CHAPTER XLVI.

Provisions in the event of a break-down of the Constitution.

Break-down of the Constitution.

374. The Governor-General, or the Governor as the case may be, is empowered in his discretion, if at any time he is satisfied that a situation has arisen which renders it for the time being impossible for the Government of the Federation, or the Province, as the case may be, to be carried on in accordance with the provisions of the Act, by Proclamation to declare that his functions shall, to such extent as may be specified in the Proclamation be exercised by him in his discretion, and to assume to himself all such powers vested by law in any Federal or Provincial authority, as the case may be, as appear to him to be necessary for the purpose of securing that the Government of the Federation or the Province, shall be carried on effectively. The Proclamation may suspend the operation of any provisions in the Act relating to any Federal or Provincial authority or body except the Federal Court and the High Court. A Proclamation by the Governor can be made only with the concurrence of the Governor-General.

The Proclamation will be communicated forthwith to the Secretary of State and laid before Parliament.

It will cease to operate at the expiry of 6 months, unless before the expiry of that period it has been approved by resolutions of both Houses of Parliament.

It may at any time be revoked by resolutions of both Houses of Parliament.

CHAPTER XLVII.

Fundamental rights.

Definition.

375. Fundamental rights have been defined as rights which go to the very root of man's existence. These rights were deemed to be the theoretical foundations of democracy. They were termed 'inalienable rights' or 'self-evident truths' in the American declaration of independence of 1776, and to be the 'natural and imprescriptible rights of Man' in the 'Declaration of the rights of Man' made by the National Assembly of France in 1791.

The Magna Carta of 1215 is probably the first conscious formulation of citizens' fundamental rights. The Petition of Rights of 1628 and

the Bill of Rights of 1689 are other examples. But these are not declarations or definitions of rights contained in any enactment. As Dicey puts it, these are merely 'judicial condemnations of claims and practices on the part of the Crown, which are thereby pronounced illegal.' (Law of the Constitution).

Fundamental duties.

Attempts have been made from time to time to embody in the Constitution a declaration of fundamental rights. The catalogue of such rights has changed from time to time, and side by side with fundamental rights, the fundamental duties also have been embodied in the Constitution, as in the French declaration of 1795, the French Constitution of 1848, and in the German Constitution of 1919.

With regard to India the necessity for a declaration of rights was emphasised in the Indian National Congress held at Madras in 1914, and in subsequent Conferences and Congresses, this has been reiterated. The question was discussed at length at the Round Table Conferences. While it was agreed that certain provisions could appropriately find a place in the Constitution Act, it was stated on the part of the British delegates that many fundamental rights which are guaranteed to the citizens of modern States, as also minority rights, were unsuitable for incorporation in the Constitution Act on the ground that they would constitute absolute limitations on the authority of the executive and the legislature.

Desirability of getting a declaration of rights in the Constitution.

376. Constitutional lawyers are divided in opinion on the desirability of getting these 'declarations' of rights in the Constitution. "Impressed with the importance of certain rights of citizens and the necessity for guarding them, Constitution-makers have often thought that by embodying these rights in a fundamental constitutional document, they would be investing them with a higher sanctity and preventing any encroachments upon them. But many of the declarations of rights are very inappropriately included in constitutional documents. In the first place it is hardly necessary, at this time of day, to think of conferring protection against the arbitrary acts of the executive Government. The rule of law is so firmly established in the system of English jurisprudence by which we are governed, that the danger of any encroachments by the executive authority on the rights of individual citizens, otherwise than under colour of law, hardly exists at the present moment. Secondly the rights included in these declarations are not placed above the reach of the ordinary legislature, for, most of them are expressed in language which recognises and permits interference by the legislature. Thirdly, the language in which the so-called rights are declared clearly show that they are not legally

