

Book Review Article

Norms and Politics: Sir Benegal Narsing Rau in the Making of the Indian Constitution, 1935-50 by Arvind Elangovan, Oxford University Press, New Delhi, 2019, Price: Rs. 995

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I

Very few among the makers of the Indian Constitution through the “constituent moment” of the Constituent Assembly of India have received a detailed treatment of their life and work, even less so their contribution to the process and final creation of the constitutional document has been recorded and analysed. This aspect of modern Indian history and more specifically its Constitutional history needs a closer examination. In this puzzle of piecing together the Constitutional document, the role of *the* Constitutional advisor to the Constituent Assembly, Sir Benegal Narsing Rau, was as exemplary as it is curious in ignoring his contribution to the assembly and the preparation of the constitutional document itself. Rau has all but disappeared from Indian history and Indian Constitutional history in particular and apart from specialists in Constitutional studies he is unknown to the modern reader, including law students. Knowing a jurist is knowing his work and not just his name where again for Rau it is wanting. The present work makes the first such attempt to fill in the gap.

Structurally the book is divided into seven chapters, namely: (1) Introduction; (2) Provincial Autonomy and Its (Anti)Colonial Limits, 1935-8; (3) Conundrum on the Eve of Decolonization: Politics of Constitutionalism, 1945-6; (4) Rau’s Constitutional Solutions to the Political Conundrum; (5) Moment of Utopia: Rau

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and a Constitution above Politics; (6) A Civil Servant's Adieu: The Burden of History in the 'Conscience' of the Indian Constitution, 1946-50; (7) Conclusion. Chapter two explains the role of Rau as the Officer on Special Duty in the Reforms Office helping in the implementation of the Government of India Act of 1935. Chapter three narrates, in a very interesting way, the background history – the historiographical process and the political conditions prevailing during the eve of Independence. Chapters four and five concern with the Constitutional views of Rau and the substantive role he played in the Constitutional document. Though important by itself, chapter six has nothing remotely concerning Rau, but if that is the “adieu” which the author wants to identify only then its presence in the book is justified making him the “third absent”.¹ Then comes the conclusion (seventh chapter) which could have been made more detailed and could have listed out the Constitutional relevance of Rau not just in his times but also in ours. Thus, chapters two, four and five are the ones which deal with Rau directly and constitute the heart of the book.

The author writes in the introduction, “For too long histories of the Indian constitution have been viewed either as a direct consequence of colonial rule or as a product of a successful appropriation of mainstream Indian nationalist movements” (Elangovan 2019: 1). As far as the history of the Constitutional development is concerned, the author has an element of truth because lawyers who have written on the subject are generally not interested much in history, intellectual history or political theory and historians or political scientists who have written on the subject are not sufficiently well-versed in the functioning of the legal world. According to Elangovan, Constitutional scholars have specifically avoided the historical-political context of the document leading to two methodological defects: (a) of either studying the Constitution in an ahistorical context, or (b) writing holistic narratives thus missing out on the details or contributions of individuals – with B.N. Rau being a victim of both (Elangovan 2019: 2-3). Because of these two methodological handicaps, the author identifies three historiographical consequences” “(i) there is a tendency in the scholarship regarding the Indian Constitution to separate the histories of the Indian Constitution from the histories of late colonial India, (ii) whenever history is taken into account, there has been a tendency to explore the history of the Indian Constitution as a story of Indian nationalism, (iii) in such a narrative there is also an assumption that the relationship between nationalism and Constitutionalism on the one hand and colonialism

and constitutionalism on the other are synchronous” (Elangovan: 2019: 3).

Evidently, all major historians of modern India have either skipped the recent Constitutional history or have given a very “holistic” narrative, which has white-washed the finer details of a document which has gone on to shape the functioning of the modern republic ever since its promulgation on 26 January 1950. This is, of course, a problem with the whole intellectual enterprise which sees its own “self” as functioning in water-tight compartments but the best representation can only be interdisciplinary. Explaining these methodological lacunae, he relies on Mithi Mukherjee, who states, “histories of the Indian constitution and the founding of the republic as such have been separated from other cultural, social, political, and economic histories of late colonial India,” (Elangovan 2019: 2)² though she goes on to add, “In particular, at the time of framing the constitution, Congress leaders, motivated by the idea of justice as equity, ensured that the principle of justice provided the guiding framework within which principles of freedom, equality, religion, and social amelioration were pursued” (Elangovan 2019: 13).³ The contrast between the stated objectives between the leaders of the Indian freedom movement as primarily and dominantly represented by the Indian National Congress and those of the Muslim League are clear for any reader and observer of the times.

