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Author(s): Courtenay Ilbert

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THE INDIAN COUNCILS ACT, 1909.¹

[*Contributed by* SIR COURTENAY ILBERT, K.C.B., K.C.S.I.]

THE Indian Councils Act, 1909 (9 Ed. VII. c. 4), the passage of which will always be associated with the name of Lord Morley of Blackburn, made important changes in the constitution and functions of the Indian legislative councils, and gave power to make changes in the executive governments of the Indian provinces.

The introduction of the measure was preceded by discussions and correspondence, which began in Lord Morley's first year of office as Secretary of State for India, and extended over a period of nearly three years.

In 1906 the Viceroy, Lord Minto, drew up a minute in which he reviewed the political situation in India, and pointed out how the growth of education, encouraged by British rule, had led to the rise of important classes claiming equality of citizenship, and aspiring to take a larger part in shaping the policy of the government. He then appointed a committee of his council to consider the group of questions arising out of these novel conditions. From the discussion thus commenced was developed a tentative project of reform, which was outlined in a Home Department letter to local governments dated August 24, 1907. This letter, after having received approval by the Secretary of State in Council, was laid before Parliament, and was published in England and India.² The local governments to whom it was addressed were instructed to consult important bodies and individuals representative of various classes of the community before submitting their own conclusions to the Government of India. The replies were received in due course, and are to be found in the "colossal blue-books" appended to a letter from the Government of India, dated October 1, 1908, in which the situation is again reviewed, and revised proposals are formulated. The views of the Secretary of State on these proposals are expressed in a dispatch dated November 27, 1908,³ and were expounded by Lord Morley in a speech delivered in the House of Lords on December 17, 1908.

¹ This article is taken from a supplementary chapter to the second edition of the author's *Government of India*. The chapter, which contains corrections and additions, bringing the book up to date, was published by the Clarendon Press in 1910, and may be obtained either separately or bound up with the volume to which it is appended.

² East India (Advisory and Legislative Councils, etc.), 1907, Cd. 3710.

³ The letter of October 1, 1908, and the dispatch of November 27, 1908, are to be found in vol. i. of the blue-book entitled East India (Advisory and Legislative Councils, etc.), 1908, Cd. 4425. The replies from the local governments are embodied in separate volumes.

Reference was made to the subject in the King's Speech which ushered in the session of 1909, and in the debates on the address in reply. The Bill embodying the proposals of the Government, so far as they required Parliamentary authority, was presented by Lord Morley on February 17, 1909, and was read a second time, after a debate of two days, on February 24. It passed through committee on March 4, and was considered on report, read a third time, and passed by the House of Lords on March 9. In the House of Commons the Bill was read a second time on April 1, was considered in committee on April 19, and on April 26 was considered on report, read a third time, and passed with amendments. The Commons' amendments were considered on May 4 and agreed to with an important modification which was accepted by the Commons. The Act thus passed received the Royal Assent on May 25, 1909.

The only important change in the Bill during its passage through Parliament related to the creation of executive councils for provinces under lieutenant-governors. Clause 3 of the Bill as introduced enabled the Governor-General in Council, with the approval of the Secretary of State in Council, by proclamation, to create an executive council for any such province. This clause was struck out by the House of Lords, restored by the House of Commons, and eventually agreed to in the modified form in which it now stands as s. 3 of the Act.

In the course of the debates on the Bill much was said about Lord Morley's announcement of his intention to appoint a native of India to a post on the Governor-General's council. This subject was not strictly relevant to the Bill, because, as was explained, the power of making these appointments is free from any restriction as to race, creed, or place of birth. Effect was given to Lord Morley's intention by the appointment of Mr. Sinha, in March 1909, to the post of law member of the Governor-General's council. This appointment carried a step further the policy adopted in 1907, when two natives of India were placed on the Secretary of State's council. In pursuance of the same policy a native of India has been placed on the executive councils for Madras and Bombay respectively, and is to be placed on the new executive council for Bengal.

Under s. 1 of the Act the "additional" members of the Indian legislative councils, *i.e.* those other than the members of the executive councils, must, instead of being all nominated, include elected members.