enforceable rights at all. They are expressed in far too loose and vague a manner to be regarded as a statement of legal rights. Most of the statements are expressed in a very crude form, without any of the qualifications and limitations which would be necessary to make them accurate legal propositions. Each one of these declarations would require an essay to explain and define it in accurate terms. The declarations are in the nature of mere moral or politico-ethical, or legislative maxims which have no claim to be treated as rules of positive law. . . . If these declarations are treated, as they should be, as devoid of any legal content, they are merely illusory safeguards of rights. If, on the other hand, they are treated as having the force of law and as not liable to change by the ordinary legislature, they are sure to interfere with the working of the ordinary legislature, and to hamper the passing of legislative measures which may be found to be called for, in the interests of the safety of the State. The delay involved in carrying through constitutional amendments may prevent the timely enactment of a remedy urgently called for. Measures like the Suspension of the Habeas Corpus Act, or the Defence of the Realm Act may be imperatively called for, but the legislature will be powerless to put them through. When the Government of this country becomes responsible to the people, we shall, ourselves, realise the wisdom of not crippling the efficiency of the legislature, and preventing it from acting with vigour and promptitude on occasions of emergency. These are the reasons why the inclusion of a Declaration of Rights in a Constitution must be held to be unnecessary, unscientific, misleading, and either legally ineffective or harmful." (Sir P. S. Sivaswamy Iyer's "Indian Constitutional Problems.")

"What is fundamental is necessarily the result of evolving civilisation. There are no fundamentals capable of standing proof against time, except entities so vague as to be meaningless. . . . Society does not wait until a Constitution is written. In proportion as matters are urgent it establishes fundamentals by laws or conventions, and what the Constitution does not include is provided outside its pages. . . . British trade union rights are not derived from any Constitution, nor are freedom of speech, writing and assembly, yet they are so fundamental that any attempts to substantially limit them meet with the strongest resistence. Constitutions do not include all that is fundamental, while many of the declared fundamentals are silently ignored." (Herman Finer's "Modern Government.")

After all fundamentals are not perfect in the sense of being indefeasible and inalienable. "They are defeasible, alienable, and escapable and the People, the Parties, the Parliaments and the Courts of

Justice have defeated them, alienated them and escaped them. . . . Referring particularly to the German Constitution of 1919 (as containing the largest declaration of rights and duties), though this is true of all Constitutions, many of the clauses are so generally worded as to have no effect until the clauses are interpreted by the competent authorities, and again, until laws are passed to give them precise definition. In the first clause are some—equality before the law, equality between the sexes, the freedom of science and art, the protection of the middle classes and of family life,—so vague, so possible of multiform interpretation that the mind passes before them completely bewildered. . . All their efficacy depends upon their future interpretation and application in statutes and judicial decisions. There is another class which avowedly waits upon legislation: the labour code, the economic council, property law, and Local Government are examples." (*Ibid.*)

377. The Joint Select Committee observe as follows:—"The question of so-called fundamental rights, which was much discussed at the three Round Table Conferences, was brought to our notice by the British-India Delegation, many members of which were anxious that the new Constitution should contain a declaration of rights of different kinds, for reassuring minorities, for asserting the equality of all persons before the law, and for other like purposes; and we have examined more than one list of such rights which have been compiled. The Statutory Commission observe with reference to this subject:—"We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the war. Experience however has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective." With these observations we entirely agree: and a cynic might indeed find plausible arguments, in the history during the last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared. An examination of the lists to which we have referred shows very clearly indeed that this risk would be far from negligible. There is this further objection, that the States have made it abundantly clear that no declaration of fundamental rights is to apply

in State territories; and it would be altogether anomalous if such a declaration had legal force in part only of the area of the Federation. There are, however, one or two legal principles which might, we think, be appropriately embodied in the Constitution, and we direct attention to them in the paragraphs which follow. There are others, not strictly of a legal kind, to which perhaps His Majesty will think fit to make reference in any Proclamation which he may be pleased to issue in connection with the establishment of the new order in India." (Para. 367.)

378. The specific recommendations of the Committee are :—

Race, colour, etc. not to be a ground of disability.

(*a*) "We think that this declaration should provide that no British subject, Indian or otherwise, domiciled in India, shall be disabled from holding public office or from practising any trade, profession or calling by reason only of his religion, descent, caste, colour or place of birth and it should be extended, as regards the holding of office under the Federal Government, to subjects of Indian States." (Para. 367.)

Protection against expropriation of property.

(*b*) "We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation, in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the legislature in relation particularly to taxation ; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights. We do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated ; but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by some independent authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think, to require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction ; and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation." (Para. 369.)