In his zeal to emphasize on the historical-political background in the process of Constitution-making and the historiographical shortcomings, the author wants to dim the remarkable Constitutional moment and the final drafting of the Constitution itself by the movers and shakers of Indian nationalism, a point highlighted by Granville Austin in his path-breaking work on the Indian Constitution (Elangovan 2019: 5).⁴ Though he is right, through Sarbani Sen, in pointing out how, “the story of writing the Indian constitution was not simply a product of enlightened leaders coming together at an abrupt moment (such as argued by Austin) but rather one which had deep roots in the Indian leaders’ engagement with the British sovereign through the exercise of popular politics. Constitution-making, then, was a translation of the idioms of popular politics to institutionalized mechanisms of balancing power in order to ensure a just outcome for all involved” (Elangovan 2019: 6-7) The author also questions the synchronicity of colonialism, nationalism and Constitutionalism (in this sequence) as a drawback of the nationalistic Constitutional approach. The Constitution-making process indeed was more complicated than a synchronous relationship between

colonialism, nationalism and Constitutionalism as the author points out but it serves the periodization like ancient, medieval and modern for history where all the minor details and overlaps and historical-political processes collapse in these three periodization to give a “holistic” picture which also is required for a broader understanding of the subject and simplifying it for the reader (as a path to enter the “chequered” history and here the chequered history of the constitution and the constitution-making process).

Sarbani Sen is actually not at variance with Austin because the leaders were “enlightened” and wise precisely because they had long experience in the Indian freedom movement against the colonial rule on the one hand and pernicious, medieval, sectarian politics led by the Muslim League. What is curious is despite pointing out the issue of insufficiency of methodological-historiographical background of the constitution making process by Indian nationalists (primarily coming from the Indian National Congress) through the Constituent Assembly of India, the author does not go into the historiographical-political analysis of the colonially promoted sectarian organisation of Muslim League founded in 1906 (though it remained a marginal organization up until 1946) which made the resolve of forming an Islamic state of “Pakistan” (styled later as Islamic Republic of Pakistan) in 1940 though Mohammad Ali Jinnah himself had no specific clue about the geographical and political structure of such an Islamic state till the very end or indeed the very beginning of the creation of the artificial state of Pakistan.⁵

The author lists out in the introduction which he then explains later in chapters 4 and 5 in greater detail, “his (Rau’s) ideas aimed to avoid Partition at all costs and in his own advice to the Indian Constituent Assembly, Rau argued for the creation of a state that could reach farthest in terms of governance and be limited in terms of being influenced by politics, a view decisively sidelined at the time of making the Indian constitution” (Elangovan 2019: 12).

II

Rau’s contribution becomes acutely important because of his role as the Officer on Special Duty since the enactment of the Government of India Act, 1935 in the Reforms Office until 1938 when “the British Colonial government undertook the mammoth task of revising and adapting its entire body of central and provincial administrative laws to ensure that they conformed to the principle of provincial autonomy” (Elangovan 2019: 35).

In Rau's view, the Government of India Act, was not any ordinary piece of legislation but was almost a Constitutional text and the Constitutional position of India would gradually drift to those of the other dominions like Canada, Australia or for that matter even South Africa (post-Boer war constitutional changes). This also showed that Rau's ideas were not in conformity with anti-colonialists as well, "Rau's constitutional thinking demonstrated the possibility of productively using the colonial act to pursue the constitutional freedom to govern, an enterprise that ran against the politics of anti-colonialism, which only identified the colonial legislation as yet another manifestation of imperial interests" (Elangovan 2019: 35-36).

An exhaustive work on the Government of India Act, 1935 itself is needed, which is rightly pointed out by the author, "the constitutional reforms and 1935 act in particular emerge as instruments through which the imperial agenda was forged. Not much attention has been devoted to examining the constitutional aspects or to the potential of the Act itself" (Elangovan 2019: 36).⁶

As the nature of the colonial administration itself, in addition to the nature of the 'Reforms Office' as an advisory body for the Governor General where B.N. Rau was appointed as an OSD (Officer on Special Duty) in September 1935, its proceedings were confidential (Elangovan 2019: 37). The herculean task of revision and adaptation involved about a 1000 provincial statutes apart from 500 central statutes (Elangovan 2019: 37). Despite the dedication and "Constitutional precision" with which Rau worked, the colonial bureaucratic channels were extremely limiting where Reforms Office headed by the Reforms Commissioner corresponded with the Parliamentary Council's Office (which included among others Sir Maurice Gwyer and Sir John Rowlett with extensive Indian experience) corresponding with the India Office in London before final approval by the Parliamentary Council, scuttled Rau's (who also symbolised a moderate and liberal Indian's constitutional aspirations) interpretations of the Act of 1935 (Elangovan 2019: 38). This emanated directly from Rau's idea of the Constitution and Constitutionalism, which the author rightly points out as, "Rau's method attempted to check imperial authoritarianism through constitutional means. Indeed, such an implication directly followed from his idea that the 1935 Act had to be considered as a constitution and, therefore, as a fundamental law of the land" (Elangovan 2019: 41).

