

# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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## THE SUPREME COURT'S LIBERTARIAN DECISIONS THAT NARROWLY ESCAPED BEING NULLIFIED BY CONGRESS

In our September issue, at p. v: 140, we stated that the Jenner-Butler Bill which sought to overcome the effect of four of the most important decisions rendered recently by the Supreme Court favouring civil liberties was defeated in the Senate. In spite of the fact that the threat to the power of the Court being undermined has for the time being been removed, we think it useful to give here more particulars than we were able to give so far of these decisions which the bill, if passed into law, would have reversed.

### 1.—Overthrow of Government

One provision of the bill was intended to amend the Smith Act as construed by the Supreme Court in *Yates v. United States*, 354 U. S. 298 (1957). This case involved a group of West Coast communists who had been convicted and sentenced for conspiring to advocate and teach the forcible overthrow of the Government in violation of the Act. The Supreme Court made a distinction in this case between mere theoretical advocacy of the violent overthrow of the Government and actual incitement to action in bringing about the overthrow. It declared that persons who favour violent overthrow of the Government but do not incite others to achieve it cannot be convicted under the Act. The bill would have allowed Smith Act convictions "without regard to the immediate probable effect" of any speech or statement advocating the Government's overthrow. It would have made advocacy of the overthrow of the Government per se criminal and would have punished persons who advocated the doctrine without regard to whether incitement to action was intended.

This would have made a very big change in the present law. As the Court says in its judgment, "The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court beginning with *Fox v. Washington*," 236 U. S. 273 (1915). For, without such a distinction, a statute punishing speech that had no effect on the likelihood of,

say, the Government's overthrow would be a violation of the First Amendment. The Government, recognizing this, had requested the trial court in this case to charge the jury in terms of "incitement." The request showed that the Government was conscious, as the defendants contended, that the Smith Act "proscribes only the sort of advocacy which incites to illegal action" and not "advocacy unrelated to its tendency to produce forcible action." But the judge's instructions to the jury were, in fact, different: they showed that the court "regarded as immaterial any issue as to the character of the advocacy in terms of its capacity to stir listeners to forcible action." The Supreme Court was therefore compelled to rule that the convictions were based on an interpretation of the Act which was unsustainable.

In the earlier case under the Smith Act, *Dennis v. United States*, 341 U. S. 494 (1951) the trial court had kept the distinction between the two kinds of advocacy well in mind. In his instruction the judge said:

In further construction and interpretation of the statute, I charge you that it is *not the abstract doctrine* of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose *by language reasonably and ordinarily calculated to incite persons to such action.*

In *Gitlow v. New York*, 268 U. S. 652 (1925), concerning a Manifesto urging the necessity of a militant "revolutionary socialism based on class struggle and revolutionary mass action," the jury were instructed that they could not convict unless they found that the document advocated employing unlawful acts for the purpose of overthrowing organized government. The case arose under a New York Criminal Anarchy Act nearly identical to the Smith Act. The Supreme Court in this case took, as the Court said in the *Yates* case, a "narrow view" of the First Amendment; despite this, it said:

The statute does not penalize the utterance or publication of abstract doctrine or academic discussion having no quality of incitement to any

concrete action. . . . It is not the abstract doctrine of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose.

The defendant's conviction was affirmed, but anyhow the judgment underscores the distinction that formed the basis of the ruling in the Yates case, the distinction, viz., between advocacy of forcible overthrow as an abstract principle and advocacy as intended to call forth an effort to instigate action to that end. As Justice Frankfurter said in the Dennis case, "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt the hearers to take unlawful action and advocacy that such action be taken." The Butler bill sought to obliterate that historic distinction.

The Jenner-Butler Bill sought also to reverse another holding in the Yates case. This was that the Smith Act, in the ban it imposed on "organizing" subversive groups, used the word "organizing" in the narrow sense of starting new groups, not regulating existing groups. The Court held in this case that there was nothing in the statute to lend support to the broad construction the Government would put on this word, viz., that "'organizing' is a continuing process that does not end until the entity is dissolved," and said: "In these circumstances we should follow the familiar rule that criminal statutes are to be strictly construed and give to 'organize' its narrow meaning, that is, that the word refers only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed 'organizational.'" As Mr. Ernest Angell of the American Civil Liberties Union said in his testimony before the Senate's Internal Security sub-committee:

The Court, in thus narrowly construing the word "organize," was following one of the most basic maxims in the history of criminal law, stated by Chief Justice Marshall more than a century ago in *United States v. Wiltberger*, 5 Wheat. 76 (1820): "A criminal law must be given its most narrow meaningful construction." I submit that by no means did the Court depart from this most orthodox, long accepted concept of the law.

The two provisions of the bill, if enacted, would enormously extend the scope of the Smith Act.

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## 2.—Anti-Sedition Laws

Another provision in the bill would have reinstated some 42 state sedition laws which were invalidated by the decision of the Supreme Court in *Pennsylvania v. Nelson*, 350 U. S. 497 (1956), in which it was held that the Federal Smith Act, which prohibits the knowing advocacy of the overthrow of the Government of the United

States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act, which proscribes the same conduct. The reasoning of the Court was that the federal criminal sanction against sedition directed at the United States is so of such a pervasive character that it may be concluded that "Congress has occupied the field (of sedition against the United States) to the exclusion of parallel state legislation (and) that the dominant interest of the Federal Government precludes state intervention." The decision caused great alarm in reactionary circles. They felt that this holding that the Smith Act had repealed all state anti-sedition laws, taken in conjunction with the decision in the Yates case, supra, narrowing the application of the Act, would leave the country exposed to unlimited propaganda urging the right to overthrow government in the United States by force or violence.

The decision, it should be remembered, does not limit the power of the states to control and punish seditious acts directed against the states themselves. As was said by the Court of Appeals, whose decision was affirmed by the Supreme Court:

While the Pennsylvania statute proscribes sedition against either the Government of the United States or the Government of Pennsylvania, it is only alleged sedition against the United States with which the instant case is concerned. Out of all the voluminous testimony, we have not found, nor has any one pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania.

