Special Legislation
For the Protection of Women and Children

P. JANAKI AMMA*

Women and children form the major portion of the world's population. A recent article on women\(^1\) quoted the Executive Director of the UNICEF when he said: "It is not governments or organisations or UN agencies who are the heroes of the struggle for world development, it is the millions of women who labour so hard and so long, under such difficult conditions and for so little reward, to meet the needs of the families and their communities. No praise can be too high for their courage and their efforts, but it is not praise that they need. It is justice and help." The same article quotes the words of the International Labour Organization, Geneva—'Women and girls are half the world's population but do two-thirds of the worlds working hours," taking into account the work done by the women in the home, as well as in field and factory. According to the U.N. Food and Agriculture Organisation in Rome, women are responsible for at least 50 per cent of all food production. Factors which shorten the work of the men who do the ploughing have the effect of lengthening the hours of the women who do the weeding. The introduction of multiple cropping and high yielding strains of wheat and rice demand more hours spent in sowing, transplanting and weeding—all women's jobs.

* Judge, High Court of Kerala.

A casual survey of the world's history would show that woman throughout the ages contributed her share for the economic welfare of the family. From primitive times woman worked in the field hand-in-hand with man. If even she left the field and remained at home, it was only for rearing up the children. The arrangement that women should remain at home was for the welfare of the family. The division of work between man and woman being for the common interest there was no occasion for the work of one being considered superior to that of the other. The primitive man could not have dreamt that his successors in the male line would claim the family properties as exclusively belonging to them. It is interesting to note that the concept of family property is gaining ground in the west. Lord Denning in his interesting book “Due Process of Law” gives vent to the spade work he had to do before the Matrimonial Homes Act 1967 and the Matrimonial Proceedings and Property Act 1970 came into force. The learned author quotes what Lord Morton of Henryton said:

“If, on marriage, she gives up her paid work in order to devote herself to caring her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own.”

The reasoning applies with equal force in the case of all communities, which deprive their women of their legitimate share in the family property.

Though it is stated that women in India occupied fairly good position during the Vedic period, it cannot be gainsaid that their position was not enviable for the last about sixteen hundred years, though there were occasional streaks in between. It appears that in the Vijayanagar Empire women in general occupied a high position in society and instances of the active part they took in the political, social and literary life of the country are not rare. It is said that the King of Vijayanagar had judges as well as bailiffs and watchmen who every night guarded the palace and these were women. 2 According to Swami

Vivekananda, the monk-patriot of India, the diminution in the status of women arrested development of Indian Society and stunted woman's personality. The regeneration started with the efforts of Raja Ram Mohan Roy, who "struck the true key note of social reform in India by upholding the cause of women." He was primarily responsible for the Bengal Regulation 17 of 1829 abolishing Sathi. There was a quick succession of eminent men all of whom took up the cause of women. A spate of legislations followed. The Widow Remarriage Act of 1851, the Female Infanticide Act 1870, the Special Marriage Act of 1872, the Child Marriage Restraint Act 1929, the Hindu Women's Right to Property Act of 1937, the Dissolution of Muslim Marriage Act of 1939, the Hindu Women's Right to Separate Residence and Maintenance Act or 1946, the Hindu Succession Act of 1956, the Hindu Adoption and Maintenance Act of 1956, the Maternity Benefit Act of 1941 and 1961, the Suppression of Immoral Traffic in Women and Children Act of 1956, the Dowry Prohibition Act of 1961, the Legislation of Abortion Act 1975 and the Equal Remuneration Act of 1976, are legislations primarily meant for amelioration of the condition of women. The Indian Penal Code contains special provisions in respect of violence towards women. The Indian Divorce Act of 1869, the Indian Succession Act of 1925 and the Parsi Marriage and Divorce Act of 1935 and the Special Marriage Act of 1954 are other statutes worth mentioning. Representatives of Indian Womanhood took part in the Round Table Conference in London. Women's right to franchise was recognised by the Government of India Acts of 1919 and 1935.