(*c*) " But there is a form of private property—perhaps more accurately described as " vested interest "—common in India, which we think requires more specific protection. We refer to grants of land or of tenure of land free of land revenue, or subject to partial remissions of land revenue, held under various names (of which Taluk, Inam, Watan, Jagir and Muafi are examples), throughout British India by various individuals or classes of individuals. Some of these grants date from Moghul or Sikh times and have been confirmed by the British Government : others have been granted by the British Government for services rendered. . . . . " We recommend that the Constitution Act should contain an appropriate provision requiring the prior consent of the Governor-General or the Governor, as the case may be, to any propossal, legislative or executive, which would alter or prejudice the rights of the possessor of any privilege of the kind to which we have referred." (Paras. 370 & 371.)

Protection of the rights of Jagirdars, Inamdars, etc.

(*d*) " We recommend that the Governor should be instructed to reserve for the significance of His Majesty's pleasure any Bill passed by the Legislature which would alter the character of the Permanent Settlement." (Para. 372.)

379. Following these recommendations, the Act declares that colour, race, etc. shall not be a ground of disability, that a person shall not be deprived of property except by authority of law, that compulsory acquisition of land could be made only on compensation, that the executive authority of the Federation or of a Province shall not be exercised, except on an order of the Governor-General or the Governor as the case may be in the exercise of his individual judgment, so as to derogate from the rights of jagirdars, inamdars etc., and that expropriatory legislation can be introduced only on the previous sanction of the Governor-General or the Governor.

380. It will be observed that under the new Constitution some only of the rights find a place in the Constitution Act, while others are to be relegated to the Royal Proclamation to be issued by His Majesty. The rights of minorities are committed to the care of the Governors and the Governor-General under the head of special responsibilities.

It is not at all clear why certain rights are to be given expression to, in the Royal Proclamation and not in the Act itself. Either they are intended to be honoured and carried out, or they are not. If the former, there is no reason why they should not be embodied in the Act. If the latter, they should not find a place even in a Proclamation. Royal Proclamations are doubtful supports of citizens' rights. They do not have the force of law. As observed by Dicey, " they merely serve to call

the attention of the public to the law, but they cannot, of themselves, impose upon any man any legal obligation or duty not imposed by common law, or by Act of Parliament." The Queen's Proclamation of 1858 was interpreted by Sir James Stephen as a mere ceremonial document, that it was not a treaty and that, therefore, it did not impose any responsibility and obligation on the English people.

After all, it is very doubtful whether the declarations of rights even in the Constitution Act itself, is of any utility, when there exists side by side with these declarations, provisions enabling the Governor-General and the Governors to pass 'Acts' and ordinances without the consent of the Legislature, under which the executive could arrest and detain persons without charge or trial, and seize and confiscate their properties.

CHAPTER XLVIII.

Constituent Powers.

Rigid and flexible Constitutions.

381. Political Constitutions have been classified indifferent ways for different purposes. . . . A flexible Constitution is one which can be altered from time to time in the same way as other laws, and by the same legislature. A rigid Constitution, on the other hand, is one which is passed not by the ordinary legislature, but by some higher authority like the people at large, or by some specially empowered person or body, and cannot be altered in the same way as other laws. A rigid Constitution controls the actions of the ordinary legislature, and enactments of the ordinary legislature which conflicts with the provisions of the Constitution would, to that extent, be *ultra vires* and void.*

The outstanding merit of the British Constitution is its extreme flexibility. The British Parliament is supreme and omnipotent. It cannot bind its successor. If it prescribed a mode of altering the British Constitution, that could be disregarded by its successor, and the Courts would obey the later law. The position is, however, different with regard to the Colonies. Their Constitutions have been invariably set up under Acts of the British Parliament or Orders in Council, and their Constitutions could be varied only by an Act of Parliament or an Order in Council, except in so far as the Act of Parliament or Order in Council empowers any other body to make changes in the Constitution. These powers are usually referred to as constituent powers. These constituent powers could be exercised only in such manner and form as may have been specified in the Act of Parliament or Order in Council, or other

* "Indian Constitutional Problems" by Sir P. S. Sivaswamy Aiyar.