By s. 2 power is given to raise the number of members of the executive councils for Madras and Bombay to a maximum of four, of whom two at least must be persons who at the time of their appointment have been in the service of the Crown in India for at least twelve years.

Under s. 3 there is power to constitute an executive council for any province having a lieutenant-governor. But, except in the case of Bengal, the draft of any proclamation proposed to be made in pursuance of this power must be laid before each House of Parliament, and the proclamation may be

disallowed in pursuance of an address from either House. The number of the executive council must not exceed four.¹

S. 4 requires the appointment of vice-presidents of the several councils.

By s. 5 the Governor-General in Council, the governors in council of Madras and Bombay, and the lieutenant-governors or lieutenant-governors in council of other provinces are required to make rules authorising at any meeting of their respective legislative councils the discussion of the annual financial statement, and of any matter of general interest, and the asking of questions.

Under ss. 1 and 6 there is extensive power to make regulations for carrying the Act into effect.

And under s. 7 certain proclamations, regulations, and rules are required to be laid before Parliament when made.

It will be seen that the provisions of the Act of 1909 are, as is usual in Acts relating to India, couched in wide and general terms, leaving all details, and some important matters of principle, to be determined by regulations and rules made by the authorities in India.

The regulations and rules required to give effect in the first instance to the Act of 1909 are to be found in a blue-book which was laid before Parliament in pursuance of s. 7 of the Act.²

The blue-book begins with a notification fixing November 15, 1909, as the date at which the provisions of the Act were to come into operation.

Then follow, under the headings Nos. II. to IX., regulations and rules for the nomination and election of the members of the several legislative councils of India, other than those who are such members by virtue of being members of the executive councils. The regulations are, in the case of each council, of a general character, and relate to such matters as number, qualifications, term of office, and mode of filling vacancies. The rules, which are scheduled to the regulations, are more detailed, and prescribe the mode in which the several elections are to be made.

In No. X. are to be found important rules regulating the business of the Governor-General's legislative council, and relating to (1) the discussion of the annual financial statement, (2) the discussion of matters of general public interest, and (3) the asking of questions.

No. XI. is a Home Department resolution of the Government of India, dated November 15, 1909, which describes in general terms the nature of the changes made by the Act of 1909, and the regulations under it, and has appended to it a table showing the constitutions of the several legislative councils.

The changes made in the legislative councils by the Act of 1909, and the regulations and rules under it, may be considered under the heads of (a) Constitution and (b) Functions.

¹ An executive council of three members is being constituted for Bengal.

² East India (Executive and Legislative Councils) Regulations, etc., for giving effect to the Indian Councils Act, 1909 (1910, Cd. 4987).

A.—CONSTITUTION.

The constitution of the councils is changed in three respects :

1. Numbers ;
2. Proportion of official and non-official members ;
3. Methods of appointment or election.

I. NUMBERS.

The Indian Councils Act, 1892, increased the size of the legislative councils constituted under the Act of 1861. The maximum of additional members was raised from 12 to 16 in the Governor-General's council, and from 8 to 20 in the Madras and Bombay councils. The limit of number of the Bengal council was raised to 20, that of the United (then North-Western) Provinces to 15. The Punjab and Burma obtained legislative councils in 1897, and Eastern Bengal and Assam in 1905, the maximum strength being fixed at 15 in the first two, and 20 in the third.

These numbers are now doubled or more than doubled. The additional members of the Governor-General's council are to be not more than 60, the additional members of the councils of Madras and Bombay, and the members of the councils of Bengal, the United Provinces, and Eastern Bengal and Assam, are to be not more than 50. In Punjab and Burma the maximum is raised to 30. In computing the number of members of the Governor-General's council, 8 must be added to the "additional" members, namely, the 6 ordinary members of the executive council, the commander-in-chief, and the lieutenant-governor of the province in which the council sits. Similarly there are now on the Madras and Bombay legislative councils 4 *ex-officio* members, namely, in each case, the 3 members of the executive council and the advocate-general; and on the Bengal legislative council there will be the 3 ordinary members of the new executive council.

