violated or will violate the existing values regarding sexual morality in the Bangladeshi society. Some may claim that it is important to maintain the social orders and to uphold certain social and cultural values. For these reasons, we have to strictly deal this type of cases. It seems that the society is ready to ignore the innocence of the child and to deprive him/her of basic rights to maintain sexual morality within its members. Following Kant (1998), it can be claimed that the society is treating the children who are not born out of a socially approved relationship or somehow disowned

by their fathers as means, not as ends. Thus, their dignity as human being is violated by the respective society.

The fear or the concern that the new verdict allows the so-called illegitimate children, along with the legitimate ones, to get access to education and other services available in the Bangladeshi society doesn't make the law flawed or unjust. Rather, this gives us an opportunity to secure the rights of children in every possible situation. We cannot guarantee that children always will be born in ideal families, in legitimate relationships. We also cannot guarantee that every child will have parents with proper intention to fulfill the responsibilities and the parents will have decent professions. Therefore, we can't deny the rights of children who are not fortunate enough to have ideal parents. Therefore, if a child wants to be identified by the name of one of his/her parents there should be no legal objection or obstacle to that.

The verdict has not only paved the way to ensure the dignity and rights of the children as human beings but also the rights of mothers who are subjected to various social and cultural injustices. An individual is freed from the obligation of being identified as an offspring of a person who failed to be a good parent, or has jeopardized his/her life. This law has created an opportunity to build a more inclusive society which values human dignity and potentiality, rather than sticking to one's genetical identity. Above all, this verdict seems to make the society and its members to contemplate on the perceptions and values regarding individual identity, gender relations, parenthood, human dignity and to overcome the social stigma regarding one's genetical identity and motherhood without marriage or with an unsuccessful marriage.

Conclusion

This paper has shown that the HCD (Bangladesh) verdict acknowledging mothers as legal guardians shows the necessity of redefining the idea of individual identity in the given society along with ensuring gender equality. This paper has argued that the verdict would facilitate the mother and children who are victims of various injustices by ensuring their legal acceptance and access to basic rights. The rights of children should not be abided by the condition of being acknowledged by their fathers. Our perceptions and values regarding sexual morality should not problematize the potentiality of children and to question their existence, dignity and identity as human beings. Laws are made to protect individuals from various injustices. The verdict in question would not only protect children's rights, in various situations, but also would help changing the social perceptions regarding individual identity, parenthood and gender relations.

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