The framers of the Constitution of India were keen in grafting into it the principles of equality and liberty proclaimed in the Declaration of Human Rights on 10th December, 1948. Article 15 prohibited discrimination against any citizen on grounds of religion, race, caste, sex, place of birth, residence or any of them. The Directive Principles of State Policy include securing to all citizens, men and women, equal rights, to an adequate means of livelihood, equal pay for equal work, human conditions of work and maternity relief. Article 44 promises to secure for the citizen a uniform civil code throughout the territory of India. Article 45 stands for free compulsory education
of all citizens including women. Article 15(3) enables the State to make special provision for the uplift of women and children.

It cannot be gainsaid that the above referred provisions have to a large extent improved the status of women and have lent a helping hand to them to stand on their own legs. If in spite of these, women have not been emancipated, it only speaks to the depth of the dungeon into which they had fallen and the failure of the legislation to achieve the objects for which they were enacted and other unanticipated developments.

The alarming reports about violence on women only depict the deterioration of moral standards and that the animal instinct in man is dominating over human virtues. The increasing number of rape cases and the demand for the reopening of the Mathura case 3 depict the need for making punishment for such offences more stringent. The gravity of such offences can be gauged only if one views it in the background of our tradition, a tradition which forced Sita to ask Sree Rama, "Was it my fault that we had to live in the forest? Was it my fault that Demon Ravana felt a craving for my body?"

It is a welcome thing that a bill has been introduced for making punishment for the offence of rape more deterrent and at the same time to give least publicity with regard to the identity of the victim. It is rightly said: that country alone can claim to be civilized wherein a young woman beautiful in form and bedecked in ornaments can walk along the street in midnight, without fear of being molested or robbed. Legislature may change the law and make it stringent, but unless those who are prone to violence, control the beast in them and decide to act as human beings no legislator will get the fruits of his labour.

One other legislation which has failed to serve its purpose is the Dowry Prohibition Act. Young women, it is reported, are subjected to harassment and even put to death on the sole ground that the promised dowry is not paid. Prosecutions under the Act are rare phenomena because of their impracticability. Some deterrent effect can be expected if the offence is treated

3. A.I.R. 1979 S.C. 185
as cognizable and non-bailable. The only silver lining is that payment of dowry is less pronounced in cases where the bride is educated and is possessed of a job.

There are at present the Indian Divorce Act, the Hindu Marriage Act, the Special Marriage Act, the Parsi Marriage and Divorce Act, the Muslim Marriage Dissolution Act and the Special Marriage Act dealing with the law of divorce. An attempt can be made for unification of the law so that identical provisions are made available in each of the statutes. That will be a step towards the uniform civil code contemplated in the Constitution.

Section 50 of the Parsi Marriage and Divorce Act deals with settlement of the wife's property for the benefit of children in cases of adultery of the wife. The section reads:

“In any case in which the Court shall pronounce a decree of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, the Court may order such settlement as it shall think reasonable to be made of any part of such property, not exceeding one half thereof, for the benefit of the children of the marriage or any of them.”

It is not known why the provision is confined to adultery of the wife and does not extend to that of the husband.

Guardianship law in general has not been fair to the mother. Under the several statutes on guardianship including the Hindu Minority and Guardianship Act, the father is the natural guardian and the mother becomes the natural guardian only on the death of the father or on his being disqualified. Under the Mohamedan Law the mother of a minor can be guardian only if appointed by Court, in the absence of the father, father's father and executors appointed by them. Cases are numerous where the father divorces the mother and neglects to maintain the child. In such cases there is no meaning in treating him as the natural guardian. In Jijabai v. Pathankhan, the father was

living away from the mother and child for several years without taking any interest in the daughter, who was with the mother. It was held by the Supreme Court that the father should be treated as if non-existent and therefore the mother could be considered as the natural guardian of the minor's person as well as property and had power to bind the minor by granting lease of her land in proper course of management of the property. There is every reason for legislation intervening in such cases and conferring on the mother rights of guardianship on a par with those of the father.

In the field of succession, generally speaking, a daughter now gets a share in the properties of her father and mother. But that share in some cases is not equal to that of a son. There is no justification for a discriminate treatment of the daughter. It may be recalled that under the Travancore Christian Succession Act a daughter is entitled to only a share which is equal to one-fourth of the share of the son subject to a maximum of Rs. 5,000. Under the Cochin Christian Succession Act, the share of the daughter is one-third of the share of the son. Similar discrimination is shown under Mohamedan and Parsi Laws. It is high time that the inequality is rectified.

