



provisions of law as this would destroy the 'very basis of the rule of law and strike at the very root of orderly administration of law.'

This was the majority view comprising Sinha, C. J., S. K. Das and Ayyangar, JJ. The minority consisting of Sarkar and Mudholkar, JJ., differed from the majority. The minority held that under the Assam Order the licensing authority was entitled to prefer a co-operative society and this was what was done in the case. The minority did not refer at all to the basic question which the majority took into consideration, *viz.*, the licensing authority using the law for an ulterior motive, that of creating a monopoly in favour of co-operative societies, which is different from giving them preference, and that this was not warranted by the legal provision.

The pronouncement of the majority in the *Mannalal* case is important and far-reaching more so in the present context when policy decisions are sought to be enforced by the Government not overtly through law, but covertly under the guise of law. This definitely is not administration according to law.

*M. P. Jain.**

The Hindu Adoptions and Maintenance (Amendment) Bill, 1962¹

The Bill is welcome in that it marks a departure from the tardy tradition of Indian legislation in rectifying lacunae in the enactments. The object of the Bill is to cure a certain lacuna in the Hindu Adoptions and Maintenance Act, 1956, which hinders the adoption of orphans, illegitimates and abandoned children who are being brought up by orphanages and institutions. It may be recalled that under section 9(4) of the Hindu Adoptions and Maintenance Act, 1956, a guardian (*i.e.*, a testamentary guardian or a guardian appointed by the court) can give a child in adoption with the previous permission of the court. The Bill seeks to enlarge the meaning of the term guardian so as to include a person having the custody of the child, to enable the managers of institutions having the custody of children to give them in adoption. To facilitate the adoption of abandoned and illegitimate children the Bill seeks to widen the definition of the term "Hindu" in section 2 of the Act, to include "any child, legitimate or illegitimate, who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh". Thus the Bill proceeds from laudable humanitarian motives.

*Reader, Faculty of Law, Delhi University.

1. Bill No. 58 of 1962.



However, it is respectfully submitted that the contemplated amendments provide an insufficient and unsatisfactory answer to a wholesome problem. To the extent these provisions confer a power to give a child in adoption, on managers of orphanages and institutions having *de facto* custody of children, they are unassailable. But the Bill fails to visualise and remove other doubts and difficulties that centre round the question of adoption of an illegitimate. It is a moot point whether under section 9 of the Hindu Adoption and Maintenance Act, the putative father or the mother can give an illegitimate in adoption. For instance, dealing with the power of a mother to give a child in adoption section 9(3) lays down: "The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind." Does the word "father" include a "putative father"? Can it be said that a mother of an illegitimate can give the child in adoption, within the terms of this sub-section, if the putative father is known, alive and otherwise competent to exercise the power? It would appear that the mother of an illegitimate can give the child in adoption, independently of the putative father, only if the courts are prepared to construe the word "dead" as including "unknown" or "non-existent". Thus literal construction of the section, in the eventual passing of the Bill, might well lead to the anomalous result that a mother of an illegitimate cannot give such child in adoption, however much it is desirable, but that if she abandons the child and the child is brought up in an institute the manager can give the child in adoption. Could it be that the legislature acquiesces in such a position? Another interesting feature of the Bill is that it can (by cautious manoeuvring) give rise to the fiction of abandonment and adoption from the institution, as a mode of legitimation under the Indian law.

Again after the amendment section 2 cl. (bb) of the Act would require that an abandoned child or an illegitimate or a child whose parentage is not known should be "brought up as a Hindu" to enable them to be adopted. By and large orphanages and children's homes are run on multi-religious or non-religious basis. The indirect effect of the Act would be that these institutions should bring up their inmates as "Hindus" whatever that term might mean to facilitate their adoption. If they were to do so, they would be running considerable risk of being dubbed as denominational institutions disentitled under the Constitution to receive any aid from the State.

A far more unsatisfactory feature of the Bill is that it seeks to rectify the lacuna in respect of Hindus only. Also, as yet, there is no



law conferring a power of adoption on non-Hindus like Christians, Muslims and Parsees. The ultimate position would be if a Hindu wants to adopt a child from a Home he would be in a position to do so, but if a non-Hindu like a Christian intends to adopt he will be found to be *sans* law and *sans* procedure. In the present writer's opinion it is better to enact a general Adoptions Act governing these matters and providing for the procedure and supervision of adoptions. A piecemeal tinkering with the problem, as at present, will only be productive of unsatisfactory results.

Illegitimacy not unoften transcends the religious barriers. So too adoptions made on purely secular and humanitarian considerations. The enactments codifying these topics in future should rest on secular foundations, paving way for a uniform civil code, which alone can in a large measure bring unity and cohesion to the nascent Indian nation.

*B. Sivaramayya.**

*Lecturer, Faculty of Law, Delhi University.