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.

law in force. These laws have, as a rule, prescribed a definite procedure for the alteration of the Colonial Constitutions. These Constitutions are, therefore, rigid, although some may be less rigid than others.

The Constitution of India has always been rigid. It is the Imperial Parliament that has, from time to time, passed enactments relating to the Government of India, and these enactments could be altered or amended only by an Act of the Imperial Parliament. The Government of India Act, 1919 can be amended or altered only by the Imperial Parliament, except in respect of certain minor matters referred to in Schedule V to the Act, relating to the jurisdiction of High Courts, alteration of the limits of Presidency towns, etc.

382. It is not absolutely necessary that the grant of responsible Government to a colony or dependency should be accompanied by the grant of constituent powers on its legislature. Canada is a noteworthy instance of a full-fledged self-governing Dominion whose Constitution could, except in respect of certain minor matters, be amended only by an Act of the British Parliament. The case of India is not, however, analogous to that of Canada. If the Canadian people should wish for a particular alteration, it is hardly likely that the British Parliament would raise any objection. But India is only a dependency; the new Constitution advances India only one step towards responsible Government, and the British Parliament has declared that it must be the sole judge as to the pace of India's constitutional advance. It therefore follows that the frame-work of the new Act and the important parts thereof are amendable only by the Imperial Parliament. It does not, however, follow that every minor change should, invariably, be effected by an amending Act in the Imperial Parliament. In regard to matters such as the composition of the legislatures and the details of the franchise, Colonial Constitutions have conferred constituent powers on colonial legislatures, and it is natural that Indians should wish for similar powers being conferred on the legislatures in India.

Constituent powers.

383. This question was raised at the Third Round Table Conference. The problem was discussed with respect to two matters: (1) The details of the franchise and the composition of the legislatures, Federal and Provincial, (2) the alteration of Provincial boundaries or the formation of new boundaries. But no definite solution was arrived at. His Majesty's Government took careful note of the very difficult issues to which the discussion gave rise. They were disposed, while leaving unimpaired the authority of Parliament to decide any issues which might present themselves, involving change of a substantial character

in the Constitution, to examine with care and sympathy the provision of such machinery as might obviate the disadvantages and inconveniences to be anticipated from the lack of means to secure any alteration of the details of the Constitution as first enacted, otherwise than by the difficult and lengthy process of an amending Bill, and would be concerned to see that any provisions designed with this object were so framed as to enable Indian opinion to be fully ascertained before any alterations were, in fact, carried out.

Provision in the White Paper.

384. The only provision made in the White Paper related to the composition of the Provincial Legislatures. Proposal 74 enabled the Provincial Legislatures, at any time not less than 10 years after the commencement of the Constitution Act, (*a*) where the Legislatures consist of two Chambers, to provide by Act which both Chambers have passed separately and have confirmed by a subsequent Act passed not less than two years later, that it shall consist of one Chamber instead of two Chambers, and (*b*) where the Legislature consists of one Chamber to present an address to His Majesty praying that the Legislature may be constituted with two Chambers, and that the composition of and method of election to the Upper Chamber may be determined by Order in Council.

Nothing was mentioned in the White Paper as to changes in the Franchise. When the matter was put, in the Joint Select Committee, to Sir Samuel Hoare, he stated that the idea was that for a definite period the franchise is to be unchanged, and that thereafter the legislatures should have the power to alter the franchise.

The Joint Select Committee on constituent powers.