Thus the actual strength of the legislative councils under the new law is as follows :¹

Legislative Council of—	Number under Regulations of 1909.	Maximum number under Act of 1909.
India	68	68
Madras	48	54
Bombay	48	54
Bengal	53	53
United Provinces	48	50
Eastern Bengal and Assam	42	50
Punjab	26	30
Burma	17	30

¹ Excluding in each case the head of the Government, *i.e.* the Governor-General, Governor, or Lieutenant-Governor.

2. PROPORTION OF OFFICIAL AND NON-OFFICIAL MEMBERS.

Under the Act of 1861 at least one-half of the additional members of the legislative councils of the Governor-General's council and the councils of Madras and Bombay, and at least one-third of the members of the other legislative councils, must be non-official. An official majority was not required by statute, but in practice was always maintained before the Act of 1909, except in Bombay, where the official members had been for some years in a minority.

Under the regulations of 1909 there must be an official majority in the Governor-General's legislative council, and a non-official majority in all the other legislative councils. The existing proportions, as fixed by the regulations, are as follows :

Legislative Council of—	Officials.	Non-Officials.	Majority.
India	36	32	Official. 4 Non-official. 6
Madras	20	26	10
Bombay	18	28	11
Bengal	20	31	6
United Provinces	20	26	6
Eastern Bengal and Assam	17	23	4
Punjab	10	14	3
Burma	6	9	

These figures exclude in each case the head of the government, *i.e.* the Governor-General, Governor, or Lieutenant-Governor. They also leave out of account the two "expert" members who may be appointed from time to time as occasion requires, and who may be either official or non-official.¹ Any alteration in the number of the executive council would affect the proportions.

It will be observed that these proportions are fixed by the regulations, not by statute. They were so picked in pursuance of the policy announced by the Secretary of State, who was of opinion that while it was necessary to maintain an official majority in the Governor-General's council, this was not necessary or desirable in the case of the other councils. Refusal by the provincial councils to pass necessary legislation may be met by exercise of the power vested in the Governor-General's council to legislate for any part of India. Undesirable legislation may be checked by the power of veto reserved to the head of the Government.

¹ There is no provision for the appointment of experts, as such, on the Governor-General's legislative council, but experts could be placed on the council, when occasion requires, under his powers of nominating members.

3. METHODS OF APPOINTMENT OR ELECTION.

Under the Act of 1861 the "additional" members of the legislative councils were nominated by the Governor-General, Governor, or Lieutenant-Governor, the only restriction on his discretion being the requirement to maintain a due proportion of unofficial members.

By the Act of 1892 the nominations were required to be in accordance with regulations made by the Governor-General in Council and approved by the Secretary of State. Under the regulations so made a certain number of these nominations had to be made on the recommendation of specified persons, bodies, and associations, the intention being to give a representative character to the persons so nominated. There was no obligation to accept the recommendation, but in practice it was never refused. In the case of other nominations regard was to be had to the due and fair representation of the different classes of the community.¹ Under the Act of 1909 the additional members must include not only nominated members, but also members elected in accordance with regulations made under the Act, and the regulations of November 1909 give effect to this requirement.

There is a separate set of regulations for every legislative council, and scheduled to each set are detailed rules as to the method of election.

The provisions of the regulations themselves are of a more general character, and those framed for the Governor-General's council may be treated as typical.

They begin by fixing the number of "additional" members, classifying them as elected or nominated, describing in general terms the classes or bodies by whom the elected members are to be elected, and defining by reference to the schedules the constitution of the electorate and the method of election.

The substitution of a system of election for a system of nomination obviously involves the imposition of certain disqualifications for election. These qualifications are laid down for the Governor-General's council by Regulation IV., which provides that—

No person shall be eligible for election as a member of the Council if such person

- (a) is not a British subject ; or
- (b) is a female ; or
- (c) has been adjudged by a competent civil Court to be of unsound mind ; or
- (d) is under twenty-five years of age ; or
- (e) is an uncertificated bankrupt or an undischarged insolvent ; or
- (f) has been dismissed from the Government service ; or

¹ See *Government of India*, pp. 115, 116, 119.

