

1. THE petitioners are citizens of India and are therefore entitled to the benefit of fundamental rights as enshrined in the Constitution.

2. The petitioner No. 1 is a woman aged about forty years, the mother of two children, one daughter Sharmishtha, aged 14 years, and one son, Aparjeet, alias Naku], aged eight years. She is employed as a senior social welfare officer with Walchandnagar Industries Ltd., Walchandnagar.

3. The petitioner No. 1, Neela Deshmukh, and her husband D.S. Mukherjee, had filed a petition for divorce by mutual consent under section 13(b) of the Hindu Marriage Act. The marriage of the parties had been dissolved by a decree of divorce on September 12, 1983, by the Hon'ble N.L. Solanki, second extra assistant judge, Vadodara.

4. In the mutual consent petition aforesaid, the parties had agreed on the terms regarding the custody of the two minor children, which terms were incorporated in the decree for divorce by mutual consent.

5. Subsequently, respondent No. 2, the husband of the petitioner No. 1, had preferred an application under section 26 of the Hindu Marriage Act for revoking the orders passed by the court of N.L. Solanki, second extra additional judge, Vadodara, with respect to the custody and education of the minor children. The matter is at present pending in the said court and no final orders have been passed regarding children's custody or education. It may be noted that the said matter regards custody and not guardianship and hence does not overlap with the present petition.

6. The petitioner No. 2 is a women's organisation devoted to the cause of women's rights, and engaged in work for the betterment of women's status. Manushi is a completely non commercial organisation. It runs a free legal advice cell for women and brings out a magazine

## Is A Father A "Natural" Guardian? —Hindu Guardianship Act Challenged

*The Hindu Minority and Guardianship Act, 1955, contains many discriminatory provisions which give precedence to fathers over mothers in matters of guardianship and custody of children. These provisions have been challenged as unconstitutional in a writ petition filed in the supreme court in June 1986, by Neela Deshmukh and Manushi, under public interest litigation. We reproduce here the substantive parts of the text of the petition.*

to propagate the values of justice, equality and freedom.

7. The petitioners are challenging the validity of sections 6, 7 and 9 of the Hindu Minority and Guardianship Act, 1955, as the same are violative of the fundamental rights of Hindu women and operate to the detriment of Hindu women. The said sections are blatantly violative of Articles 14 and 15 of the Constitution of India which prohibits discrimination on the ground of sex alone and which extends to all citizens equal protection of the law.

Sections 6, 7 and 9 of the Hindu Minority and Guardianship Act, 1955 are reproduced herein below :

“(6) Natural guardians of a Hindu minor :

The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (including his or her undivided interest in joint family property), are :

(a) In the case of a boy or an unmarried girl—the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

(b) In the case of an illegitimate boy or an illegitimate unmarried girl, the mother, and after her the father.

(c) In the case of a married girl—the husband, provided that no person shall be entitled to act as the natural guardian

of a minor under the provisions of this section.

(i) if he has ceased to be a Hindu, or  
(ii) if he has completely and finally renounced the world becoming a hermit (*vanaprastha*) or an ascetic (*yaeti* or *sanyasi*).

(7) Natural guardianship of adopted son :

The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

(9.1) Testamentary guardians and their powers :

A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(9.2) An appointment made under sub section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(9.3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such may, by will,

appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section-12) or in respect of both.

(9.4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of their person or in respect of their property or in respect of both.

(9.5) The guardian so appointed has the right to act as the minor's guardian

unmarried girl. The word "natural" is not defined under section 4 (Definitions) except tautologically by reference to section 9.

The petitioners say that there is nothing in "nature" to support a presumption in favour of the father in matters of guardianship. In fact, many more arguments could be adduced to show that it is more natural and reasonable and more advantageous for the welfare of a child to make a presumption in favour of the mother in

great deal of suffering and hard-ship to many Hindu women and minor children. It is well known that in society, as it exists today, men have more power and resources than women. Within the family too, men usually have more financial power and social sanction to control and dominate women and children. Men and their families often make use of this power to mistreat women. In the event of a matrimonial dispute, the man is often in a better position to seize control of the property, including the possessions



after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(9.6) The right of the guardian appointed by will shall, where the minor is a girl, cease on her marriage."

