

BHUTAN

A DELEGATION from Bhutan visited New Delhi in June 1946, shortly after the Cabinet Mission's statement on 16th May, and expressed their anxiety to learn the effect the impending constitutional developments in India might be expected to have on their country. The Foreign Secretary of the Government of India invited the delegation to prepare a statement of their case and undertook to inform the Bhutan authorities through the Political Officer in Sikkim when the appropriate moment arrived for it to be presented.

The main features of Bhutan's relationship with India may be briefly stated.

In 1924, after thorough consideration, Bhutan had been defined as a State under British suzerainty but not an Indian State; further definition was not attempted and the precise status of the territory was of purpose left undetermined.

It had been argued on behalf of the Political Department at that time that "suzerainty", however, was itself a relationship difficult to define, possessing degrees of strength varying with the circumstances of each instance in which the relationship obtained; and it was conceivable for a State to be both suzerain of another and under the suzerainty of a third without the autonomy of any of them being affected.

Whatever the exact juridical definition of Bhutan's status might have been by treaty, Bhutan had agreed in the past to be guided in her external relations by the British Government, who for their part had expressly undertaken not to interfere in the internal affairs of the territory; and since the

conduct of external relations might in the last resort involve the use of force, the British Government were responsible, by implication, for Bhutan's defence. Bhutan (according to the Political Department's view) was regarded in effect as a protectorate of Britain, but wholly autonomous so far as its internal affairs were concerned.

Bhutan was, therefore, not regarded as an Indian State, but outside India: and the treaties with Bhutan, though executed by the Governor-General-in-Council, were treaties entered into between two foreign States. Consequent on developments in India at the end of the World War II, it was felt that those treaties must either become a dead letter or be revised; and in the latter event, whatever revision there might be, it seemed evident that Britain's future relationship with Bhutan could not, for plain reasons of geography, be other than so tenuous as to have no practical meaning.

That, however, was not immediately in issue. What was in issue at the time was India's constitutional relationship in future with Bhutan and the manner in which it was to be recognised and regulated.

The logical course, it was presumed, would be for India to succeed to the British Government's position *vis-a-vis* Bhutan, a relationship which had worked satisfactorily in the past and might well be expected to work satisfactorily in the future. Such succession, however, would necessarily have had to be by agreement between the new India and Bhutan. At the same time, since Britain's withdrawal from India was the cause of the virtual abrogation of her treaties with Bhutan, it was considered reasonable that the treaty to be negotiated between India and Britain should contain provision for Bhutan's future, in common perhaps with that of any other autonomous or independent territories with which Britain had entered into treaty relations by virtue of the position she held in India.

It was assumed that India would wish to cultivate the friendliest of relations with all such countries and that she

would respect their integrity in each regard. It followed that everything possible would require to be done to assist Bhutan to adjust herself easily and satisfactorily to changing circumstances.

Four questions concerning Bhutan's future have been referred to me for advice:

- (1) What is the precise status of Bhutan at present? In particular, is it an Indian State?
- (2) What would be its relationship to India when India becomes an independent sovereign State? In particular, what would be the effect of India's new status on the existing treaties with Bhutan?
- (3) If the existing relationship between India and Bhutan is to be preserved, what is the best method of doing so?
- (4) What is the position of Bhutan *vis-a-vis* the Constituent Assembly?

I discuss these questions in order:

An Indian State was defined in the Government of India Act of 1935 as meaning "any territory, not being part of British India, which His Majesty recognises as being such a State, whether described as a State, an Estate, a Jagir or otherwise". The test is thus recognition by His Majesty. From a note of the Political Department it appears that, after thorough consideration in 1924, Bhutan was defined as a State under British suzerainty but not an Indian State. It is not clear whether this was done by means of any published document. On the other hand, in the *Memoranda on the Indian States* of 1940 (the latest Government publication on the subject), Bhutan was not only included (*pp.* 43 to 48) but also described as a State "having political relations with the Crown representative".

Under the (1935) constitution, the Crown representative has no political relations except with "Indian States". The

main characteristic of an Indian State, from the point of view of international law, is that it has no separate external relations at all. Bhutan, on the contrary, has external relations, although by the agreement of 1910, the Bhutanese Government bound itself to be guided by the advice of the British Government in regard to them. Thus, if Britain were at war with a foreign Power, every Indian State would be automatically at war with that Power. But Bhutan would not be technically at war until the Bhutanese Government, acting on the advice of the British Government, declared war separately. The distinction between the two cases may not amount to much in practice; but it exists and is the measure of the difference between Bhutan and an Indian State.