- (g) has been sentenced by a criminal Court to imprisonment for an offence punishable with imprisonment for a term exceeding six months, or to transportation, or has been ordered to find security for good behaviour under the Code of Criminal Procedure, such sentence or order not having subsequently been reversed, or remitted, or the offender pardoned ; or
- (h) has been debarred from practising as a legal practitioner by order of any competent authority ; or
- (i) has been declared by the Governor-General in Council to be of such reputation and antecedents that his election would, in the opinion of the Governor-General in Council, be contrary to the public interest.

But in cases (f) (g) (h) and (i), the disqualification may be removed by an order of the Governor-General in Council in that behalf.

Identical provisions are embodied in all the other sets of regulations, except that the powers exercisable by the Governor-General in Council may be exercised by the Governor in Council or Lieutenant-Governor.

The positive qualifications both of electors and of candidates are fixed by the scheduled rules, but by the regulations females, minors, and persons adjudged to be of unsound mind are disqualified from voting.

Every person elected or nominated must, before taking his seat, make an oath or affirmation of his allegiance to the Crown.

The ordinary term of office of an "additional" member, whether nominated or elected, is three years. But official members and members nominated as being persons who have expert knowledge of subjects connected with proposed or pending legislation are to hold office for three years or such shorter period as the Governor-General may at the time of nomination determine. A member elected or nominated to fill a casual vacancy sits only for the unexpired portion of his predecessor's term. The effect of these provisions, which are repeated in substance in all the sets of regulations, is that for elected members of the legislative councils there must be a general election every three years.

The regulations provide for declaring seats vacant, for choice or determination of seat in case of a candidate elected by more than one electorate, and for the case of failure to elect.

An election is declared to be invalid if any corrupt practice is committed in connection therewith by the candidate elected, and provision is made for the determination of disputes as to the validity of elections.

The elaborate rules scheduled to the regulations under the Act of 1909 show the number and diversity of the electorates to the legislative councils, and the variety of methods adopted for constituting the electorates, and for regulating their procedure in elections. The object aimed at was to obtain, so far as possible, a fair representation of the different classes and interests in the country, and the regulations and rules were framed for this

purpose in accordance with local advice, and with reference to the local conditions of each province. The consequent variety of the rules makes it impossible to generalise their provisions or to summarise their contents. All of them may be regarded as experimental, some of them are avowedly temporary and provisional. For instance, it has not yet been found practicable to constitute satisfactory electorates (1) for the representatives of Indian commerce, except in the Bombay council, (2) for the representatives of the Punjab landholders and Muhammadans on the Governor-General's council, or (3) for the representative of the planting community on the Bengal council. Under the existing regulations each of these interests is represented by nominated members, but election is to be substituted for nomination as soon as a workable electorate can be formed.

The most difficult of the problems to be faced was the representation of Muhammadans, who claimed to be represented as a separate class or community. This problem has been attacked in various ways. One method adopted is a system of rotation. The representative of the Bombay landholders on the Governor-General's council was elected at the first, and is to be elected at the third and subsequent alternate elections, by the landholders of Sind, a great majority of whom are Muhammadans, while at other elections he is to be elected by the Sardars of Gujerat or the Sardars of the Deccan, a majority of whom are Hindus. In the Punjab the numbers of the Muhammadan and non-Muhammadan landholders are about equal and the representative of this constituency is expected to be alternately a Muhammadan and a non-Muhammadan. When these two seats, the Bombay seat and the Punjab seat, are held by non-Muhammadans, there are to be two members elected by special electorates consisting of Muhammadan landholders in the United Provinces and in Eastern Bengal and Assam respectively.

In some provinces there are special interests, such as the tea and jute industries in Eastern Bengal and Assam, and the planting communities in Madras and Bengal, for whom special provision has been made.

The representation of smaller classes and minor interests will have to be met by nomination, in accordance with the needs of the time and the importance of different claims.

Where the electorates are scattered, as in the case of the landholders and the Muhammadans, provision is made for the preparation and publication of electoral rolls containing the names of all persons qualified to vote.