Another ground on which the Supreme Court abrogated all state laws punishing sedition against the National Government was that the states' administration of such laws might hamper the enforcement of the federal law. As was pointed out by the Court of Appeals:

Unlike the Smith Act, which can be administered only by federal officers acting in their official capacities, indictment for sedition under the Pennsylvania statute can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only to be mentioned to be appreciated. Defence of the Nation by law, no less than by arms, should be a public and not a private undertaking. It is important that punitive sanctions for sedition against the United States be such as have been promulgated by the central governmental authority and administered under the supervision and review of that authority's judiciary.

The Butler bill sought to upset this ruling to the effect that the Smith Act had pre-empted the entire area of sedition with the result of invalidating similar state statutes. The aim of the bill was to allow the states to enforce their own laws against the overthrow of the

Federal Government, permitting them, as was said by the "New York Times," "to compete with the Federal Government in prosecuting subversive activities against the Federal Government."

### 3.—Contempt of Congress

#### Compulsion of Testimony

While the above provisions in the Butler bill aimed at amending the laws as interpreted by the Supreme Court, the bill contained two other provisions seeking to deprive the Court of authority altogether to review legislation passed by Congress or the states.

In *Watkins v. United States*, 354 U. S. 178 (1957), Chief Justice Warren delivered a judgment of far-reaching importance to the effect that while Congress has the right, by the use of the power to summon a witness and compel him to testify, to obtain facts pertinent to a valid legislative purpose, its investigation can be justified solely as an adjunct to the legislative process and must not "encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." The Court held not only that the questions put to a witness under subpoena should be pertinent but that this pertinence should be made clear to the witness. He should have knowledge of what would constitute contempt of Congress if he did not respond to the questions. "That knowledge must be available with the same degree of explicitness and clarity that the Due Process clause requires in the expression of any element of a criminal offence." In this particular case the Court found that authorizing resolution of the Un-American Activities Committee was "woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry" and that his conviction for refusing to answer those questions "is necessarily invalid under the Due Process clause of the Fifth Amendment."

As Mr. Ernest Angell said in respect of the identical provision contained in the Jenner bill:

If a person is to be charged with criminal contempt for refusing to answer a question put by a Congressional committee, he should be afforded the same basis for predicting the consequences of his conduct as he does with respect to every other criminal conduct.

The ability to foresee the criminal consequences of one's act is perhaps the most basic difference between life in our society and life in a Communist society.

That is the principle the Court sustained in *Watkins v. the United States*.

The Butler bill sought to take away from the courts the power of passing on pertinence of the questions put to witnesses in trying charges against them for contempt of Congress and would instead make Congress itself the final authority to determine the pertinence. If enacted, the provision would have made Congressional

investigations limitless inquisitions without coming under subjection to any of the constitutional limitations.

### 4.—Admission to the Bar

Last year the Supreme Court in two cases, *Schwartz v. Board of Examinations*, 353 U. S. 232, and *Konigsberg v. State Bar of California*, 353 U. S. 252, overruled, as contrary to the Due Process clause of the Fourteenth Amendment, decisions of state courts in cases involving refusal of admission of prospective lawyers to the bar because they had Communist affiliations. In the latter case the Court said: "We recognize the importance of leaving states free to select their own bars, but it is equally important that the states not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association."

The Jenner-Butler bill sought to remove from the Supreme Court jurisdiction to pass in appeals on the validity of state regulations governing admission of persons to practise law. This provision of the bill had caused much concern among Negro lawyers, because it would have prohibited the Supreme Court from reviewing any citizen's claim that a state had unconstitutionally discriminated against him because of race in refusing him admission to the bar. The general counsel of the National Association for the Advancement of Coloured People thus describes what the effect of the provision, if adopted, would be:

Virginia, Mississippi and Tennessee have enacted laws making attorneys who handle litigation sponsored by the N. A. A. C. P. subject to disbarment. State officials in Texas, Alabama, Florida, Virginia, Georgia, Louisiana and Arkansas have sought to convey the impression that Negro attorneys who represent Negroes seeking vindication of their constitutional rights to be free of state-imposed discrimination are pursuing a course of conduct amounting to barratry, champerty and running and capping, all offences punishable by disbarment.

Negro lawyers who aid in litigation seeking the end of discrimination will have little hope of ultimate vindication of their rights through normal democratic processes if denied, as this bill provides, a right of review by the Supreme Court of the United States.

Fortunately the bill has been killed, but it indicates what violent reactions the Supreme Court's recent decisions favouring individual liberty have provoked among conservatives. In the past several important decisions of the Court, like those on the minimum wage and maximum hour statutes and the child labour law, were felt to be unsatisfactory; mostly they were unsatisfactory to men of liberal thought, for the Court as a body is usually conservative in its outlook. But the liberals who were offended by the decisions did not seek to curb

the Court. They waited patiently for the outlook of the Court to change, and their patience was rewarded. Now, however, the Court is being attacked by conservatives who feel that its decisions are revolutionary. In fact the decisions are by no means revolutionary; as Mr. Anthony Lewis says in the "New York Times", "the recent course of decisions could be described as truly conservative, in the sense of conserving traditional rights against new Government impositions." When this is realized it is hoped that the heat in the attack will disappear.

### The Impasse in Algeria

The prospects that the four-year-old bloody struggle in Algeria would end on account of the bold and imaginative policy which Premier Charles de Gaulle could initiate after the astonishing victory obtained by him in the plebiscite on the new Constitution (and the vote was obviously a personal vote of confidence in himself) were bright about a month ago, but the chances of a negotiated peace have again become slimmer.