According to Rau, as a "foundational document" any provision of

law which violated the 1935 Act had to be modified or repealed apart from the principle of separation of powers between the executive and the legislature (the Governor General and Provincial Governors on the one hand and the legislatures on the other) which could be read in the language of the Act itself (Elangovan 2019: 41).

To support such an interpretation, Rau cited the case of *R. V. Burah* (1878), 3 A.C. 889, where it was held, “*The Indian Legislature has powers expressly limited by the Act of the Parliament which created it and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation at large, and of the same nature, as those of Parliament itself*” (Elangovan 2019: 41). Rau qualified the designation of provincial governors by reading wherever the term governor appeared as “Governor acting in his discretion” or “Governor acting in his individual judgement” (Elangovan 2019: 42)

Had the British government accepted this qualification it would have led to greater legislative ease, more reforms and better administration during the first limited ‘national government’ formed between 1937-39 in the provinces, a point highlighted by Prof. K.T. Shah (another unsung hero of Constituent Assembly) through Elangovan, “The imperial assumptions of the 1935 Act and in particular the overwhelming discretionary powers of the Governor were perhaps best articulated by K.T. Shah in an elaborate critique of the Act. Titled *Provincial Autonomy*, K.T. Shah’s monograph-length critique of the 1935 Act makes for an interesting read in multiple contexts for its politics and its legal interpretations” (Elangovan 2019: 58).

On resolving the disputes of federal, provincial or concurrent lists, Rau suggested that “environment and setting” and “pith and substance” should be the guiding principles governing it. For example, in the Indian Merchant Shipping Act, 1923 which concerned contracts (under provincial list) and masters and seamen (concerned federal jurisdiction), taking the help of principle of “environment and setting”, this Act “clearly dealt with merchant shipping and not contracts, per se, which made the provisions federal” (Elangovan 2019: 42-43). In a counter example of the Indian Post Office Act of 1898 where the government could intercept postal articles in the interest of public order; which concerned both federal (post and telegraph) and provincial (public order) matters, “Rau argued that though the ‘environment and setting’ of the Act made these provisions authorizing interception federal, the pith and

substance of the Act indicated public order, which was a provincial subject and hence these provisions must be classified as provincial and not federal” (Elangovan 2019: 43). The author points to Rau’s apolitical nature, but the interpretation of the Indian Post Office Act, 1898 concerning colonial surveillance, would invariably have had political implications and would have ended up helping the nationalist cause (Elangovan 2019: 43).

On significant matters and where Rau highlighted 1935 Act as a Constitutional document, the colonial government shot it down by considering it as a mere “tool of governance” and it never got out of its colonial mindset to meet the constitutional aspirations of Indians (Elangovan 2019: 44-47)

In the author’s understanding and reading of the events and contribution of Rau, provincial autonomy was the most important aspect in terms of adaptation of all the existing laws, both central as well as provincial. A significant ‘Constitutional’ point which the author raises in his note 51 which should have been in the main body of the text, “Section 124(1) of the 1935 Act was an important provision of delegation of authority that led to considerable discussion among government officials. The provision stated the following: ‘Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends. This provision would be used by Rau to claim provincial autonomy by arguing that the federal government can transfer power back to the provinces, even if it had to take them back” (Elangovan 2019: 65 *fn.* 51). In resolving the “puzzle of provincial autonomy”, the author provides interesting instances of Rau’s intervention in: (1) Bengal: Jurisdiction over the University of Calcutta – Federal or Provincial subject? (2) Punjab: Law and Order and Excise; and in (3) Queries from the Central Departments.