8. A perusal of the aforesaid sections 6, 7 and 9 of the Act would clearly show that they are violative of articles 14 and 15 of the Constitution for the reasons detailed in the paragraph hereinafter.

9. Section 6(a) makes a father the natural guardian of the person and property of a legitimate minor boy or an

matters of guardianship. However, in the interests of gender parity and equality, the petitioners do not wish to adduce those arguments but prefer to argue for the equal right of both parents to be the guardian of their children. The petitioners say that, in fact, when section 6 (a) declares the father "the natural guardian" of a legitimate child, it does so not to uphold any "natural law", but to uphold an inegalitarian social structure which gives precedence and dominance to men over women. That section 6 (a) contravenes the principal of natural justice whereby both parents have a manifest and equal right to guardianship of their child.

10. The said section 6 (a) causes a

of the woman, and of the children. Often, the couple lives in the man's natal home and the dispute results in the woman being thrown out of the house. Often, too, the man may refuse to give her custody of or access to the children.

Thus, the situation of husband and wife is not an equal one. And this inequality becomes more blatantly visible in the event of a dispute.

The petitioners say that sections 6, 7 and 9 give legal sanction to this social inequality, further reinforce the powerlessness of women, and tilt the balance even more in favour of the man.

11. A very large number of women are compelled to endure cruelty and maltreatment at the hands of the husband

and in-laws because of their economic and social dependence on the latter, and because of a social arrangement which necessitates the woman leaving her house and going to live in the man's home, where she is isolated and outnumbered by his relatives and associates. In the event that she is cruelly treated or thrown out of the house, amounting to constructive desertion by the husband, she may be denied access to her children. This is usually done to further harass the mother by separating her from her children. The interests of the children and their wishes are usually ignored. The children are used as pawns in the game of subduing the woman and making her submit to maltreatment. Many men use the threat of separating the wife from the children as a weapon to blackmail her into accepting maltreatment in marriage. Society tends to sanction the behaviour of the man in keeping custody of his children and denying it to the mother because of the social prejudice in favour of the father as the head of the family whose name the children will continue.

It is deplorable that even the codified law should reinforce discriminatory social attitudes and practices by giving the father precedence over the mother in matters of guardianship. By so doing, the law often helps a man to create a situation wherein his wife is compelled to choose between separation from her children or submission to maltreatment by her husband.

12. By declaring the father the natural guardian, the law sets up a presumption in his favour. This means that whenever there is a dispute over guardianship, the mother has to sue. The father need not sue as, if no suit is filed, he is presumed to be the natural guardian. In our society, most women are in a weaker position than are most men, in the matter of moving the courts. Most women, when deserted by their husbands, are reduced to a weak financial position. They are often rendered dependent on their natal

families. In such a situation, it is difficult for them to place the further financial burden of a legal suit upon their natal family. Further, most women have less access and exposure to the public arena, including that of the courts. They have less knowledge and information of their legal rights. If informed that the law states

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*The law helps a man create a situation wherein his wife is compelled to choose between separation from her children or submission to maltreatment by him*

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that the father is the natural guardian, they may not realise that they have a right nevertheless, to sue for guardianship if the father is unfit to be a guardian, by reason of his violent or irresponsible behaviour. Most women would give up in despair once informed that the law declares the father the natural guardian. Further, in our society, women are discouraged from going to court and family pressure is likely to operate in the direction of dissuading her from suing and of allowing him to continue to have guardianship. For all these reasons, it is



doubly unjust that the law should give precedence in guardianship to the man and thus implicitly place the onus to sue upon the mother. In so doing, the law further sharpens an already unequal situation and also advances the likelihood that a large number of helpless children will be placed in the

guardianship of uncaring fathers merely because the latter have been declared natural guardians by the law and the mother is unable to sue him and prove that he is an unfit guardian.

**Manushi**, as a women's welfare organisation, has been approached by many women placed in the circumstances outlined above. Since the present petition is thus, not based on injustice to one individual but to a substantial section of the public and affects most women directly or indirectly, it is being filed as public interest litigation.

13. Section 6 (b) makes the mother the natural guardian of an illegitimate child and after her, the father. It is clear from the self contradictory nature of section 6 (a) and section 6 (b) that this law blatantly safeguards the vested interests of men, to the detriment of women. If there is indeed, some "natural principle", entitling the father to be the "natural guardian" of his child, in preference to the mother, how and why should the illegitimacy of the child contravene this principle? Legitimacy is not a "natural" but a purely social category created by the social institution of marriage.