It may not be out of place to mention that the Hindu Succession Act also contains provisions which are not consistent with equity and fairness. Section 15 dealing with succession of a female Hindu is an example. One would expect that property of a female Hindu leaving no lineal descendants or husband would devolve on her parents; but the section makes a distinction between property inherited by her from her parents and from her husband and her father-in-law. The former devolves on the heirs of her father while the latter devolves on her husband's heirs. On a parity of reasoning the property obtained by a male as heir to his wife should in the absence of lineal heirs devolve on his wife's heirs. Section 8 does not contain such a provision. Section 15 also does not make specific mention about the properties earned by a female Hindu out of her own exertions or gains of learning and therefore they will devolve on her husband's heirs. It is only in the fitness of things that such property goes to her own blood relations.
Coming to the field of labour, legislature has given due recognition to the fact that the physical welfare of women who are compelled to work in factories and plantations etc., is of vital importance to the State and that it is within the province of the State to see children of tender years are not employed in dangerous occupations and that their health and welfare are adequately looked after whenever they are employed in factories etc. The Factories Act, the Plantation Labour Act 1951 etc., contain provisions regulating the period of work and the conditions thereof. Provisions are also made for maternity benefit, creches etc. The special provisions are made not with a view to favour one class of citizens to the detriment of others, but on the ground that such regulations and protections are necessary in the interests of the community. At the same time there has always been the criticism that women are discriminated against in the matter of wages and other service conditions. It may be noted that the Declaration on Elimination of Discrimination of Women was adopted by the U.N. General Assembly on 7th November 1967. Article 1 thereof proclaimed:

"Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity."

The United Nations Secretary General Kurt Waldheim is stated to have declared: "If the quest for solutions of the world's problems is to emanate from the popular level, as it must, it demands as much involvement from women as from men." 5

Such involvement is not possible if women are to remain second class citizens. Working women present a special challenge. An assurance against discrimination in employment is highly essential to bring about equality among citizens. Plato said in his Dialogues:

"And if I said that the male and female sex appear to differ in the fitness in any art or pursuit, we should say that such pursuit of art ought to be assigned to one or the

other of them; but if the difference consists only in women bearing and men begetting children, this does not amount to proof that a woman differs from a man in respect of the sort of education she should receive, and we shall therefore continue to maintain that our guardians and their wives ought to have same pursuits.”

In the field of labour equal pay for equal work is a constitutional guarantee. It was in fulfilment of that guarantee that Parliament passed the Equal Remuneration Act of 1976. The Act enjoins the employer to pay equal remuneration to men and women workers for the same work or work of similar nature. It is a matter of regret that much zeal is not exhibited in implementing the provisions of the Act. On the other hand, minimum wages are seen fixed in the case of even agricultural workers at different rates for men and women. On this aspect also I may recall the words of Lord Denning in connection with the English Statutes, Equal Pay Act 1970 and Sex Discrimination Act 1975:

“Whenever a woman does work of equal value to a man she is entitled to pay equal to his. Whenever there is a job which she can do she is entitled to apply for it and get it on equal terms with man. There must be no discrimination against her because she is a woman. Likewise there must be no discrimination against man because he is a man.”

So much about Legislation on women.

Coming to the question of children, they are the potential man-power, on which depends the future of the nation. Article 45 of the Constitution makes provision for free and compulsory education for all children until they complete the age of fourteen years. Article 25 prohibits employment of children below the age of fourteen years in any factory or mine and their engagement in any other hazardous employment. Article 39 states that children and youth should be protected against exploitation and against moral and material abandonment and also enjoins that the tender age of children should not be abused. Under Article V of the Geneva Declaration of the Rights of Child, the child must be the first to receive relief in times of distress.
Vagrancy among children it sought to be prevented by the Prevention of Begging Acts, the Vagrancy Act and the Police Act in force in the States. The Apprentices Act of 1850 was passed for binding children between the ages of 10 and 18 as apprentices and to regulate the relation between employees and apprentices. The Reformatory Schools Act of 1897 dealt with youthful offenders. The Wards Act of 1890 dealt with the welfare of minors. Section 82 of the Indian Penal Code states that nothing is an offence which is done by a child under seven years of age. Section 83 exempts from liability an act done by a child above seven years of age and under 12 years if he has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct. Under section 315 an act done with intent to prevent child being born alive or to cause it to die after birth is made punishable with imprisonment for ten years. A similar punishment is available under section 316 for causing the death of unborn child by an act amounting to culpable homicide. Section 317 deals with exposure and abandonment of a child under 12 years by parent or person having custody of it. The offence is punishable with imprisonment for a term of seven years and fine. Section 318 makes the offence of concealment of birth by secret disposal of dead body punishable with imprisonment for two years. The Indian Penal Code makes violence against minor girls, selling or buying minor girls for purposes of prostitution and also rape punishable with heavy terms of imprisonment.