The first notable step de Gaulle took to demonstrate to all Frenchmen, and especially to Algerian Moslems, that he was keen on finding an honourable solution was that on 13th October he ordered all military personnel in Algeria to quit politics. He wrote: "The moment has come . . . for the military to stop taking part in any organization which has a political character." This meant that officers from the paratroop commander Gen. Massu downwards were to withdraw from the dissident Committee of Public Safety formed last May to impose its will on the Paris Government, and this time Massu, who triggered the Algerian revolt, and other officers quietly submitted to the order and quickly left the military-civilian junta. As army officers were the backbone of this junta, it meant that the threat of effective defiance of Paris by Algerian Europeans diminished to the vanishing point. The colons tried to stage a strike in protest but the strike being forbidden, it completely fizzled out. The Algerian Public Safety Committees were in the habit formerly of disregarding orders from the centre, and de Gaulle had often to ignore their open defiance. He was then going slow. But his position has by the tremendous vote obtained by him in the constitutional referendum been so immensely strengthened that now he felt he could successfully tackle the central problem, that of curbing the military, and by this one act of forcing the military out of politics he showed that he could put the army in its place and that his Government was not going to be its creature. This step was applauded in all Left-wing circles as a return to "republican legality," with the virtual liquidation of the 13th May movement that overturned the Fourth Republic. Former Premier Pierre Mendès-France, e. g., who had reproached de Gaulle with having failed to disavow the junta, expressed

satisfaction, saying "should these intentions be honestly put into action, should unmistakable concrete facts follow, a way towards relaxation of tensions and peace could open up."

This order wiping out the dissidence and indiscipline in the French Army in Algeria was intended to clear the way for elections there, which are to be completed at the end of this month. The purpose of the elections, as de Gaulle put it, was to fill the political void in Algeria with a new political élite. Algeria has been allotted sixty-seven deputies to the National Assembly and of these forty-six are to be Moslems, in addition to the four to be elected in the Sahara, who are expected to be Moslems. Premier de Gaulle ordered General Salan, supreme military and civil commander in Algeria, to insure that all currents of opinion in Algeria were permitted free expression in the electoral campaign. He wrote:

The supreme interest of the country demands that the elections should take place in conditions of liberty and absolute sincerity and that lists of representatives of all tendencies—I say of *all* tendencies—should be able to solicit, competitively and on equal footing, the votes of the electorate.

Enlarging on this theme, de Gaulle said the advocates of any programme—including matters relating to "the status and political destiny of Algeria"—should be permitted to run. Only persons accused of having participated in the nationalist terror activities should be barred from candidacy. This injunction means that the supporters of Algerian independence and even members of the rebel Front de Liberation Nationale (F. L. N.) could, if they are not under criminal charges, offer themselves for election. Thus the "government-in-exile" in Cairo too would be permitted to put up candidates to seek election.

Some further steps have been taken to secure that the elections will be free. No civil servant or member of the armed forces currently serving in Algeria or who served there within the last year could be a candidate. It will be a civilian electoral commission under the chairmanship of Henri Hoppenot rather than the army that will receive candidacies in Algeria. Detailed instructions were issued to the chairman of the commission, charging him with the task of preventing any pressure from any source to dissuade candidates of all opinions from running. De Gaulle also ordered that seizures of French newspapers in Algeria such as took place before should cease unless the authorities were willing to back up the seizures with prosecutions on specific charges. Similarly, candidates should not be interfered with on grounds of public order without the consent of the electoral commission. Gen. de Gaulle has offered amnesty to any Algerian nationalist who wants to work peacefully and legally for his ideals. And it is widely believed that he ardently desires that a fair proportion of the Moslems to be elected would be

those who are espousing the cause of full independence for Algeria, so that the deputies would truly represent Algerian opinion. For his own part he has refused the Moslem demand for immediate independence but has offered them a representative, democratic régime. The F. L. N. of course is boycotting the elections. The Algerian elections will be on the party list system; the list getting the most votes will be regarded as the victor according to the winner-take-all rule. Thus there will be no run-off elections to decide the result by simple pluralities in constituencies where candidates do not obtain an absolute majority.

Overtures by the National Liberation Front for negotiations appeared at first to have produced no affirmative response from the de Gaulle Government, but after the pre-eminence of the governmental authority in Paris was effectively asserted in Algeria, de Gaulle himself made a bid for peace talks. He invited the F. L. N. leaders to come to Paris to discuss "the end of hostilities" without any prior conditions. He said, they "would be received and treated honourably. Their full security will be assured and I guarantee them the freedom to leave again," whatever be the outcome of the talks. He praised them for the courage with which they had carried on their movement and he wanted to discuss with them directly a "brave man's peace." He had made it plain that full independence was out of the question—at least for the present; his solution was independence within the French community. At his press conference he said:

The political future of Algeria is in Algeria itself... when the citizens have the opportunity of expressing their will, ... Legislative elections are going to take place soon. In March there will be elections for municipal councils. In April the Senatorial elections. What will follow? I say this is a matter of evolution.

The future solution will have as a basis... the courageous personality of Algeria and her close association with metropolitan France. This ensemble completed by the Sahara will, I think, sooner or later link itself for its common interest with the free states of Morocco and Tunisia,

thus expressing sympathy with Algerian leaders' desire to federate with Tunisia and Morocco. The F. L. N. leaders are of course firmly committed to full independence, but de Gaulle's offer at least left the door wide open for a political compromise. The move met with universal approbation of all Frenchmen except the die-hard Rightists. That he showed his readiness to treat directly with the rebel leaders was itself a measure of de Gaulle's absolute ascendancy in French politics. This will become clear from the fact that his predecessor, Premier Pierre Pflimlin was thrown out of office on mere suspicion, which Pflimlin vehemently denied, that he was getting ready to negotiate with the rebels whom the army officers

and Algerian Europeans characterized as a gang of cut-throats and torturers, and with his going out of office the Fourth Republic itself collapsed.