In fact, Bhutan is, from the point of view of international law, in much the same position as the Ionian islands before their annexation to Greece in 1864. They were then under the protection of Great Britain and Great Britain could determine their foreign relations for them. But during the Crimean War it was judicially held that they were at peace with Russia, because Great Britain had not declared war for them, although she might have done so. (See the case of the *Ionian Ships* [1855] 2 Spinks, 212, quoted on p. 50 of Pitt-Cobbett's *Cases on International Law*, 1931, Vol. I.) Such a position is not possible in regard to an Indian State strictly so called; an Indian State would be automatically at war with any Power which was at war with Great Britain. I think, therefore, that Bhutan is not an Indian State strictly so called and that the *Memoranda on the Indian States* should be revised accordingly.

Strange though it may seem, Bhutan is not even a State in India; for "India", as defined in the Government of India Act, 1935, consists of British India *plus* the Indian States *plus* any territories under the suzerainty of the Ruler of an Indian State *plus* the tribal areas *plus* any other territories which His Majesty-in-Council may, from time to time, after ascertaining

the views of the Government of India and the Indian legislature, declare to be a part of India. I am not aware of any declaration by His Majesty-in-Council including Bhutan in India; nor does Bhutan fall in any of the other categories in the above definition. It follows, therefore, that Bhutan is not in India. From the point of view of geography, this may sound strange, but such is the present legal position. If "India" is defined differently in the new constitution, the position will, of course, be different.

The precise legal status of Bhutan at present is that of a semi-sovereign foreign State: "foreign", because it is not in law an Indian State nor is it British territory; and "semi-sovereign", because its sovereignty in external affairs is limited by the agreement of 1910.

I next turn to question 2, "What would be the relationship between Bhutan and India when India becomes an independent sovereign State?" This raises a very difficult question of international law on which there may well be room for differences of opinion. The answer to the question really turns upon the effect which India's new status would have upon the existing treaties or agreements with Bhutan. Let us consider some of the main provisions in these instruments. Under article 4 of the treaty of 1865, as modified in 1910, the British Government had agreed to make an annual allowance to the Government of Bhutan of one lakh of rupees in consideration of the cession of the 18 Doars by the Bhutan Government. Under article 9 of the same treaty, there was to be free trade and commerce between the two governments. Under article 10 of the treaty, as revised in 1910, the British Government had undertaken to exercise no interference in the internal administration of Bhutan and the Bhutanese Government, on its part, had agreed to be guided by the advice of the British Government in regard to its external relations.

Then there were certain provisions for the surrender of criminals upon the demand of the British Government on the

one side or the Bhutan Government on the other. It will be noticed that the term used in all these provisions is the "British Government".

The question now is, how this term is to be interpreted and what becomes of these provisions, when the British Government no longer rules in what is now British India. Will the provisions simply lapse, or will they operate to bind His Majesty's Government in the U.K. in spite of its ceasing to be sovereign in India, or will they be binding as between Bhutan and the new Government of India? It is unnecessary to go into details of the conflicting views held by different countries, or even by the same country at different times, on questions of this character; anyone interested in the subject may refer to McNair's *Law of Treaties*, 1938 (pp. 412-427). The conclusion to which I have been driven after studying the authorities is that when the British Government transfers the sovereignty of what is now British India, it will have to be made clear what is to be the effect of the transfer on treaty provisions of this kind; otherwise the position will remain ambiguous.

This brings me to the next question: "If the existing relationship between Bhutan and India is to be preserved, what is the best method of doing so?" The best method of removing all uncertainty on the subject and of preserving the existing relationship would be to insert an appropriate article in the contemplated Indo-British treaty which is to accompany the cession of sovereignty by the British Crown to the people of India. The article may be on some such lines as the following:

"The new Government of India engages duly to honour all the obligations of its predecessor towards any foreign State arising under any treaty, agreement, engagement or arrangements heretofore in force with that State, provided that such State—

(a) recognises India as an independent sovereign State,
and

- (b) engages duly to honour all reciprocal obligations of its own, as if they were obligations towards the new Government of India”.

Such an article would serve to keep alive existing treaties not only between India and Bhutan but also between India and any other foreign State, *e.g.*, Afghanistan or Siam. In fact, I have already suggested the insertion of an article of this kind in the Indo-British treaty. It will, of course, be open at any time to the new Government of India and the foreign State concerned to negotiate any new treaty to replace the existing treaties. The article in question is merely meant to preserve the *status quo* in the meantime.

I now come to the last question, which concerns the position of Bhutan *vis-a-vis* the Constituent Assembly. If Bhutan is not an Indian State—in my view it is not—it will not be able to have any representative in the Constituent Assembly, even by grouping with any neighbouring Indian State. Its problems will have to be dealt with in the same way as the problems of any other foreign State, such as Afghanistan, or Nepal, or Tibet or Siam: that is to say, by the insertion of an appropriate provision in the Indo-British treaty and by the negotiation, if necessary, of new treaties with the new Government of India in due course.