

GITHA HARIHARAN & ANOTHER VS. RESERVE BANK OF INDIA & ANOTHER

Does the law sanction a woman's right to be a parent? This may be a facetious question, particularly in Indian society, which eulogises motherhood with every breath it takes. But this ridiculous question had to be asked because of two irrational legal provisions all Hindus are subject to -- Section 6 of the Hindu Minority and Guardianship Act (1956) and Section 19 of the Guardian and Wards Act (1890). The first of these acts says that the Hindu father is the "natural guardian" of his legitimate minor son and his minor unmarried daughter. He is the guardian of the child's "person and property" to the exclusion of the mother. The mother's rights enter the legal picture only if the father dies; takes to vanaprastha; turns yati or sanyasi; or if a court deems him "unfit" for guardianship. Section 19 of the Guardian and Wards Act debars the court from appointing the guardian of a minor whose father is living, and is not, in the court's opinion, unfit to be guardian. As long as this lack of fitness is not proved, the child's welfare "rests" with the father. Taken together, legal provisions and the interpretation of various high courts have delivered the entire package of the minor's welfare and guardianship to the father. These provisions in effect strip the mother's right to be an equal partner in parenthood.

Rehabilitating Mothers

On February 17, 1999, a Supreme Court bench including the Chief Justice of India, wrote a judgement about mothers and children. The apex court ruled that "it is an axiomatic truth that both the mother and father of a minor child are duty bound to take due care of the person and property of their child." In a concurrent judgement, one of the members of the same bench noted that "the father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category."

This was supposed to be a landmark judgement; a milestone in the struggle for women's rights. I should have felt some sense of triumph. But the truth that I could not fail to look in the eye was a simple question: are we so blind that we need the law to tell us a mother has the right to be her child's acknowledged guardian?

Five years ago, I discovered that though I am an adult citizen of India, a working, tax-paying citizen, a wife and a mother—all things acceptable and respectable—I am still not considered the "natural guardian" of my child. I had applied to the Reserve Bank of India for its nine per cent relief bonds on behalf of my eleven-year-old son. I was told that only the child's father could sign the application for either purchase or repayment. My husband and I wrote to the RBI that for this purpose, we were agreed that I would function as guardian. But the response was unbending, and, we discovered, completely legal: if I wanted to sign as my child's guardian, I would have to produce a certificate from a competent authority to prove that my husband was "unfit"; or that he was dead; or that he had taken to vanaprastha.

Consider the ironies: like any other woman, I had been brought up in a world that told you in a myriad ways that your *raison d'être* is motherhood. Again, like most women, I had made my peace with biological and societal expectations. But to be told that I could be considered the natural guardian of "illegitimate" children, not "legitimate" ones! And that I was legally fit only to be a caregiver, not a recognised decision-maker on matters

concerning my child's welfare! How is it that the law had no problems with my paying tax on my child's income, out of a mere mother's earnings?

With the help of the Women's Rights Initiative programme of the Lawyers Collective, my husband and I filed a writ petition in the Supreme Court challenging the constitutional validity of the Hindu Minority and Guardianship Act (1956). Section 6 of this Act states that the mother is the natural guardian of her legitimate minor child "after" the father; section 19 of the Guardian and Wards Act (1890) debars the court from appointing the guardian of a minor whose father is living, and is not, in the court's opinion, unfit to be a guardian. Together, these sections have usually been interpreted by the courts to mean that the child's welfare "rests" with the father. The result: the mother is stripped of her right to be an equal partner in parenthood. The crux of our writ petition was the question, what disqualifies a mother from making decisions about her child's welfare? There is no social, economic, scientific or biological basis to the assumption that a woman is not capable of guardianship. And if there is no rational basis to this law, what is the sole criterion at work? The mother's gender. Did this not violate the equality promised by Articles 14 and 15 of the Constitution?

We were not the first to ask for a rational approach to the question of guardianship. Not only had there been numerous such cases, usually coming up for consideration when there was a custody dispute between parents; but in its 135th Report in 1989, the Law Commission concluded that these two legal provisions are unconstitutional. It recommended that both the mother and father be declared natural guardians with equal rights over the child. The Commission also recommended that the mother retain custody till the child is 12. The rationale is that the child's welfare determines questions of guardianship and custody; not rights based on gender alone.

Ten years after these recommendations, in 1999, in a country that is clearing its throat for futuristic talk about the millennium, the law has acknowledged, albeit in cautious terms, that the mother too can be the guardian of "the person and property" of her child. The law in question—or the offending section—has not been struck down. But the Supreme Court has reinterpreted the reading of the same law so that it alters the balance of power, which has always been tilted heavily in favour of the father in all family laws. This is particularly true for matters of custody, where the "natural guardianship" of the father weighed heavily with the court while granting custody orders. The judgement will enable women, for centuries effectively marginalized in the family unit by customary laws, to come out of the closet and be legally rehabilitated.

What does all this mean in reality, shorn of legalese and rhetoric? It means that a woman trapped in an unhappy marriage, or a violent domestic situation, need not compromise her well being and that of her child's simply out of fear of losing access to the child. It means that a mother's signature will count on application forms for school and college admissions for her child; on medical permission forms; on passport application forms. It means the mother can invest in her child's name or at least participate in decision-making about her child's financial welfare. Though conventional wisdom maintains that the father plays the primary role and the mother the supporting role in financial support of the child, certain facts about the growing financial role of mothers have now been "officially" taken into account. An increasing number of women across social classes are contributing to household incomes. Since the priority of earning women is childcare, their income goes towards the children or the general good of the

household—this is the rationale behind various government and non-government development programmes that aim at the mother so as to cover the entire family. Across classes, women are often functioning heads of households without the title.

This is a first step towards visibility. The legal experience of other countries indicates that the “rights of parents and children” do not have to be in opposition to women’s rights. In England, for example, so absolute were the father’s rights that “he could lawfully claim from the mother’s possession even a child at her breast.” English law has made a journey worthy of imitation from a position not unfamiliar to us. In the 1980s the emphasis shifted from parental rights to responsibility. Neither parent is “privileged” in the eyes of the law as the natural or legal guardian of the child. In this sense, both mother and father have equal rights to parenthood. In India, where we are so often smug about our dedication to “family values”, we are yet to ensure that the future we travel towards will see a more egalitarian family unit. High on our agenda for the new century has to be re-appropriating women’s issues from communalists, or self-serving politicians, or the crumb-throwing paternalistic pillars of our society.

Githa Hariharan, New Delhi, 1999