CHAPTER IV

PARENTAL POWER AND THE EVOLUTION OF THE INSTITUTION OF CHAUCERSHIP

It is now accepted that most of human societies, in the course of their evolution, passed through a stage known as patriarchal stage (1). In the growth of human societies patriarchal stage occupies a very important place, not merely because it marks a stage in human history, where the human male was able to establish and proclaim his supremacy over all things, human and material, but also because most of our modern social and legal institutions, notions and concepts owe their origin to it and still bear its clear stamp.(2)

This stage is marked with the emergence of the patrie potestas. It is here that it grew and developed in its fullest dimensions. In the patriarchal society, as Maine very aptly puts it:

"...... the eldest male parent - the eldest ascendant - is absolutely supreme in his household. His dominion extends to life and

(1) The patriarchal school, which holds the view that human societies have first passed through a patriarchal stage, i.e. a stage where human female - the mother - dominated, also do not deny the existence of the patriarchal stage in the development of human societies. One of the most important and leading scholar, and a protagonist of the patriarchal theory, Lewis H. Morgan, in his work, 'Ancient Society: or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization' defines patriarchal family as 'an organization of number of persons, bond and free into a family, under paternal power'.

(2) Maine said:

"The family, as held together by the patrie potestas is the nidus out of of which the entire law of persons, germinated."

(Ancient Law, p. 126).
death, and is unqualified over his children and their wives as over his slaves; indeed the relationship of sonship and servitude appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of the family himself. The flocks and herds of children are the flocks and herds of the father, and the possession of the parent, which he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree, the eldest son sometimes receiving a double share under the name of birth right (1), but more generally endowed with no hereditary advantages beyond an honorary precedence (2).

In the patriarchal society the male parent has over his children the jus vindex essequiae, the power of life and death as well as the power of uncontrolled corporeal chastisement. He could sell his children, he could transfer to another family by gift or adoption (3); he could give a wife to his son; he could give away his daughter in marriage to whoever he desired; he could divorce his children; and such like vast powers he possessed and exercised. In short, he has the power to modify their personal condition at pleasure.

The concept of guardianship germinated in that society at the time when paternal power was at its height. At that time on the death of the father leaving behind children, a question naturally arose: who would exercise paternal power in respect to them?— till at least the children were able to exercise it themselves. Romans conceived the idea of tutors, who originally existed to protect their own interest rather than the interest of children. Hindus left the void filled in by the king, who also usually appointed the nearest male relation as guardian—ordinarily the person who would take the property in the event of minor dying issueless. In English common law also originally guardianship

---

(1) Hindu sage have specified a double share to the eldest son in succession as well as on partition; see Apathamba, I, 6, 14, 10-12; Naidayam, I, 2, 2-3; Gautama, XVIII, 1; Vasishtha, XVII, 42-45; Bahun, IX, 112, 114, 156; Veda, XVII, 13; Bapala, Digest, II, 215; Brihaspati, Digest, 217; Yajnavalkaya, I, 114; Viramitrodasa, Vetul's ed., p. 153.

(2) Ancient Law, p. 162 (World Classics series). In his work, Origin of the Family, Private Property and the State, Frederic Engels said that the essential feature of the patriarchal family is the 'incorporation of bondsmen and the paternal power'. Earlier he said: 'The overthrow of mother-right was the defeat of the female sex, an event affecting the history of the world. The man seized the reins of the house, and the woman was
was meant more for the protection of the interest of the guardian than of
the ward — tenure guardianships were mostly of this type. Chosseon law
entrusted it to the father's executor or to the grandfather.

Then guardianship was more concerned with property than person.
The guardianship as an institution which exist primarily and essentially
for the protection of the interest of the child is relatively of later
growth.

Recorded human history shows that in some societies *patria
cotestas* existed in its full vigour. The Roman society is a
clear illustration of this. At Roman, paternal power existed in its
fullest. At that time tutorship came into existence as an extension of
paternal power to protect the interest of the agnates. Curatorship
was also conceived as an institution to protect the interests of those
who have dealing with the child. It was a later development that tutorship
as well as curatorship were looked as institutions meant for the protection
of young *paterfamilias* and budding *paterfamilias* from the consequences of
his acts; to enable a *paterfamilias* who was intellectually and physical
weak, to grow into adulthood. Then the distinction between tutorship
and curatorship blurred — both had the same function of according protec-
tion to one who cannot protect himself.