The petitioners say that there is no logic at all in declaring the father the natural guardian of a legitimate child and the mother the natural guardian of an illegitimate child. The only purpose served by section 6 (b) is to absolve the father of primary responsibility, financial and legal, for an illegitimate child and

burden the mother with the sole responsibility for the support, up keep and care of the child, since, in our society, an illegitimate child is viewed not as an asset but as stigma.

On the other hand, section 6 (a) gives the father primary right to guardianship of a legitimate child, because in our society, a legitimate child is viewed as an asset and an heir. That Section 6 (b) also reinforces prevalent social injustice by assigning primary responsibility for an illegitimate child to a woman.

14. The petitioners say that Section 6 (a) and (b) further violate the spirit of articles 14 and 15 of the Constitution by discriminating between legitimate and illegitimate children on the ground of birth alone. When the said articles prohibit discrimination on the grounds of birth, creed and sex alone, they implicitly prohibit discrimination on the ground of birth rather than merit. A child is termed legitimate or illegitimate not by its own choice or due to its own fault, but is so labelled by society on the basis of an unjust arrangement which treats children born out of wedlock as inferior to those born in wedlock. It is deplorable that laws in a democratic society committed to principles of equality, should incorporate and reinforce such discrimination.

15. Section 6 (c) makes the husband the natural guardian of a married girl who is a minor, in preference to either of her parents. This provision is also violative of articles 14 and 15 of the Constitution, since it discriminates against women on the ground of sex alone. A wife is not made the natural guardian of a minor boy who is married. Thus, a minor boy who is married continues to be under the guardianship of his father. A boy's marital status is irrelevant to the question of his guardianship but a girl's marital status determines who her guardian will be.

The petitioners say that this provision is based on a highly inequalitarian conception of marriage



wherein a wife is placed in subordination to her husband. Thus, a husband is the guardian of a minor wife but a wife is not the guardian of a minor husband. Such a conception of marriage has no place in a democratic society constitutionally committed to gender equality.

16. Section 6 (c) causes great suffering and hardship to minor girls who are married and may place their lives and properties in jeopardy. Under section 8, a natural guardian cannot, without the previous permission of the court, dispose of the minor's immovable property. However, no mention is made of movable property. Thus, the husband of a minor girl would be entitled to dispose of her cash, jewellery and other valuables. In the event of a dispute over the custody of the girl, he would have precedence over the girl's parents by virtue of the said section. This amounts to putting a minor girl, who may not even have attained the legal age of marriage (15, under the Hindu Marriage Act), at the mercy of her husband in preference to her own parents who are likely to have her welfare more at heart.

The petitioners say that one of the reasons for prohibition of child marriage and fixing a minimum age of marriage and age of consent was to protect minor girls from abuse and maltreatment at the hands of husbands and in-laws. This purpose is subverted by the said section 6 (c) which puts a minor girl under the

guardianship of her husband in preference to her own parents. That the said section undermines the concept of parity and consonance of laws.

17. The said section also allows for an anomaly in law, insofar as it implicitly allows a minor husband to be the guardian of a minor wife.

18. Section 13 of the Hindu Minority and Guardianship Act, 1955, lays down that "the welfare of the minor shall be the paramount consideration in the appointment or declaration of any person as guardian of a Hindu minor."

The petitioners submit that this section, which is in accordance with well established Indian and international jurisprudence in the matter of guardianship and custody, is contradicted by the blanket declaration of every Hindu father as the natural guardian of a legitimate child, every Hindu mother the natural guardian of an illegitimate child and every Hindu husband the natural guardian of a minor wife.

The dictionary meaning of the word "paramount" is "superior to all others; chief; of the highest order of importance." It is evident that if the welfare of the minor is, under section 13, the "paramount consideration" in the declaration of any person as a guardian, then a guardian can only be declared in each case on the basis of the welfare of that particular minor, which is a question of fact.