385. The Joint Select Committee were, however, of the opinion that it was not yet practicable to grant constituent powers to Indian Legislatures. They observed as follows :—

" We are satisfied that, though there are various matters in the Constitution Act which after an interval of time, might in principle be left quite appropriately to modification by the Central or Provincial Legislatures, as the case may be, as subsequent experience may show to be desirable, it is not practical politics here and now to attempt to confer such powers upon them. It would be necessary, not merely to decide what matters could thus be dealt with, but also to devise arrangements to ensure that the various interests affected by any proposed modification were given full opportunity to express their views, and that changes which they regarded as prejudicial to themselves could not be forced upon them by an inconsiderate majority. With a Constitution necessarily so framed as to preserve so far as may be a nice balance between

the conflicting interests of Federation, States and Provinces, of minority and majority, and indeed, of minority and minority, and with so much that is unpredictable in the effects of the inter-play of these forces, it is plain that it would be a matter of extreme difficulty to devise arrangements likely to be acceptable to all those who might be affected; and it would probably be found that the balance could only be preserved, and existing statutory rights only guaranteed by a number of restrictions and conditions upon the exercise of the constituent powers which would make them in practice unworkable. But, whether or not this can reasonably be regarded as a defect in the Constitution Act, we do not think that the question is one of immediate importance, since we should have felt bound in any event to recommend that the main provisions of the Act should remain unaltered for an appreciable period, in order to ensure that the Constitution is not subjected at the outset to the disturbances which might follow upon hasty attempts to modify its details." (Para. 375.)

Indian Legislatures to be associated with future modifications.

386. The Indian Legislatures, however, are not to be completely dissociated from any future modifications with regard to the size or composition of the Legislature. The Joint Select Committee observe as follows:—

"We have given reasons for our conviction that a specific grant of constituent powers to authorities in India is not at the moment a practicable proposition. We think, however, that a plan whereby the new Legislatures can be associated with the modification hereafter of the provisions of the Act, or of any Order in Council, relating to the composition and the size of the Legislatures or the qualifications of electors, is very desirable. It is, of course, competent for any Legislature in India to pass a Resolution advocating a constitutional change, with a request that its Resolution should be forwarded to His Majesty's Government for consideration, and for this no provision in the Constitution Act would be required. But in our view it ought hereafter to be possible, under specified conditions, for a responsible Government in India, with the approval of its Legislature, to be assured that any such Resolution is actually taken into consideration by His Majesty's Government and their decision upon it formally recorded. We recommend, therefore, that, where an Indian Legislature has passed a Resolution of this kind, and has presented an Address to the Governor-General or Governor, as the case may be, praying that His Majesty may be pleased to communicate it to Parliament, the Resolution shall be laid before both Houses of Parliament not later than six months after its receipt, with a statement of the action which His Majesty's Government propose to take upon it." (Para. 380.)

Constitutional Resolutions.

387. Following the above recommendations, the Act makes provision for resolutions being passed in the Indian Legislatures on the following matters, and the following matters only :—

(1) An amendment of the provisions relating to the size, or composition of the Chambers of the Federal Legislature, and the method of choosing members of that Legislature, without altering the proportion of seats as between the two Chambers and the proportion of seats allotted in each Chamber to British India, and the Indian States.

(2) An amendment of the provisions relating to the number of Chambers in a Provincial Legislature, or of their size or composition.

(3) An amendment providing literacy qualification for women, or dispensing with the requirement that women electors should apply for enrolment on the electoral register.

(4) Any other amendment of the franchise.

In respect of items 1, 2 & 4, the Resolution could be passed only after the expiry of 10 years from the inauguration of the Federation, or of the autonomous Provinces, as the case may be. With regard to item 3, the Resolution may be passed at any time.

It is also laid down in the Act, following the recommendations of the Joint Select Committee, that, as a guide to His Majesty's Government and Parliament in this matter, the Governor-General or Governor, as the case may be, should, in forwarding a Resolution, state his own views on the question of its effect upon the interests of any minority or minorities; and that the Resolution should have been proposed on the motion and on the responsibility of the Federal or Provincial Ministers, as the case may be.

These amendments would be carried out by Orders in Council. Even where no such resolution has been passed, and even before the expiry of the period of 10 years aforesaid, any such amendment may be made by Order in Council, provided that the views of the Governments and the Legislatures which would be affected by the proposed amendment has been taken.

Constitutional revision and the Indian States.