‘Education’ became a provincial subject in the seventh schedule of 1935 Act which led to the question whether University of Calcutta should vest in the Governor General and the federal government or in the provincial government of Bengal. Rau wanted it to vest with the federal government, “Rau suggested that the proper adaptation would be to place the jurisdiction of the university, which was a corporation, in the hands of the federal government since the university catered to multiple provinces—Bengal, Assam, and Burma—

and, under the provisions of the new Act, any subject that crossed provincial borders automatically fell within the jurisdiction of the federal government” (Elangovan 2019: 48). This view was contested by the provincial government (and finally accepted) which raised the issue of both how 1935 Act was only a convenient tool of governance rather than a constitutional document because of which the 1921 Calcutta University Act still held good which provided for control of the university by the provincial government of Bengal (Elangovan 2019: 48-49).

As a result of 1935 Act, “law and order” became a provincial subject but many allied subjects which aid law and order stayed with the federal government like arms, ammunitions, firearms, explosives but reading clauses 124 (1) and 124 (2) together the federal government could delegate the performance of these functions to the provincial government (Elangovan 2019: 49-50). It was contested by the Punjab provincial government, as articulated by F.H. Puckle, the Chief Secretary, on grounds that subjects ceded by the province to the centre and then redelegated to the province would create difficulties in interpretation both for the government as well as the courts apart from the provincial government acting unconstitutionally by refusing to discharge re-delegated responsibility, to “wreck the Constitution from within” as was the stated objective of the nationalists, who would invariably form the government (Elangovan 2019: 50).

In one instance of A.G. Clow’s (Secretary, Department of Industries and Labour) apprehension about ‘recovering power already ceded to the provinces under the 1935 Act’ concerning: (1) Power to prescribe returns and so keep statistics uniform under the Workmen’s Compensation and Factories Acts; (2) Power to add workmen and diseases to the schedules of the Workmen’s Compensation Act and (3) Power to schedule hazardous occupations under the Factories Act, Rau predictably replied, “*I do not think it is quite right to say that some of the powers could be recovered after the start of the new constitution by passing a Central Act. If Mr. Clow means that the centre can legislate and put into the body of the legislation some of the matters now relegated to rules, he is right; but if he means that by a new Central Act the rule-making powers, which, in the process of adaptation, have been transferred to the Provincial Governments, can be taken back by the Centre, I do not think he is right*” (Elangovan 2019: 53). In any case, where the issues were of minor import, they were adapted uncontroversially according to the recommendations of the Reforms Office as advised by Rau but on more crucial matters the colonial government’s bureaucratic hierarchy held sway and the final call rested with the Parliamentary

Council in tandem with the India office, London (Elangovan 2019: 54-55).

It is understandable under the circumstances and shows the pre-eminence of the Government of India Act, 1935 as the forerunner of the Indian Constitution itself and shaping the contours of the central and provincial government with a strong centre which was about to come famously quipped as a “union of states”. The 1935 Act itself had many other aspects apart from just provincial autonomy which needed to be addressed and if at all Rau had any views, writings or role in its implementation, it needed to be recorded in the book. A very brief life-sketch is provided by the author which leaves the reader grappling with how Rau’s upbringing and circumstances shaped his worldview remains unrepresented (Elangovan 2019: 15-24). This does not require a hagiography but a closer examination of life-circumstances, though for a beginner even a hagiography is instructive which is grossly missing in Rau’s case.

The important conclusion which the author reaches in this chapter: “constitutionalism troubled both the imperial authorities and nationalist forces. In the hands of a colonial bureaucrat, Rau, the Act assumed intimidating proportions with his stipulation that it be treated as a constitution. Already faced with a legislation that embodied the contradicting claims of sovereignty from both Britain and India, the colonial authorities soon realized that submitting to the constitutionality of the act would mean relinquishing their vaguely defined discretionary powers and, as such, refused to conform to Rau’s stipulations. Similarly, the nationalists’ view of the Act depended on undermining its constitutional principles, an action that was necessary to register their protest against an imperial legislation. Furthermore, the nationalists agreed to participate in the reforms only after some of the constitutional principles embodying in the Act were diluted.....In late colonial India then the task of drafting a constitution was not simply about colonial devolution or nationalist appropriation. Rather, constitutionalism had to contend with both these forces with neither of them proving to be a natural ally” (Elangovan 2019: 61).