Of all the provisions dealing with children, the most outstanding and important are the provisions dealing with juvenile offenders and juvenile courts. The underlying principle behind the establishment of juvenile courts is the realisation that the misdeeds of children are often the result of the failure of the family and should be attributed to factors in the larger social environment. Juvenile Courts have their own judges and special procedural rules for the adjudication of juveniles. Though the courts initially dealt with delinquent juveniles the jurisdiction was subsequently extended to include individuals who were not juveniles, not mal-adjusted, but lacked the natural supervision, care and protection of the family, those who are commonly called incorrigible and ungovernable. Later on the abandoned and
the orphaned came under the jurisdiction of the juvenile court. The United Nations' comparative survey of juvenile delinquency in Europe summarised the trend as follows:

"Once it is admitted that an offence committed by a juvenile is only a symptom of a condition of which society disapproves, it is not difficult to realise the possibility, even the necessity, of extending court jurisdiction to persons whose symptoms call for protection treatment. With this realisation the non-criminal element entered into the legislative provisions dealing with the delinquents, and at the present time some laws pay greater attention to this than to the criminal element."

It is interesting to note the observations of the Supreme Court of America in Kent v. United States,\(^6\) that "the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness."\(^7\) In In re Gault,\(^8\) that court had occasion to consider the juvenile justice process with particular reference to the due process clause of the Fourteenth Amendment of the Constitution relating to adequate notice, the fifth amendment statement of the privilege against self incrimination, right to notification of the charge, right to counsel, right to confrontation and cross-examination, right to transcript of proceedings and right to appellate review. The Court observed:

"The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help "to save him from a downward career. Then, as now, good will and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the

---

7. Id., at p. 55 per Fortas J.
8. 387 U. S. 1.
appearance as well as the actuality of fairness, impartiality and orderliness—in shore, the essentials of due process—may be a more impressive and therapeutic attitude so far as the juvenile is concerned. For example, in a recent study, the sociologist Wheeler and Cottrell observed that when the procedural taxness of the "parens patriae" attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel." Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child." 9

I do not want to go into more details on this aspect. In India juvenile delinquency is dealt with under the various Children Acts. The juvenile courts assume different functions in relation to juveniles, reformation, prevention, protection and guardianship. The Kerala Children Act makes provisions not only for Children's Courts but also for Children's homes, neglected children and uncontrollable children. Proper implementation of the provisions will help in tackling the problems of delinquent and destitute children.

9. Id., at pp. 26, 27 per Fortas J.
Apart from the Children Act, there are the Probation of Offenders Act and the Borstal Schools Act which deal with treatment of children and adolescents who are charged with offences. Adoption and foster-care programmes are also devices for the protection of destitute children. A scheme for legalisation of adoption is already on the anvil of the legislature.

Although not offenders, there are certain other classes of children who are in need of particular care and attention. They are the handicapped, the crippled, the deaf and dumb, the blind and children with retarded growth. These unfortunate people do not come under any legislation. The State has however a duty to place its protective hands on these physically handicapped and to see that they are educated and made to perform the functions of a normal person to the extent possible.

Shri Jawaharlal Nehru said:

“Somehow the fact that ultimately everything depends on the human factor gets rather lost in our thinking of the plans and schemes of natural development in terms of factories and machinery and general schemes. It is all very important and we must have them, but ultimately of course, it is the human being that counts much more as a child than as a grown up.”