The declaration of any parent on the basis of that parent's sex alone as the "natural guardian" can have nothing to do with the welfare of the minor. There is no evidence whatsoever that the welfare of legitimate children in general, lies or even tends to lie in their having the father as guardian or that the welfare of illegitimate children lies or tends to lie in their having the mother as the guardian or that the welfare of married minor girls lies or tends to lie in their having the husband as guardian. Therefore, sections 6, 7 and 9 cannot be meaningfully read in conjunction with section 13 of the said Act since the said



section declares the minor's welfare to be the paramount consideration in the declaration of any person as a guardian while sections 6, 7 and 9 treat the sex of the guardian as the primary consideration in allocating natural guardianship rights.

The petitioners submit that all the above mentioned clauses, although they have reference to guardianship, do, in fact, have a bearing upon and influence the awarding of custody of a child in case the parents are separated. The presumption in awarding of custody is bound to be in favour of the legal guardian.

The petitioners say and submit that the said provisions, namely, sections 6, 7 and 9 of the Hindu Minority and Guardianship Act, 1955, discriminate against Hindu women on the ground of sex alone, and are thus, unconstitutional and violative of the rights of Hindu women under articles 14 and 15 of the Constitution of India. The petitioners say that Hindu women are being discriminated against before the law and denied equal protection of the law on the ground of sex alone.

The petitioners, therefore, pray that the said provisions be declared null and void and it be declared that both parents of a minor child, legitimate or illegitimate, married or unmarried, shall have equal rights to be considered natural guardians of the minor, in preference to any other person, including the spouse of the said minor.

Further, it may be declared that in the case of any dispute over guardianship and/or custody of a minor, the parties may sue under the Guardians and Wards Act, 1890. The welfare (not being defined as material welfare alone) of the minor, and the wishes of the minor where the minor is in a position to express them, should be the only consideration in deciding matters of guardianship and custody.

It is pertinent to point out that in England the equality of parental rights are ensured under the English Guardianship Act, 1973, whereby in



relation to the custody of upbringing of a minor and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, a mother possesses the same rights and authority as the law allows a father and the rights and authority of mother and father are equal and exercisable by either without the other.

Further, an agreement for a man or woman to give up, in whole or in part, in relation to his or her child, the above rights and authority, is in enforceable.

It is submitted that under the Act passed in 1886, in England the father alone had the power of appointing a testamentary guardian, and as against the guardian so appointed, the mother could not act.

The position for Hindu parents in India, unfortunately remains what it was in England in the 1886 era, whereby the father alone had absolute rights. That the Hindu Minority and Guardianship Act appears to have been framed on the model of the English law prevalent up to 1973 in England.

Much water has flowed under the bridge since the 1886 period, as the English law now gives much wider rights to a minor's mother in respect of guardianship of her child, and thus places the parents in an equal position. The English Guardianship of Minors Act, 1971, and further, the Guardianship Act, 1973, provide and guarantee equal rights to both the parents.

The English Act of 1973 further

provides, under section 4(1), (2) of the Act that on the death of a minor's parent, the other parent, if surviving, becomes guardian of the minor, either alone or jointly, with any guardian appointed by the deceased parent for this purpose. The natural father of an illegitimate child who is entitled to custody by virtue of a court's order under section 4(3) of the Act, may be treated as if he were the minor's lawful father to achieve parental equality in guardianship.

### Prayer

In the circumstances aforesaid, the petitioner herein prays that this honourable court may be pleased to :

(a) Declare that sections 6, 7 and 9 of the Hindu Minority and Guardianship Act, 1955, by virtue of which a father is the natural guardian of a legitimate minor boy or unmarried girl, the mother the natural guardian of an illegitimate minor child and the husband the natural guardian of a minor married girl, are violative to that extent of the rights of Hindu women under articles 14 and 15 of the Constitution of India and thus null and void ;

(b) Give a mandatory order and direction, directing the respondents, their officers, servants and agents, to refuse to give effect to the said sections of the Hindu Minority and Guardianship Act;

(c) Declare that henceforth both parents shall be considered natural guardians of their minor children, legitimate or illegitimate, in preference to others, including spouses of the said minors ;

(d) Declare that in the event of a dispute, either parent may sue under the Guardians and Wards Act, 1890, and that the welfare of the minor (not defined as material welfare alone), shall be the paramount consideration in declaring one or the other parent, guardian of the minor ;

(e) Pass such further and other order or orders as may become necessary from time to time and as this honourable court may deem fit, just and proper in the circumstances of the case. □