III

From 1935-38, the author jumps straight to the conundrum of 1945-6, without giving an overview of Rau’s activities during the interregnum though he mentions how this period was significant both for Rau as well as India when he became a Judge of the Calcutta

High Court, chaired a committee inquiring into Hindu Law reforms, adjudicated a river-water dispute between the provinces of Punjab and Sind, headed an enquiry into the question of dearness allowance for railway employees, briefly became the prime minister of the state of Jammu and Kashmir (the only political post he held very briefly when he resigned over a disagreement with the king) (Elangovan 2019: 68). All these legal issues where Rau played a prominent role are acutely important both for a legal historian and a student of legal history and should have been dealt with by the author. This period saw the deadlock between Congress and Muslim League and the inevitable failure of the Shimla Conference, 1945. Lord Wavell, the then Viceroy, had decided to call the conference by inviting “all the players” including of course the Congress and the Muslim League to reconstitute the Executive Council, hold elections in provincial assemblies to finally set up a Constitution-making body (Elangovan 2019: 70). In the event of success of the conference Lord Wavell set out the drafting of the Constitution as the agenda for the body set up by the interim government in addition to effective prosecution of war against Japan on the eastern front and the issue of associating of princely states with the new Constitution of India (as drafted by the body) (Elangovan 2019: 71). The sectarian and uncompromising nature of Muslim League is shown by Jinnah’s three suggestions of not submitting its panel of names for the Executive Council and how those names should be discussed confidentially between Jinnah and the Viceroy, all the Muslims in the Cabinet should be from the Muslim League and there ought to be an even better Constitutional safeguard than the Viceroy’s veto to safeguard Muslim minority interests (Elangovan 2019: 74). These extra-Constitutional demands by Jinnah as representing the Muslim League shows that he was not interested in a dialogue and reconciliation from the outset, his only purpose was to sabotage the Shimla conference and realise the aim of an exclusivist Islamic Republic of Pakistan, in sharp contrast with Congress which stood for a United India. It is in this strained atmosphere that provincial elections were held in 1945-46, where Congress predictably fought on grounds of Quit India and radical economic and social reconstruction of a united and undivided India; and Muslim League fought only on the ground to create a “land of the pure” called Islamic Republic of Pakistan (Elangovan 2019: 76).

The author has failed to even mention Jinnah’s call for Direct Action (announced for 16 August 1946)⁷, which led to massive communal riots where most of the victims were Hindus in Bengal specifically in order to polarise the masses and solidify his stand for

the creation of the Islamic State.⁸ There is also a mischaracterization (without offering a note or clarification) on p. 79 where the author speaks of “a journalist of some daily called Hamdan from Bombay had reported to Jinnah in September 1945 that at a recent All India Congress Committee (AICC) meeting both Nehru and Patel threw an ‘open challenge’ to the Muslims. If at all, it was a challenge to the obscurantist-exceptionalist Muslim League as represented by Jinnah and not “Muslims” in general. Nehru, who is often criticized for being soft on Muslim obscurantists, said in an interview on 14 July 1945, “The League inevitably represents not only the particular claims of a group, but represents them in a medieval context” (Elangovan 2019: 81). On another occasion, he said, “Mr. Jinnah’s fear of the Hindu majority in a centralized national government is based on his medieval trend of thought” (Elangovan 2019: 81). He went on to add, “League is at present the most powerful organisation amongst them but it has no constructive approach or objectives and its leaders have openly said they base their appeal on hatred” (Elangovan 2019: 82).

It is interesting to note how the idea of a constituent assembly where all Indians would come together to frame their constitution was expressed by none other than Gandhi himself way back in 1922 (Elangovan 2019: 84-85). It was then formally recognized by the Congress Working Committee in 1934 and given weight by the Constitutionalist and lawyer K.M. Munshi invoking the precedents of US and other former British colonies (Gandhiji had supported Munshi’s views and even corrected his draft before it was sent to the press) (Elangovan 2019: 85).

Congress resolved in April 1936, “No constitution imposed by outside authority and no constitution which curtails the sovereignty of the people of India....can be accepted” (Elangovan 2019: 85) and in November 1939, the Congress Working Committee resolved, “A Constituent Assembly is the only democratic method of determining the constitution of a free country, and no one who believes in democracy and freedom can possibly take exception to it” (Elangovan 2019: 86). As predictable, this demand for the formation of a constituent assembly for framing the Constitution was met with opposition by the Muslim league and communal representation (Elangovan 2019: 86). - In fact contrary to this recurrent communal politics as harboured and promoted by the Muslim League influencing the constituent assembly in a negative manner it almost became an obligation on the part of the framers of India’s Constitution to get over this negative impact and make

the Constitution making and the document of the Constitution itself as a remarkable achievement of the Indian freedom movement. Therefore, in this respect, constitutionalism did follow nationalism which worked not just in opposition to colonialism but also venal communalism as represented, articulated and engineered by the Muslim League and its regressive leader Mohammad Ali Jinnah.

