

CITIZENSHIP IN THE COMMONWEALTH OF NATIONS

[This is the text of a paper read by Sri B. N. Rau at the second International Conference of the Legal Profession held at The Hague in August 1948.]

THE British Nationality Act is a significant piece of legislation which deserves careful study, not only because of its actual provisions but also of its potentialities.

The scheme of the Act can be described in a few words. Its main principle is that the people of each of the self-governing countries within the British Commonwealth have both a particular status as citizens of their own country and a common status as British subjects. Accordingly, the key clause of the Act provides that every person who under the Act is a citizen of the United Kingdom and colonies, or who under the law of any of the other component units of the Commonwealth, namely, Canada, Australia, New Zealand, South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon, is a citizen of that unit shall, by virtue of that citizenship, be a British subject. An alternative description of "British subjects" as "citizens of the Commonwealth" was suggested by India and has apparently been agreed to by the other units, and this phrase will, therefore, be used as a synonym of British subjects in this paper. Logically there is much to be said in its favour.

It will be remembered, for instance, that every citizen of a Swiss canton is a citizen of Switzerland; it is, therefore, not

inappropriate that every citizen of a component unit of the British Commonwealth should be called a citizen of the Commonwealth. But the converse proposition, which is true of Switzerland and some other federations, is not yet true of the Commonwealth. Thus, a citizen of Switzerland has all the rights of a citizen of the canton where he settles; so, too, a person born in, and subject to the jurisdiction of, the United States is a citizen of the United States and also of the State where he resides; but a citizen of the Commonwealth has not necessarily all the rights of a citizen of the country where he settles or resides. From a purely legal point of view this is intelligible, because the Commonwealth is not a federation but a group of independent units, each entitled to make its own citizenship law. Nevertheless, it is to be hoped that the Commonwealth will in this respect strive for the federal ideal of having a common citizenship with no arbitrary discrimination between the citizens of one unit and those of another.

Eire (or Ireland) is in a peculiar position under the Act. It will have been noticed that it is not mentioned among the component units of the Commonwealth like Canada, Australia and the rest. Irish leaders have in the past claimed that Eire is an independent country in external association with the States of the British Commonwealth. The Act appears to give effect to this view: accordingly, under the Act, the citizens of Eire are not automatically British subjects or citizens of the Commonwealth; but the Act provides that they are to be treated as such until a further alteration is made in the law in force in the particular country of the Commonwealth concerned.

Besides citizens of the Commonwealth units, who are automatically citizens of the Commonwealth, and citizens of Eire, who though not citizens of the Commonwealth are to be treated as such for the time being, the Act deals with another class of persons called "British protected persons". A clause of the Act first defines protectorates and protected States:

"His Majesty may, in relation to the States and territories under his protection through his government in the United Kingdom, by Order-in-Council declare which of those States and territories are protectorates and which of them are protected States for the purposes of this Act". Then follows the definition of a "British protected person" as meaning "a person who is a member of a class of persons declared by Order-in-Council made in relation to any protectorate, protected State, mandated territory or trust territory to be British protected persons by virtue of their connection with that protectorate, State or territory".

A person who is not a British subject nor a citizen of Eire nor a British protected person is under the Act an alien.

The Act contains no definition of "British subject" except to the effect that every citizen of a unit of the Commonwealth is by virtue of that citizenship a British subject. It follows that until each of these units has a citizenship law, the persons who are at present British subjects in that unit will cease to be such upon the Act coming into force on January 1, 1949, unless special provision is made for them. The Act accordingly contains a transitional provision that during the interval they will remain British subjects without citizenship.

Such, in brief, are the provisions of the Act so far as they are material for our present purpose. Two questions arise out of the Act, one of particular importance to India and the other of general interest.

The first relates to the nationality or status of the subjects of what are known as the Indian States. What will be their position during the interval between the coming into force of this Act and the enactment of a citizenship law for India? Prior to August 15, 1947, they were under the suzerainty of His Majesty, though not forming part of His Majesty's Dominions. They had no capacity for separate foreign relations and were, therefore, not States for the purposes of international law.

On August 15, 1947, as the result of the Indian Independence Act passed by the Parliament of the United Kingdom, His Majesty's suzerainty lapsed; but certain other events have also happened. A Dominion of India comprising certain territories under the sovereignty of His Majesty has been established by the same Act and most of the Indian States, though freed by the statute from the suzerainty of the Crown, have through their Rulers executed instruments of accession, ceding to the Dominion various powers, including all powers in respect of external affairs. They have thus parted with all capacity for foreign relations in favour of the Dominion, but it cannot be said that they have parted with all their sovereignty in favour of the Crown.

In the light of these facts, let us take, for definiteness, a person born in one of these States before August 15, 1947, and consider his position with reference to the definition of "British subject" contained in the British Nationality and Status of Aliens Act, 1914. The expression "British subject" in that Act means a person who is a natural-born British subject or a person to whom a certificate of naturalisation has been granted or a person who has become a subject of His Majesty by reason of any annexation of territory. A natural-born British subject, so far as is relevant for our purposes, is defined in the same Act as any person born within His Majesty's Dominions and allegiance.