In England where the *patria potestas* over full grown children
probably did not exist after the conquest, the paternal power over infant
children was not less sweeping. (1) The father has absolute power over
his children at common law, and by statute he was given *testamentary*
testamentary power, he could exercise it in excluding the mother from
guardianship even after his death. An attempt was made at equity to
curb his powers by invoking the king's prerogative as *prærogativa patria*.
The attempt of successive Lord Chancellor succeeded in creating a necessary
background for legislative reforms which culminated in the passing of
the Guardianship of Infants Act, 1925, which enshrines the principle of
paramountcy of welfare of children. English law now almost considers
 guardianship as an obligation rather than a power or right which it was
looked at earlier.

*Note:*

Under Hindu law we find that originally the paternal power existed in its fullness, but its rigour was soon mitigated because at a fairly early period the essentially patriarchal family got itself transformed into the typical Hindu joint family, where the position of the father or the eldest male was dominating, though not supreme. Then since the entire Hindu social and legal structure was based on duties, where even kings have duties, could not the Hindu law could not but enjoin some duties on the father towards his children. It was also natural for our sages to confer supreme duty of protecting the children on the sovereign.

We do not have various types of guardians clearly specified. One reason is that the existence of joint family — which was almost a perpetual institution — prevented the need of guardians, felt very much. But a more cogent reason seems to be that Hindu jurisprudence recognized the principle that if liability is incurred by one on behalf of another for a purpose which is justified in law, then the person on whose behalf the liability was incurred is bound, notwithstanding the fact that he did not authorize the other to incur the liability. This is why we recognized de facto guardians. This is why distinction between different types of guardians got blurred to the extent that no distinction remains between them. Left to itself, Hindu law of guardianship would have certainly matured into a law primarily and essentially meant for the protection of childhood.

But foreign intervention came. In 1990 when the Guardians and Wards Act was passed, English law was torn between conflicting notions: supremacy of paternal power and paramountcy of welfare of children. This conflict was transmitted into Indian law and both were given statutory recognition. (1)

Since then, under the impact of judicial developments in England, our judiciary in trying sex its test to assert the supremacy of welfare principle, but statutory provisions subdue and humble it. The Act of 1990

(1) § 19 of the Act lays down that a father cannot be deprived of the guardianship of his children unless he is found unfit, while § 17 lays down that in appointing guardians the welfare principle is supreme. The case is laid down in § 25 in respect to adjudication for custody of children.
is still the law and has not been amended even once since then! Even the Hindu Minority and Guardianship Act, 1956 has not been able to achieve much.

In Mohammedan law also the paternal power was not less sweeping. The father's right of *jahr*, i.e. of imposing a status of marriage on minor children existed. The father has full testamentary power of appointing a guardian. Mother was not at all a guardian. But then the unique feature of Mohammedan law is that it made distinction between custody and guardianship. Mohammedan jurisprudence clearly recognized the principle that it is not necessary that the person who is the guardian of the child must also be entitled to custody.

Mohammedan law gave the mother a right of *hizanat* (custody) over her children up to certain age. Up to that age, the father could not deprive her ordinarily deprive her of the custody of her children.

What is remarkable is that the Muslim society then gave legal recognition to the principle that there cannot be a substitute for mother's care and affection for a child of tender years. This was the recognition of welfare principle. However, the welfare could not go very far; it was fixed by law. Probably the ever-present paternal power could not be bridled and therefore the hizanat of the mother terminated at a very period. Mother's right of hizanat was also subordinated to paternal power.

All this was natural in a society where domination of male over everything around him was the accepted central idea of social relationship but what is stressed here is this: that that society could conceive the idea of subjecting the paternal power to some limitation, however insignificant those limitations might have been.(1).

In the subsequent chapters of this work, this development and the outstanding features of each system would be studied.  

(1) For instance, the father's right of guardianship was conditioned by the mother's right of hizanat and *kazi* 's supervisory jurisdiction. The father's right of *jahr* was conditioned by the minor child's right of exercising option of puberty.

(2) I.e. in Chapters V, VI, VII, VIII, IX and XII.