In fact, Islamic theology becomes suspect once again which speaks of Muslim brotherhood and how a non-Muslim could never represent Muslim interests in a common citizenship which Indian nationalists wanted to formulate.⁹

IV

Wavell knew the ground situation well enough and wanted to have practical solutions by engaging Congress and pandering to the interests of Muslim League whereas Cripps and Pethick Lawrence were still living (mentally) in the immediate aftermath of the Government of India Act of 1935 and wanted to play the supervisory role of the colonial administration (Elangovan 2019: 92-116). In the end, both sides (of the British colonial administration) were proven wrong when not just Wavell's plan was unsuccessful (he was ousted by internecine politics) but also the Cripps Mission and the Cabinet Mission Plan (as formulated by Sir Stafford Cripps and Lord Pethick Lawrence) was thrown into the dustbin of history (Elangovan 2019: 92-116).

On this point, the author writes at the beginning of chapter 4, "*Cripps (and Pethick-Lawrence) believed that the way forward was devolution based loosely on the 1935 Act and pre-empting the nature of the Constituent Assembly so that a constitution could be agreed upon even prior to the meeting of the assembly. Wavell on the other hand argued for parity between the Congress and the League, failing which he thought that the British government should continue their presence in India. The Congress argued from the point of an undivided India and saw the Constituent Assembly as an important instrument for strengthening its goals. The Muslim League was deeply suspicious of the Constituent Assembly and refused to agree to any decision that did not involve the partition of the subcontinent*" (Elangovan 2019: 122-123).

Rau tried to mediate between these two British approaches of devolution (Cripps–Pethick-Lawrence) and arbitration (Wavell) along with putting forward arguments for a united and un-partitioned India with two necessary preconditions being fulfilled: (1) principle of self-determination of India; (2) his earliest Constitutional draft

accepting the idea of Pakistan without partitioning India in order to have a wider support and participation (including that of the Muslim League) in the formation of the constituent assembly to draft the Constitution (Elangovan 2019: 123). According to the author, he worked on these additional principles: (1) a claim of self-determination for India as a fundamental principle; (2) he outlined a Constitution that included the claims of (future) Pakistan as well as Congress' vision of a united India; (3) he attempted to rescue the Constituent Assembly from merely being a body of political negotiations to a body that could claim legitimacy on its own right (thus trying to bind the three centripetal forces of British, Congress and the Muslim League) (Elangovan 2019: 123).

Despite retirement from the civil services in 1944, because of Rau's vast knowledge of Constitutional law, not just of the Commonwealth but also that of the United States, and above all because of his trouble-shooting nature due to his remarkable impartiality Lord Wavell again roped him in the Reforms Office to bring coherent policy of the British themselves apart from having a settlement reached between the Congress and the Muslim League (Elangovan 2019: 124). During this period of flux there was also a boundary dispute between Orissa and Madras which Rau helped resolve and immediately he was offered the post of Officer on Special Duty (OSD) in 1945 (Elangovan 2019: 124). In this book, the author could very well have brought out the details of the dispute and Rau's legal acumen in resolving it.

It also needs to be pointed out how Rau worked on the draft treaty to be signed between Britain and India (a point stressed by Cripps) for the transfer of power and his outline for the new constitution on grounds of self-determination (Elangovan 2019: 125). The author could have discussed Rau's draft treaty and his outline for the Constitution and if his outline weren't too voluminous, he could have provided it in an appendix to the book.

As far as the treaty between Britain and India was concerned, the issue of defence and defence forces, provision for princely states, minority rights, and formation of a workable Indian federation were some of the most important issues to be dealt with. As far as the structure, organization, and function of armed forces in India was concerned the British Commander in Chief, Claude Auchinleck, mentioned how the Commonwealth Reserve Force would be stationed in India and it would function autonomously from dominion laws (local Indian laws) and would be responsible directly to the British parliament (Elangovan 2019: 126-30). Rau countered this view (as

summarized by Elangovan), “Reserve Force, if it were to be stationed in India, would be subject to all the local laws and supervision of the commanders in India, except in cases relating solely to the organisation of the force itself....In other words, Rau was basically arguing that a sovereign India, even if it were to use British troops, could not accept a Commander in Chief of those troops who would be responsible to the British Parliament. He had to be responsible to the Indian government” (Elangovan 2019:127-28).