It is clear that in the case put, the person concerned was not born in territory which at the date of birth was within His Majesty's Dominions (although it was within His Majesty's allegiance). It follows, therefore, that he was not a natural-born British subject. Has he become a subject of His Majesty by reason of any annexation of territory? The instruments of accession executed by the Indian States effect, at most, a partial transfer of sovereignty in respect of certain subjects and not a complete transfer such as is implied in annexation. It is, therefore, clear that the person in question

is not a British subject within the meaning of the British Nationality and Status of Aliens Act and this conclusion is fortified by the provisions of section 262 of the adapted Government of India Act of 1935, which embodies India's present constitution. This section provides that the Ruler or a subject of an acceding State shall be eligible to hold any civil office under the Crown in India in connection with the affairs of the Dominion, etc., and goes on to say that, subject as aforesaid and to any other express provisions of the Act, no person who is not a British subject shall be eligible to hold any office under the Crown in India. The clear implication is that the subject of an acceding State is not a British subject.

It would also seem that after August 15, 1947, he can no longer be described even as a "British protected person" as defined in the British Nationality Act, because with the lapse of the suzerainty of the Crown, Indian States have ceased to be under His Majesty's protection through His Government in the United Kingdom as they were before August 15, 1947. It may be true in a sense that they have again come under His Majesty's protection as the result of their instruments of accession, but this would be protection through the Government of the Dominion of India and not through the Government of the United Kingdom and it is this latter protection that the Act requires for a British protected person. The subject of an acceding Indian State may thus be described as a "Dominion protected person", but not a "British protected person" as defined in the Act. Not being a British subject, nor a British protected person, nor a citizen of Eire, he would perforce be an alien under the provisions of the Act. It is a question for consideration whether a person who may be said to be under His Majesty's protection through the Government of India should be classed as an alien. It is to be noticed that the inhabitants of territories under the "mandate" or "trusteeship" of a Dominion may be British protected persons under the Act.

Of course, once India enacts a citizenship law of her own, most of the inhabitants of the acceding Indian States will probably become citizens of India and, therefore, citizens of the Commonwealth under the terms of the Act; it is during the interval that may elapse between January 1, 1949 (when the Act is due to become effective) and the enactment of a citizenship law for India that the question of the status of these persons arises. The transitional provision mentioned in an earlier paragraph does not apply to them: it applies only to those who are at present British subjects.

So much for the first question. The other matter is of more general interest and arises out of the provisions of the Act relating to Eire. Let us suppose that these provisions were widened so as to apply not only to Eire but to any "associate State of the Commonwealth", this expression being defined to mean not only Eire but also any other State that may be notified in this behalf by Order-in-Council. The result would be that any State in any part of the world, whatever may be the form of its government, could, if it so desired, become an associate State of the Commonwealth. For this purpose all that it would have to do would be to come to an agreement with the countries of the Commonwealth whereby the citizens of the associate State would be treated as citizens of the Commonwealth and reciprocally the citizens of the Commonwealth would be given a corresponding status in the associate State. Thereupon it could be notified as an "associate State". The Commonwealth would thus enter upon a new stage of development: in addition to the units that now compose it—in addition to the "component States", as we may term them, there would be a group of "associate States" linked to the Commonwealth by a form of common citizenship, but completely independent in every other respect.

There would be nothing strange or unnatural in such a development. It has been said that the Commonwealth is a

growing, developing organism, subject like all vital things to change in response to change in circumstances. One of these changes has already been alluded to: since 1937, Eire has described herself in her constitution as a sovereign independent State, while preserving a link with the Commonwealth in external affairs. In other words, Eire has been seeking a looser form of association with the Commonwealth. On the other hand, there has also been in recent times an inclination on the part of certain independent States outside the Commonwealth to draw closer towards it without sacrificing their independence. These opposite but convergent tendencies point to the need for a new relationship, for the recognition of an outer group of States, associated with the Commonwealth, but not bound to it quite so closely as its inner units. In the course of the debate on the Indian Independence Act in the House of Commons in 1947, one of its supporters described the Commonwealth, not entirely in jest, as a club with various grades of members—ordinary members, county members, week-end members and even foreign members. A development of the kind indicated in the last paragraph would thus be in accordance with present-day trends.

It must, however, be remembered that a club—if one may pursue the analogy a little further—cannot grow or flourish merely by liberal rules of admission; to attract or retain members, it must give them something worth while and satisfying, not necessarily in material privileges, but at least in companionship in the pursuit of high ideals. Above all, there must be a sense of genuine equality among the members; for only then can each country be expected to give of its best and to contribute to the peace of this weary old world.

I had the honour of presenting a paper on this subject at a Conference of the International Bar Association at the Hague in August 1948 and as a result the following resolution was adopted:

- “(1) That, in order to promote tolerance and good neighbourliness among the people of different countries, as many of these as possible should secure by mutual agreement and other appropriate means, that the citizens of one country shall, while residing or sojourning in another, have the incidents of citizenship of the latter; and
- “(2) that this Conference would welcome, as an example, any arrangement whereby the incidents of Commonwealth citizenship under the British Nationality Act could become available, on a reciprocal basis and under agreed conditions, to the citizens of countries outside the Commonwealth.”

It may be observed that the wording of the first part of the resolution follows that of the preamble to the Charter of the United Nations, which recites that the peoples of the United Nations have determined “to practise tolerance and live together in peace with one another as good neighbours”. It would obviously be a step towards the accomplishment of this aim if as many countries as possible in the world could agree that they would not treat each other's citizens as foreigners.