The F. L. N. provisional government was, however, placed in a difficult situation by de Gaulle's offer, very encouraging as the offer was. To go to Paris to negotiate with the French Government would imply renunciation of its claim to governmental status, but on the other hand to refuse the talks and to let Algeria's future be subsequently arbitrated by democratic processes would deeply compromise its moral position. The emigré government after prolonged consideration ultimately decided to reject the offer, which naturally caused much disappointment not only to liberals in France and in the outside world, but also, it would appear, to Algerian Moslems, who were greatly impressed by the fact that de Gaulle by his order to the military officers to quit the Committee of Public Safety had become master of the army and was able to put into effect his liberal policy of according self-rule to overseas territories (just then the formation of Madagascar as an autonomous "Malgache Republic" within the French community had been announced). The Moslem population of Algeria had also been greatly impressed by de Gaulle's five-year plan of economic and social reforms in Algeria that would cost, according to conservative estimate, a billion dollars a year—cost which many competent Frenchmen thought would almost be more than France's economy could bear. On the whole, the rebel leaders' decision would seem to be unfortunate. For there can be no doubt that the mass of the Moslem population of Algeria has grown war-weary and desires to have quiet restored provided it is an honourable peace that they can enjoy, and self-government within the French community at the start does not appear to them to be quite so dishonourable. For it should be remembered that, in spite of the rebel leaders' efforts to induce them to boycott the constitutional referendum, about 80 per cent. of the registered voters went to the polls and 95 per cent. of these voted for the Constitution. This was undoubtedly due in part to the pressure of the Army, but who can say that this might not happen again? In this connection it must be said to the credit of de Gaulle that he has issued strict orders to the Army not to exert any pressure on the Moslem population to participate in the election to the Legislative Assembly. Anyway it is clear that the Algerian Moslems ardently desire peace and think that de Gaulle can bring peace. To prove his bona fides de Gaulle ordered the liberation of 100,000 Algerians held in administrative detention camps in Algeria after the rejection of his offer by the F. L. N.

De Gaulle's policy would succeed if in the elections a sufficient number of liberal-minded Europeans and moderate-minded Moslems would come forward to present common lists of candidates. For, in Algeria, individual

candidates do not go to the polls in each constituency as in the rest of France, but joint lists, each containing a fixed proportion of Europeans and Moslems, have to be presented if they are to be valid, and it is obvious that if such lists are not forthcoming the elections cannot be held at all. It appeared that Europeans and Moslems would not be able to make common cause and run on common lists, but at the last minute several lists have been offered, and it remains to be seen whether the kind of men—both European and Moslem—who can make de Gaulle's Algerian policy successful would be returned. A series of terrorist attacks were reported from various parts of Algeria in order to prevent Moslems from participating in the elections, and the final outcome at this writing remains in doubt.

## Independence of West African Countries

### 1.—The Cameroons

General de Gaulle's enlightened colonial policy, which has made it possible for Guinea to shake off its status of a dependency and emerge as a full-fledged sovereign nation, has also resulted in a promise of independence to the Cameroons.

Togoland and the Cameroons were German colonies until the end of World War I. After the Treaty of Versailles, both territories were split into British and French mandates under the League of Nations authority. When the United Nations took the place of the League as a world organization after World War II, the mandates were converted into trusteeships. Now all these territories, whether under British or French control, have been given a pledge of independence in 1960.

British Togoland was absorbed into the Gold Coast Colony after attaining independence as Ghana in 1957. This absorption took place after a referendum which is always held before the U. N. trusteeship is terminated. The French Togoland has already been promised independence in 1960. What is remarkable in this case is that the people of Togoland themselves recognize that a short period of transition and growth must be allowed before they assume in full the responsibilities of a wholly independent country. In this period they expect to receive the further co-operation and help from France which they need and they will shortly be approaching the United Nations to request that organization for technical assistance designed to make and keep the new state economically viable. They will also have to solve another problem: part of the population of Togoland which was one country before mandates were given to Britain and France is now included in Ghana, and though after 1960 the whole population will become independent, some of the Togolese will be on one side of the frontier and some on the other. This division, though brought about accidentally, will naturally be irksome to them, and one may be sure they will make an effort to reunite

the Togolese peoples by peaceful means and it is to be trusted that no impediment will be placed in the way of such unity.

France has now recognized the right of the Cameroons, which she is administering as a U. N. trust territory and which already is enjoying a semi-autonomous position, to choose independence. The Premier of the French Cameroons, Mr. Ahmadou Abidjo, told the Legislative Assembly on 18th October that de Gaulle's Overseas Minister had written to him that France would support a resolution before the United Nations for termination of the trusteeship. The actual termination will take place if a referendum taken in the territory discloses that the people are in favour of it. It would require about two years to complete this procedure and it is expected that the territory will become independent before the close of 1960. In the transitional period the territory will be accorded wider legislative and administrative powers, including most of those hitherto exercised by the French High Commissioner, the final authority being still retained in matters of defence, foreign policy, external commerce and the like by France during the period of transition. To this the Cameroons Government is agreeable. This territory too, like Togoland, will be faced with the question of reunification, because part of it was handed over by the League of Nations to Britain and attached to Nigeria for administrative purposes. And though this part too will become independent in 1960, the 3,000,000 people of the French Cameroons will not like to be separated from the 1,100,000 people of the British Cameroons. This artificial division must come to an end, which it is hoped will be possible by negotiation in future.

### 2. — Nigeria

Britain has promised the largest of her remaining colonies — Nigeria — to accord to it on 1st October 1960 national independence within the Commonwealth, Nigerians themselves at a Constitutional conference attended by 80 delegates representing all shades of political views having expressed a desire for continuing the ties with Britain after the achievement of independence. Nigeria is the seventh country to attain independence after World War II. It has a population of 35 millions and after it is elevated to Commonwealth status, about an equal number of people will still remain in the British colonies.

Originally the United Kingdom came to assume responsibilities in Nigeria, principally as a means of abolishing the slave trade, and only some fifty years ago it took over the administration of all the regions composing the country as a single territory. Since then the country has made a steady advance towards self-government. In 1946 Regional Councils were established for the Northern, Eastern and Western groups of provinces and a central legislature was constituted for the whole territory. The

central problem was how to reconcile the need for internal autonomy of the regions so as to meet the varying needs and aspirations of their widely differing people with the need for establishing a central authority necessary to preserve the unity of the country. A quasi-federal constitution was introduced in 1951, increasing at the same time the autonomy of the regions. It was found, however, that this constitutional framework was too closely knit to allow the regions to work together effectively, and in 1954 a regular Federation was established, giving increased regional autonomy, especially to the Eastern and Western Regions. In 1957 these regions were granted full powers of internal self-government. At the centre the Federation has a Council of Ministers consisting of a Prime Minister and twelve other members appointed by the Governor-General on the advice of the Prime Minister. The Ministers are drawn from the House of Representatives, all but six of whom are elected by popular franchise. In the regions, the Executive Councils are the principal instruments of policy, each consisting of a Premier and a number of Ministers. The Premiers are leaders of the political parties which command a majority in their respective Houses of Assembly. A large majority of the members of all the Houses of Assembly are elected. The Northern Region is to attain, in March next year, the same degree of self-government as is already enjoyed by the Eastern and Western Regions, and the Cameroons, administered by Britain in association with Nigeria under a trusteeship agreement with the United Nations, is to receive a further instalment of constitutional development.