The qualifications prescribed for electors in the case of landholders and Muhammadans vary greatly from province to province. Landholders must usually possess a substantial property qualification. In some cases titles and honorary distinctions, fellowships of Universities, and pensions for public service are recognised as qualifications.

The qualifications for candidates are, as a rule, the same as those for electors, but in some cases, where such restrictions would be inappropriate,

other qualifications are prescribed. Thus a person elected to the Governor-General's council by the unofficial members of a provincial council is required to have a place of residence within the province, and such practical connection with the province as qualifies him to represent it. The election is either direct, or indirect through elected delegates. In some cases the electors or delegates vote at a single centre before a returning officer, in others they vote at different places before an attesting officer, who dispatches the voting paper to the returning officer.

In Bengal each delegate has a varying number of votes, the number depending in the case of district boards and municipalities on the income of these bodies, and in the case of the Muhammadan community on the strength and importance of the Muhammadan population of a district or group of districts. Elsewhere the same object has been obtained by varying the number of delegates on like grounds, each delegate then having one vote.

The member of the Governor-General's council chosen to represent the Muhammadan community of Bombay is elected by the Muhammadan members of the Bombay council. The Government of India were assured that this method would secure better representation than election by delegates *ad hoc*.

The procedure for voting is generally similar to that prescribed by the English Ballot Act. But in some cases, such as the elections by the corporations of the presidency towns, the chambers of commerce and the trade associations, the voting is regulated by the procedure usually adopted by these bodies for the transaction of their ordinary business.

B.—FUNCTIONS.

The functions of the legislative councils fall into three divisions, (a) legislative, (b) deliberative, and (c) interrogatory.

(a) LEGISLATIVE.

The Act of 1909, and the regulations under it, make no alteration in the legislative functions and powers of the provincial councils. These are still mainly regulated by the Act of 1861.¹

(b) DELIBERATIVE.

Between 1861 and 1892 the powers of the legislative councils were confined strictly to legislation.² The Act of 1892 introduced non-legislative functions by empowering the head of the government in every case to make rules authorising the discussion of the annual financial statement, provided that no member might propose a motion or divide the council. Under this

¹ See Digest, ss. 63-7, 76-8.

² See Digest, ss. 64, 77.

power one or two days were allotted annually in every council to the discussion of a budget already settled by the executive government.

The Act of 1909 repealed the provisions of the Act of 1892 on this point and required rules to be made authorising at any meeting of the legislative councils the discussion of the annual financial statement and of any matter of general public interest.¹

The rules made under this direction introduce two important changes :

(i) The discussion of the budget is to extend over several days, it takes place before the budget is finally settled, and members have the right to propose resolutions and to divide the council upon them :

(ii) At meetings of the legislative councils matters of general public importance may be discussed, and divisions may be taken on resolutions proposed by members.

In each case the resolutions are to take the form of recommendations to the government, and the government is not bound to act upon them.

The rules framed for the Governor-General's council are printed in the blue-book of 1910,² and are of much interest and importance.³ It may be useful to summarise here some of their leading provisions.

Financial Statement or Budget.—The rules distinguish between the financial statement and the budget. The first means the preliminary financial estimates of the Governor-General in Council for the financial year next following. The second means the financial statement as finally settled by the Governor-General in Council. On a day appointed in each year by the Governor-General, the financial statement, with an explanatory memorandum, is to be presented to the council by the finance member, and a printed copy is to be supplied to each member. No discussion takes place on this day.

The first stage of discussion takes place on a subsequent day after the finance member has made any explanations he thinks necessary. On this day any member may move any resolution entered in his name in the list of business relating to any alteration in taxation, new loan, or additional grant to local governments proposed or mentioned in the financial statement or explanatory memorandum, and a discussion takes place on any resolution so moved.

The second stage of discussion begins after these resolutions have been disposed of. The member of council in charge of a department explains the head or heads of the financial statement relating to his department, and resolutions may then be moved and discussed.

The range of discussion is subject to important restrictions. There is a schedule to the rules defining which heads of the financial statement are open to or are excluded from discussion. Among the excluded heads are military,

¹ 8 Edw. VII. c. 4, s. 5.