What both Rau and the present Constitutional biographer are erroneous in giving too much legal status to the almost 600 princely states which existed in the Indian subcontinent. Though, as textualist and strict legal interpreter, Rau is consistent in his reading of law. All these princely states would just give bloated revenue to the British empire which would just receive money without taking the blame of these autocratic regimes and its mostly whimsical tyrants who ran the whole state/estate as their private property, including the people who inhabited it. This is, of course, in addition to the colonial project of balkanization (*divide et impera*) of the Indian subcontinent. The States Department (which dealt with the princely states, on the one hand, and India Office in London on the other) without the knowledge (or collusion) of the British Government of India destroyed most of the records of the misdeeds of the princely states (which the colonial regime used to leverage to arm-twist, demand greater revenue and far greater indirect control over them) and clandestinely shipped rest of the documents to England so that the leaders of the national movement could not study them and it does not become another arrow in their quiver to demand their complete merger with the Indian Union.¹⁰ There was already a very strong Congress movement in all of these princely states where often the condition of its people was even worse off as compared to British India. This detail and the interesting histories surrounding some of the princely states are recorded brilliantly by the British journalist Leonard Mosley whom the author could have referred in the present work.

On the issue of minority rights, Rau was categorical about it being solely a national (internal matter) and not an international question whence it could be framed as part of a treaty with the British for transfer of power. A point which Elangovan has not emphasized is how this indirectly validated the claims of the nationalist movement led by Congress and its commitment to the protection of minority rights under any Constitution which it would frame in the future through the constituent assembly. Rau’s views were (through Elangovan), “Rau began his discussion of minority rights by pointing out that

prima facie, a treaty that was supposed to be between two different countries could not specify guarantees for religious and racial minorities, as those were matters entirely internal to the dominion... Rau noted that these principles (for the general guidance of the new legislatures and governments) could be enunciated as a set of fundamental rights. Rau then went on to list the set of fundamental rights. The significance of Rau enunciating fundamental rights was not lost on the India office. It realized that by enumerating fundamental rights of the minorities, Rau had effectively located the problem of minorities as a national and not as an international question.....Rau was firm on the question of self-determination. His reasoning was that if India was to be a free, sovereign dominion, issues of minority rights had to be framed in terms of a national question of representation and not in any other international terms, as that would undermine the status of dominionhood in the first place” (Elangovan 2019: 133-34).

Rau proposed the formation of a workable federation for the solution to the logjam between Congress and Muslim League setting out four obligations for it in his proposed constitution: “(1) The promotion of peace both within and outside India; (2) The raising of the level of nutrition and the standard of living of the people of India; (3) The provision of educational facilities so as to promote equality of educational opportunity and; (4) The improvement of public health” (Elangovan 2019: 143). In hoping to resolve issues by proposing a conference (which never took off), Rau in tandem with the redoubtable V.P. Menon (Reforms Commissioner who played a prominent role in the unification of India, a credit solely heaped on Vallabhbhai Patel) proposed its purpose thus, “The purpose of the Convention is to formulate detailed proposals for a new Constitution creating an Indian Union with the full status and powers of a Dominion, including the power to decide its future relationship with the other members of the British Commonwealth” (Elangovan 2019: 139). In fact, their hope (Rau and Menon) was based on the Canadian example of divisions on racial and religious feelings (English v. French settlers; Protestant v. Catholic and English v. French language divisions) between upper and lower Canada which initially looked unsurmountable but gradually through a conference it was negotiated and a successful federation, a united Canada was created (which continues till today) (Elangovan 2019: 138).

Rau’s idealist hope was how economic problems besetting both Hindus and Muslims was the common factor and its resolution required cooperation which meant no scope for political intervention

apart from the question of minorities being not alone the issue of Muslims but those of other minorities including Sikhs, Christians, Parsis as well for which he made an impassioned appeal to Jinnah to become a part of the government and work with Congress as a team to accomplish these common tasks (a common plank which Jinnah never agreed to) (Elangovan 2019: 145-149).

Despite all efforts by all players including Rau, Jinnah never agreed to take part in any such proposed conference nor ultimately the Constituent Assembly, and Congress' patience wore thin at this League obstinacy and they went ahead both with the formation of the Constituent Assembly and the framing of independent India's Constitution (with both Partition and transfer of power happening when the constituent assembly was in session and despite Rau's objections based on procedural correctness) (Elangovan 2019: 149-160).

V

In Chapter 5, Elangovan emphasizes how Rau privileged directive principles over fundamental rights. This might be as a result of Rau's experience as a civil servant in remote parts of the country which made him realize how economic development coupled with public health and education would lead to a better future for the country as a starting point and fundamental rights might put a roadblock on some of these initiatives (like land reforms immediately after the promulgation of the Constitution which led to the first amendment dressing down right to property from a fundamental to a legal right).