#### PROTECTION OF MINORITIES

The most difficult problem with which Nigeria is faced is the problem of minorities, ethnic, religious and linguistic. The people are distributed among many tribes or tribal groups distinguished by customs, traditions and languages, and in each of the three regions there is a two-thirds majority of one racial group, the minority being as large as one-third. In the Northern Region the Hausa and Fulani are a dominant majority, in the Western Region the Yoruba and in the Eastern Region the Ibos. There is considerable diversity even within these tribal and language groups. The people of the Southern Cameroons are of Bantu stock. The minorities fear that when full independence comes they will be subordinated to the dominant majorities. They have urged that new states should be carved out of the Regions to provide fresh units endowed with autonomy within the Federation.

A Minorities Commission was appointed, under Sir Henry Willink, to suggest means, short of the creation of new states if possible, of allaying the minorities' fears. The commission decided against creating new states and setting up further regional governments. It felt that the best protection of minority interests would lie in ensuring a strong federal government, and particularly in placing

the police force, though serving both federal and regional needs, under the ultimate control of the federal government. As a further safeguard, the commission recommended the setting up of special development boards in two minority areas (one in the Eastern and another in the Western Region) under a council entrusted with preservation of the culture and interests of the minority groups in its area.

It speaks volumes for the marked political talent, including the ability to compromise when necessary, of the Federal Prime Minister and the Premiers of the Regions that at the Constitutional Conference they agreed to these recommendations of the Minorities Commission, and the great hurdle in the way of national sovereignty was thus cleared. The Conference decided that special provisions be made for the two minority areas and that safeguards for fundamental human rights be embodied in Nigeria's Constitution for independence. It was also decided that, after independence, amendments of the entrenched provisions of the Federal Constitution should require at least a two-thirds majority of all members in each House of the federal legislature and the concurrence of each House in at least two of the self-governing regions. Corresponding safeguards would also apply to entrenched provisions of regional constitutions. Furthermore, it was decided that in certain prescribed emergencies the federal legislature should be empowered to make laws for the peace, order and good government of any region even if, in normal circumstances, such legislation would be ultra vires the Federation.

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## COMMENTS

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### A Shift in Pakistan

In Pakistan Major General Iskandar Mirza handed over the reins of Presidentship to the supreme martial law administrator, General Mahommed Ayub Khan, and retired from politics altogether. This shift will appear to outside observers as a further move towards military rule and away from democracy. But evidently it does not so appear to Pakistanis themselves. The reason given for the change is that though Gen. Mirza was the President of a Republican state, he was too much entangled with party intrigues to effect the complete divorce from politics which the abrogation of the Constitution and imposition of martial law on the whole country were intended to inaugurate, and if party manoeuvres of a sordid kind are to be wholly eliminated from the country till the Augean stables are cleaned and normal conditions are restored, in which alone healthy politics is possible, the change was inevitable. In any case Pakistani public opinion seems to regard it as both necessary and justifiable. There can be no question that, whether democracy may come back to Pakistan soon or late, the lot of the common man has become much more bearable under the administration of martial law than before, and since effective



power was in the hands of Gen. Ayub Khan even when he was not the formal President, there is no reason to suppose that this improvement will not continue uninterrupted: hoarding of grains and other necessities, profiteering, blackmarketing, smuggling will be effectively put down, goondalism suppressed and security of life and limb assured, without which democracy is an empty phrase.

Pakistani opinion on the replacement of Mirza by Ayub Khan was correctly voiced by the honoured "Lady of Pakistan," Miss Fatima Jinnah. Welcoming the shift in a forthright manner, she says: "A new era has opened with the assumption of Presidentship by Ayub Khan. He has vowed that he will stop administrative confusion and anti-social activities, restore confidence and a sense of security and stability and re-establish normal conditions. It is my fervent wish that he will be vouchsafed the wisdom and strength to achieve this object." Newspapers in general have said that Miss Fatima has correctly represented the sentiments and hopes of the masses of Pakistan and that no one will be found to shed a tear at the change that has come over the country. But what about democracy? In that respect too no one seems to think that its approach, whenever that may be possible, will recede because of the change in the head of the state. An independent paper, saying that Miss Fatima has given vent in her statement to the feeling that resides in the innermost recesses of the average Pakistani's heart, is content to refer, on the question of the re-advent of democracy, to Gen. Ayub Khan's declaration on his becoming the chief martial law administrator that democracy would be restored and his view expressed to a representative of the Associated Press of America that in the matter of determining the polity of Pakistan "we shall have to come back to republicanism" and that "when doing so, public opinion will be consulted," and on becoming President he made it clear that that would remain his policy. This shows that the general feeling is that Ayub Khan will not abuse the absolutist power that has been conferred on him. Finally, the paper says, with Miss Fatima, "God give him the grace to walk on the right path and enable him to attain the cherished goal" of republicanism.

The recent happenings in Pakistan constantly remind one of the silent revolution wrought by Gen. de Gaulle in France. De Gaulle has one great advantage. Whatever doubts Frenchmen may entertain about his ability to solve the intricate problems facing his country, no one questions his disinterestedness and integrity; and whatever dictatorial powers may have been conferred upon him, every one feels confident that he is not a dictator in the vulgar sense, that he will not abuse those powers for personal or even party aggrandisement. A writer who knows him well has said of him:

Personal ambition, one feels in his presence, is dead in him. He clearly believes that his place among the great of French history is secure and he has never betrayed the slightest sign of any meaner ambition. There seems to be therefore no consideration of sordid interest to sully his almost mystical self-identification with the valid aspirations of France.