² 1910, Cd. 4987.

³ The rules for the other councils are not included in the blue-book, but are framed on similar lines.

political, and purely provincial affairs, under the heading "revenue," stamps, customs, assessed taxes, and courts, and, under the heading "expenditure," assignments and compensations, interest on debt, ecclesiastical expenditure, and state railways. Besides these the rules themselves exclude from discussion any of the following subjects :

- (a) Any subject removed from the discussion of the Governor-General's legislative council by s. 22 of the Indian Act, 1861 ;¹
- (b) Any matter affecting the relations of His Majesty's Government or of the Governor-General in Council with any foreign State or any native State in India ; or
- (c) Any matter under adjudication by a court of law having jurisdiction in any part of His Majesty's dominions.

Any resolution moved must comply with the following conditions :

- (a) It must be in the form of a specific recommendation addressed to the Governor-General in Council ;
- (b) It must be clearly and precisely expressed and must raise a definite issue ;
- (c) It must not contain arguments, inferences, ironical expressions, or defamatory statements, nor refer to the conduct or character of persons except in their official or public capacity ;
- (d) It must not challenge the accuracy of the financial statement ;
- (e) It must be directly relevant to some entry in the financial statement.

Two clear days' notice of any resolution must be given. The president may disallow any resolution or part of a resolution without giving any reason other than that in his opinion it cannot be moved, or that it should be moved in a provincial council, and his decision cannot be challenged.

The budget as finally settled must be presented to the council on or before March 24 by the finance member, who then describes any changes made in the figures of the financial statement, and explains why any resolutions passed by the council have not been accepted. No discussion takes place on this day, but on a subsequent day there is to be a general discussion at which observations may be made, but resolutions may not be moved. Nor is the budget as a whole to be submitted to the vote of the council.

Many of the rules for regulating procedure in debate are of a kind with which members of the House of Commons are familiar, but some of them present distinctive features. No speech may exceed fifteen minutes, except those of the mover and the member in charge, who may speak for thirty minutes. Any member may send his speech in print to the secretary not less than two clear days before the day fixed for the discussion of a resolu-

¹ *I.e.* matters which the Governor-General in Council has not power to repeal or affect by any law. See Digest, s. 63.

tion, with as many copies as there are members, and one copy is to be supplied to every member. Any such speech may at the discretion of the president be taken as read.

Matters of General Public Interest.—Discussions on these matters must be raised by resolution, and must take place after all the other business of the day has been concluded. The general rules regulating the form of the resolutions, and the discussions upon them, are, in the main, the same as those for the discussion of resolutions on the financial statement, the chief difference being that the range of discussions is wider and that amendments are allowed. The only subjects specifically excluded from discussion are those belonging to the three classes mentioned above in connection with the financial statement, namely, matters for which the councils cannot legislate, matters relating to foreign and native States, and matters under adjudication by a court of law. But the president has the same discretionary power of disallowing resolutions as he has in the case of resolutions on the financial statement.

The right to move amendments on resolutions is made subject to restrictions which are intended to provide safeguards against abuse of the right. Fifteen days' notice of a resolution is required, and priority depends on the time of receipt. When a question has been discussed, or a resolution has been disallowed or withdrawn, no resolution or amendment raising substantially the same question may be moved within one year.

(c) INTERROGATORY.

Since 1892 members of the legislative councils have had the right to ask questions under conditions and restrictions prescribed by rules. This right is now enlarged by allowing a member to put a supplementary question "for the purpose of further elucidating any matter of fact regarding which a request for information has been made in his original question." But the president may disallow a supplementary question, and the member to whom it is addressed may decline to answer it without notice. The rules which now govern the asking of questions in the Governor-General's council are printed in the blue-book of 1910.

The quorum for the transaction of business, legislative or other, at meetings of the Governor-General's legislative council is fixed by one of the regulations of November 15, 1909, for the constitution of that council. Regulation XIII. provides that, in addition to the Governor-General, President, Vice-President, or other member appointed to preside, there must be present fifteen or more members of the council, of whom eight at least must be additional members. There are similar provisions in the regulations for the other councils.