388. With regard to India there is one further difficulty. The Indian States are acceding to the Federation on the basis of the Government of India Act, 1935. A Federation is a compact or treaty entered into between sovereign or antonomous units, and the State units are entitled to say that the treaty shall not be altered except with their consent. The second schedule to the Act says that the amendments of

specified portions of the Act shall not affect the validity of the Instruments of Accession of the States. The constitutional power of the British Parliament is, of course, unlimited. Supposing a case is made out for amendment of certain portions of the Act specified in the second schedule, various questions arise for consideration. Can the British Government plead that such an amendment would affect the validity of the Instrument of Accession of the States, and therefore unless the States agree, the amendments could not be made. Secondly, assuming that these amendments are made by the British Parliament, and the States do not agree to these modifications, have they got the right to secede from the Federation. If not, are they to continue in the Federation under the original Act, the British Indian Provinces being governed by the amended provisions. Again some States may accept these amendments while others may not. These questions were brushed aside by Sir Samuel Hoare, in the Committee stage, as 'very remote'. It is not clear why this contingency should be regarded as 'very remote', unless the Secretary of State had in mind one of two things : either that no Prince would stand in the way of any amendment that Parliament was resolved to carry out, or that Parliament would carry out only those amendments which all Federated States agree to.

389. Part II of the 1st Schedule to the Act deals with the provisions relating to the representation of the Indian States in the Federal Legislature. It is laid down in the Act that no Order in Council can be made amending these provisions without the consent of the Ruler of the State affected by the amendment.

Orders in Council to be approved by Parliament.

390. All Orders in Council, made under the Act, including an Order in Council proposing any such amendments above referred to, shall be laid in draft before Parliament, and shall be issued only on an address to that effect presented to His Majesty by both Houses of Parliament. Where Parliament is dissolved or prorogued, or adjourned for more than fourteen days, emergent Orders in Council may be passed to be in force for 28 days after the commencement of the sitting of the House of Commons, unless meanwhile both Houses pass resolutions approving the making of the said Order.

The idea underlying this special procedure is to ensure that Parliament should have a voice in the determination of all matters relating to the Indian Constitution. Ordinarily, all Orders in Council are made upon the advice of Ministers without the intervention of Parliament.

Matters to be prescribed by Orders in Council.

391. We may, in this connection, state categorically the matters which it is proposed to prescribe by Order in Council. They are as follows :—

(*a*) The payments (other than salary proper, which is fixed by the Act itself) to be made to the Governor-General and Governors on their own account and that of their personal staffs ;

(*b*) the salaries and conditions of service of the Governor-General's Counsellors ;

(*c*) the salaries, pensions, leave and other allowances of the Judges of the Federal Court and of the High Courts ;

(*d*) the salary and conditions of service of the Commander-in-Chief, the Auditor-General in India, and of any Provincial Auditor-General;

(*e*) the percentage of income-tax which is to be assigned to the Provinces and the basis on which that assignment is to be made ;

(*f*) the sum to be retained at the outset by the Federation out of the proceeds of taxes on income which would otherwise be assigned to the Provinces ;

(*g*) the basis on which the States are to contribute to federal revenues during the operation of federal surcharge on income-tax ;

(*h*) the assignment to producing units of the export duty on jute and jute products, in excess of one half ;

(*i*) the subventions to be made from federal revenues to certain deficit Provinces ;

(*j*) the qualifications of electors to the Provincial and Federal Legislatures ; the delimitation of constituencies ; the method of election of representatives of communal and other interests ; the filling of casual vacancies and other ancillary matters ;

(*k*) the specification of the areas to be treated as Excluded and Partially Excluded, respectively ;

(*l*) alteration of boundaries of Provinces, and creation of new Provinces ;

(*m*) separation of Aden from India ;

(*n*) making provisions with regard to the exercise by the Auditor of Indian Home Accounts, functions on behalf of Burma ;

(*o*) adapting existing Indian law to the new Constitution until fresh laws are passed ;

(*p*) bringing into operation different portions of the Act, and ordering the holding of elections to Legislatures in advance of dates fixed for the commencement of the Act ;

(*q*) adjustment of relations between India and Burma on certain matters ;

(*r*) certain other minor matters.