Could one say the same thing of Iskander Mirza or can one say it of Ayub Khan? We do not know; it is only Pakistanis who can speak with any amount of confidence. De Gaulle combines with the qualities described above another, viz, that he has a large vision. If Ayub Khan is possessed of patriotism in the real sense and unselfishness and can take a broad view of things, the present crisis need not cause much concern. The country will not be the worse for the temporary suspension of its democratic Constitution. On the other hand, democracy may flourish with vigour by providing the conditions in which alone it can become a success. Every Indian wishes from the depths of his heart that such will be the result.

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## INDUSTRIAL DISPUTES ACT

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### Retrenchment Relief Denied

#### MANDAMUS ISSUED TO GOVERNMENT

Finding that for various reasons including scarcity of raw materials, the Ganga Oil Mill of Kanpur was running at a loss, the owners of the mill on 12th January 1954 arrived at an agreement with their workmen. The terms of the agreement provided that the mill would be closed down initially for three months and wait for conditions to improve. During this period the workmen were to be paid a subsistence allowance; after the expiry of the period the mill would restart after a review of the situation had been made; on restart a complement of workmen would be employed. But such workmen as could not be absorbed would be entitled to retrenchment relief. After reviewing the situation in April 1954 the owners of the mill decided to continue the closure.

Thereupon some workmen filed an application under sec. 25 (1) of the Industrial Disputes Amendment Act, 1953, for recovery of retrenchment relief. The employers objected that theirs was a case of bona fide closure of the mill, hence no retrenchment relief was admissible. The regional conciliation officer accepted the case of the workmen, found that about Rs. 17,000 was due to the workmen, and referred the matter to the Government for necessary action. On this the collector had commenced proceedings for the recovery of the money from the owners of the mill. Thereupon the latter made a writ application to the Allahabad High Court challenging the proceedings.

The petitioner's counsel referred to a recent decision of the Supreme Court in Hariprasad Shivshanker Shukla and another v. A. D. Divilkar (A. I. R. 1957 S. C. 121),



wherein Their Lordships had laid down that retrenchment meant the discharge of surplus labour or staff by the employer for any reasons whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it had no application where the services of the workmen had been terminated by the employer on a real and bona fide closure of business.

On 17th September Mr. Justice James allowed the writ petition. His Lordship accepted as well-founded the contention on behalf of the mill that they were obliged to close down the mill for real and bona fide reasons and issued a writ of mandamus directing the State of U. P., the regional conciliation officer and the collector of Kanpur not to recover the amount of about Rs. 17,000 as retrenchment relief to the workmen.

His Lordship said it appeared that the ruling decision was given subsequently to the decision of the petitioner's case by the regional conciliation officer and most likely it was because he failed to appreciate the implication of a bona fide closure of the mill that he considered the workmen entitled to retrenchment relief.

#### Proceedings in Labour Dispute Cases

##### QUASHED BY THE SUPREME COURT

The Constitution Bench of the Supreme Court on 4th November allowed the appeal preferred by Messrs. Shri Krishna Gyanoday Sugar Limited of Guraru in Gaya district, set aside the order of the Patna High Court and quashed the proceedings in two cases before the Industrial Tribunal, Bihar.

The Gaya Sugar Mills Limited owned a sugar factory at Guraru. An order for the compulsory winding up of the company was made in 1952 and a liquidator appointed. The liquidator leased out the mills with the permission of the court under sec. 171 of the Companies Act. In 1954, on the expiry of the first lease, the mills were leased out to the Shri Krishna Gynoday Sugar Limited, the present appellant.

On December 2, 1954, four days before the execution of the lease, the Government of Bihar referred certain disputes between the managements of 28 sugar factories and their workmen for adjudication to the Industrial Tribunal.

On March 23, 1955, two applications were made under sec. 33-A of the Industrial Disputes Act, one by 15 persons alleging that the appellant had without any reason and without any notice discharged them from service, and the other by five persons contending that the appellant company had changed its conditions of service during the pendency of the disputes before the Tribunal without its permission under sec. 33 of the Act.

The appellant company moved the Patna High Court for a writ quashing the proceedings in the two applications before the Industrial Tribunal. The High Court dismissed the petition on September 20, 1956, holding that sec. 10 (1) of the Act was not controlled by sec. 171

of the Indian Companies Act, and, therefore, no leave of the court was necessary before making a reference under sec. 10 (1) of the Industrial Disputes Act.

It further held that though the notification was issued on December 2 and the appellant took possession of the mills on December 6 it was still an "employer" within the meaning of the term used in secs. 33 and 33-A. The company then obtained special leave to appeal under Art. 136 of the Constitution.

It was urged before the Supreme Court that in view of the Gaya Sugar Mills Limited having gone into liquidation and in view of the reference of the Bihar Government on December 2, 1954, under sec. 10 (1) of the Industrial Disputes Act involving considerable financial burden on the mills, the State Government ought to have obtained sanction of the court under sec. 171 of the Companies Act before making the reference of the industrial disputes qua the said mills, and in so far as it had not been done the reference was bad in law.

Secondly, it was contended that on a true construction of secs. 33 and 33-A, the "employer" therein mentioned could only be the "employer" concerned in the industrial dispute which was the subject matter of reference, and as the appellant had taken the lease four days after the reference it was not an "employer" within the meaning of secs. 33 and 33-A.

Mr. Justice Bhagwati, who delivered the judgment, considered the question whether the reference was a legal proceeding within the meaning of sec. 171 of the Companies Act, and came to the conclusion that it did not arise for decision and His Lordship preferred not to express any opinion on it. Turning to the second question regarding the connotation of the word "employer" as used in secs. 33 and 33-A, His Lordship said that on the date of the reference the appellant was not in the management of the mills and it could not be bound by the reference.

Mr. Justice Bhagwati said that in no event could the appellant be held to be bound either by the reference or the award. If that were the true position, His Lordship said no question could arise of the appellant obtaining written permission of the Industrial Tribunal under sec. 33 for discharging or punishing or for effecting any change in the conditions of service of the workmen concerned and the applications under sec. 33-A were not maintainable.

The appeal was allowed.

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## INCOME-TAX ACT

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### "Reconstructed Business"

#### MEANING CLARIFIED BY BOMBAY HIGH COURT

The question as to what is the difference between "a newly-established industrial undertaking" and "an industrial undertaking formed by reconstruction of a business already in existence," came up for decision in an income-

tax reference before Mr. Justice S. T. Desai and Mr. Justice K. T. Desai at the Bombay High Court.

A partnership firm was started in July 1948 for manufacturing shoes in the name of Coral & Co.

The assessee company, named the Gaekwar Foam and Rubber Co. Ltd., was registered as a limited liability company in July 1949.

By an agreement of sale dated February 28, 1950, the assessee company took over the assets of the business of Coral & Co. including its goodwill for the consideration of Rs. 1,50,000. The payment was not made in cash but by allotting shares of the assessee company to the partners of the firm of Coral & Co. The nominal capital of the company was Rs 5,00,000. Neither the credits and outstandings nor the debts and liabilities of the Coral & Co. were taken over by the assessee company. The name of the assessee company was changed into Carona Shoe Co. Ltd.

In respect of the assessment year 1952-53, the assessee company claimed exemption from tax under sec. 15 C of the Income-tax Act on the ground that it was a newly-established industrial undertaking.

The income-tax officer rejected the assessee's contention and held that the assessee company was formed by reconstruction of a business already in existence, viz, Coral & Co.

The Tribunal held that the assessee company was entitled to exemption from tax under sec. 15 C. The Commissioner thereupon came to the High Court in this reference.

In giving judgment on 30th September, Their Lordships said that the question for consideration was whether the assessee company was a newly established industrial undertaking formed by reconstruction of a business already in existence.

Their Lordships said that, on the face of it, it was an agreement of sale of the assets of building, machinery and plant of an existing industrial undertaking and also of the stock-in-trade.

It was urged by counsel for the department that this was a case of reconstruction of a business already in existence and that the identity of the vendor firm was completely merged in the assessee company.

Their Lordships were unable to say that this was a case of amalgamation or identity of the vendor firm being merged in the assessee company. In Their Lordships' opinion this was a case of a business of a firm ceasing after its sale when it could not carry on its business.

The expression "reconstruction" represented a legal conception but no judge had ever attempted to give a comprehensive definition of that expression. The Income-tax Act had not defined this expression.

The underlying idea of "reconstruction" must be "business already in existence." There must be a continuation of the activities and business of the same

industrial undertaking. It must be substantially the same business carried on by substantially the same persons.

But where there was an out and out sale, there could be no question of reconstruction. It would be a misnomer to speak of a buyer of the business of a firm reconstructing vendor's business.

In Their Lordships' opinion, this was a clear case of sale of a business and it could not be said that the vendors had formed a new company by construction of a business already in existence. This was a case of a newly-established industrial concern and consequently it was entitled to exemption from tax under sec. 15 C of the Act.

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## " PATNI " SETTLEMENT

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### Agrarian Law Relating to " Patni " SUPREME COURT'S DECISION

The Supreme Court on 18th September allowed the appeal by Radha Sundar Dutta against Md. Bahadur Rahim and others after deciding an important point of agrarian law relating to " patni " settlement.

The suit property is one of the villages forming part of the permanently settled estate of Burdwan zamindari. This village was granted by the Maharaja of Burdwan in patni settlement to the predecessors in interest of the defendants. The land was subsequently granted to the defendants on a yearly rental with a condition that on default of payment the land could be sold for realization of the dues. Under this clause the land was put up for auction and bought by the Maharaja of Burdwan himself. In 1941 the Maharaja granted the land again on patni to the appellant.

The appellant filed a suit to recover possession of the land from the defendants and the subordinate judge held in their favour. In appeal the District Court of Burdwan upheld the decision of the subordinate judge. The respondents went in second appeal to the High Court, who allowed the appeal on the view that sale of a part of an estate included in a patni settlement was bad and void. The present appeal to the Supreme Court was filed against this judgment of the High Court.

The appellant contended before the Supreme Court that the decision of the Calcutta High Court was based on an erroneous appreciation of the character and incidents of patni tenure. He submitted that there was no bar to the creation of a fresh patni in respect of land comprised in a bigger patni, and that the sale under which the appellant had acquired interest was valid.

After examining the documents under which the grants had been created, the Supreme Court held that the grant in June 1899 to the predecessors in interest of the defendants, who at that time held the patni interest in respect of 'lot' Ahiyapur, created a new patni and that the sale of the land comprised therein is not bad as of a portion of a patni. In coming to this decision, the

Supreme Court noted that they were taking a different view from the decision of the Calcutta High Court in *Kanchan Barani Deby v. Umesh Chandra*, which had stood for over three decades.

As a result of the decision of the Supreme Court, the appellants become entitled to khas possession of the suit land by virtue of the fresh patni granted in their favour by the Maharaja.

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## LAND ACQUISITION ACT

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### Acting Without Authority

#### STRICTURES OF THE HIGH COURT

Mr. Justice Jagdish Saha, of the Allahabad High Court, on 16th September struck a note of warning that if acts committed by the State Government in disregard of the provisions of law were not stopped immediately, a time might come when the life and property of the people would not be safe.

With this note of warning His Lordship issued a writ of mandamus directing the State Government to restore the land of the petitioner after destroying all the structures within 30 days of the receipt of the order.

The petitioner, Mr. Bisheshwar Prasad Seghal of Pakiri village in Pilibhit district, had alleged that his land was taken over by the Government for construction of a public road without taking proceedings under the Land Acquisition Act.

In the counter-affidavit filed on behalf of the State Government, it was admitted that when the construction of the road was started on the plots in question, no notification under the Land Acquisition Act had been issued. It was further submitted that in the larger interests of the country, it was thought essential that this road must be constructed without delay.

His Lordship said that it could not be denied that at the time when the petitioner's land was encroached on, it was a clear case of trespass and there was a clear violation of the provisions of Art. 31 of the Constitution. The subsequent notification published in the U. P. Gazette after several months could not validate the proceedings which had their origin in act of trespass.

His Lordship further observed that that the respondents — the State Government, the District Magistrate and the District Engineer, P.W.D., Pilibhit — in the present case had acted in an irresponsible manner and in complete disregard of the provisions of law.

In law there was nothing to justify the Government to acquire land for public purposes without having recourse to the provisions of law, His Lordship added

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## NOTES

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### "No Racial Discrimination"

#### IN THE USE OF TAX-SUPPORTED FACILITIES

The Supreme Court of the United States on 20th October reaffirmed its stand that all publicly supported

facilities must be made available to all irrespective of race or colour. This decision was rendered in a case in which the Park Improvement Association of New Orleans City, a municipal association, had by executive order closed the park which provides many recreational facilities like boating, golf links, tennis courts and picnic grounds to Negroes. The federal district court issued an injunction to the association that gave Negroes the use of the park facilities. The Court of Appeals in New Orleans upheld the injunction and in doing so noted that the courts had always ruled that the refusal on the part of city or state officials to make tax-supported facilities available on a non-segregated basis to Negroes deprived them of equal protection under the law. The Park Improvement Association thereupon appealed to the Supreme Court challenging the authorities on psychology who were cited by the Supreme Court in its decision of 1954 outlawing racial segregation in public schools. The Supreme Court dismissed the appeal. It did so not by merely refusing to review the case, the method usually adopted in such appeals, but by affirming the appellate court, to make it emphatically clear that it agreed with that court's ruling.

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### Mass Treason Trial in S. Africa

The notorious treason trial of South Africa took a surprising turn last month when the trial commenced: the prosecution withdrew the indictment against 91 persons charged with high treason.

It will be recalled that the legal proceedings followed a series of mass arrests in December 1956 in many parts of the country. The accused, originally 156, are mostly African, but include also whites, Indians and Coloureds. Most are members of African "freedom" movements opposed to the Government's racial segregation policies. They were accused of preparing to overthrow the Government by force. The trial began on 1st August after a preliminary inquiry that lasted more than a year. Charges against almost half the accused were dropped before the trial had commenced.

The defence has vigorously attacked the conduct of the case since the trial began. It successfully challenged one of the three judges of the special court hearing the case. (The Minister of Justice had set up the special court without authority and his action was retrospectively legalized by passing the Special Criminal Courts Amendment Act.) The defence also succeeded in getting part of the indictment quashed.

The prosecution was thereby reduced to basing its entire case on an attempt to prove conspiracy. The defence then made a second application for the annulment of the indictment. The prosecution had been expected to reply to this application last month. Instead, the chief prosecutor opened the proceedings with an application to amend the indictment by reducing the number of alleged

overt acts by the accused and withdrawing the indictment against 91 accused even before they had made their pleas to the court. A new indictment is now to be submitted, a step which under the law can be taken since the accused have not yet pleaded. The 91 are to be re-indicted, as the Capetown "Africa South" says, under charges with which the Nationalist Party Government thinks it can get a conviction.

#### Other South African Matters

*University Apartheid.*—The so-called Extension of University Education Bill, which provides for the exclusion of non-white students from the "open" Universities as well as for the establishment of "tribal" colleges, is in no way an improvement on the measure introduced and withdrawn last year. It completely ignores the representations made to the Commission set up by the Government not only by the "open" Universities but by representatives of Pretoria and Potchefstroom in favour of University autonomy, independent multi-racial councils and senates, and control of the new colleges by existing Universities. The councils and senates of these colleges are to consist exclusively of whites appointed by the Minister of Native Affairs, and are to be aided by separate councils and senates of non-whites, also appointed by the Minister. After a period of "training and gaining experience" the non-white bodies will assume the powers of the white bodies, thereby taking control of the colleges, and the white bodies will then function in an advisory capacity. The Minister or his deputy is given absolute power over the colleges. The "Star" refers to "the danger that, on the arguments used by the Commission, no South African University can in future be sure of being allowed to retain what has always been regarded as one of the safeguards of academic freedom." Moreover, the "conscience clause" (prohibiting religious tests being applied to professors, lecturers and students), which was included in last year's bill, has now been omitted which, says the "Sunday Times," means that "the authorities at the proposed non-white Universities will now be able to debar lecturers, students etc if they are Jews, Mohammedans, atheists, agnostics and so on, or even members of other Christian churches."

*African Taxation and Poverty.*—The increase made in African general tax from £1 to £1 15s. (now, for the first time, also applicable to women) has no moral or fiscal justification, and means that Africans are in fact taxed more heavily than any other equivalent income group. A pamphlet published by the Institute of Race

Relations on this subject mentions the following outstanding points.

(1) In every case where comparable income and expenditure figures are available, between 69 and 78 per cent. of African families in the areas concerned have incomes below the minimum necessary to provide the barest essentials of healthy living. The pamphlet quotes Professor Batson's comments on the "poverty datum line," which, he says, "does not allow a penny for amusements, for sport, for medicine, for education, for saving, for hire purchase, for holidays, for odd bus rides, for newspapers, stationery, tobacco, sweets, hobbies, gifts, pocket money, or comforts and luxuries of any kind . . . for replacements of blankets, furniture or crockery. It is not a 'human' standard of living . . ."

(2) In Johannesburg the cost of "essentials" for an African family practically doubled in the years 1941-54; since then, housing, transport, clothing, food and other costs have again increased. Between 1950 and 1954, minimum family expenditure increased by 33%, but average family incomes by only 24%. The pamphlet gives some shocking facts about the effects of malnutrition caused by economy on food.

*Group Areas in Pretoria.*—Almost the entire built up area of Pretoria has been zoned for occupation by whites, although the change-over process may take anything from one to seven years. The following is the way in which various racial groups will be affected by the Group Areas proclaimed in the administrative capital:

**Whites:** A very few families may have to move from the area proclaimed for Indians. No others will be affected.

**Chinese:** No group area proclaimed. Will probably be allowed to continue trading in their present premises under permit, but as most, if not all, of their properties will be in defined areas, they cannot make any extensions or alterations to their premises except under permit.

**Coloured People:** About 7,900 people, practically all of whom will have to move (in from one to seven years) to an undeveloped area (Derdepoort) nine or ten miles from Pretoria.

**Indians:** 7,300, largely traders (some established for 75 years), who will have to move from the centre of the city to an undeveloped area for Indians, thus losing their white, coloured and African customers.

**Africans:** About 60,000 in Lady Selborne and Claremont will have to move to locations with "economic" rents and high transport costs.