Rau's draft Constitution, as identified by Elangovan, contained seven principles relating to the following subjects – "(1) promoting international peace and security, (2) ensuring the elimination of communal discord, (3) securing fair conditions of education, work, and, interestingly, ensuring "the right to rest and leisure", (4) promoting the welfare of the weaker sections of the people, (5) protecting the culture, language, and script of different communities, (6) raising the level of nutrition and (7) ensuring a healthy workforce with particular emphasis on avoiding child labour. In making these rights non-justiciable, Rau did not intend to make these issues of secondary relevance than that of fundamental rights" (Elangovan 2019: 180-181).

Maybe both because of placing directive principles over fundamental rights as well as his firm belief in British parliamentary democracy, Rau held the parliament to be the ultimate authority and

not the judiciary, though he gave the president a far more active role (discretionary powers concerning appointment of judges, protection of minorities, suppression of widespread disorder, prevention of riotous conditions, protecting financial stability) in upholding constitutional principles aided by a commission (consisting of Chief Justice of Supreme Court, Chairman of the Upper House and speaker of the Lower House) and a Council (consisting of Prime Minister, Deputy Prime Minister, Chief Justice, Speaker and Chairman of the two houses, Advocate General, all ex-Presidents, all ex-Prime Ministers, all ex-Chief Justices and such other nominated individuals as the President would deem fit) in keeping a check on the legislature, than which was finally adopted (Elangovan 2019: 185-188). Rau had a more lenient view on the concept of citizenship (refugees, border areas), where in his draft Constitution, “every person (a) who, or either of whose parents, or any of whose grandparents was born in the territories included on that date within the federation, or (b) who on that date has his domicile in those territories shall be a citizen of the federation” (Elangovan 2019: 184).

As a moderate Constitutionalist genuinely interested in economic development of the country where as a civil servant he had been witness to immense poverty and privation he believed in economic development as the panacea for even political ills facing India and he tried his best even to accommodate the interests of the Muslim League. As an officer on special duty attached with the British Government, it was even as a professional commitment, he had to abide by and work within the confines of the colonial government, apart from being made such an officer in the first place, because of his unbiased professionalism and immense knowledge of constitutions and constitutionalism across the world.

VI

Chapter 6 is important by itself constituting the history of the fundamental rights; the Nehru report and the question of “community” in the Nehru report; the 1935 Act and after; Ambedkar’s and Munshi’s drafts on the fundamental rights; with the “state as a subject of fundamental rights” of specific importance in respect to religious liberty and equality as enshrined fundamental rights. The six enlisted rights to freedom essentially based on the Munshi Report (with slight changes) finally found their way into the Constitution.

The author believes that Munshi through his draft on fundamental rights “did not want to engage with the very real politics of identity”

(Elangovan 2019: 212). Rather he did deal with the politics of identity very effectively by rendering it inconsequential in determining equal citizenship and universal suffrage and turned the whole debate on its head by turning narrow identitarian politics infructuous as a necessary precondition for the formation of a post-colonial state. It is rather his wisdom as an enlightened leader and his homage to the national movement against British colonial rule of which he was also one of the actors.

The author has failed to understand why K.M. Munshi called “Pakistan” a racist programme (Elangovan 2019: 214-215). The racist attitude of Muslim elites stemmed from how they had “lorded over the non-Muslims” in India by force and political power, which is best reflected by the Khilafat Leader Mohammad Ali, the ideological forerunner of Pakistan (one time ally of Mahatma Gandhi during Non-Cooperation-Khilafat Movement)¹¹, when he said, “If the Emir of Afghanistan chose to invade India, it was the duty of Indian Muslims to support him¹².....However pure Gandhi’s character may be, he must appear to me from the point of view of religion inferior to any Mussalman, even though he be without any character..... according to my religion and creed, I hold an adulterous and a fallen Mussalman to be better than Mr. Gandhi.”¹³ “Pakistan” literally means land of the pure. The Muslim elites could not imagine being governed in a democratic country by non-Muslims through universal suffrage, in other words “the impure Hindus”, so they had to create an Islamo-fascist state of Pakistan¹⁴, a failed state¹⁵, an epicentre of global terrorism¹⁶ (after all, the most “famous” terrorist Osama Bin Laden was also found in Pakistan, close to the military establishment in Abbottabad¹⁷), with a veritable “zoo” of terror camps¹⁸ inside its territory alongwith in the illegally occupied territory of India (parts of Kashmir called Pakistan Occupied Kashmir and Gilgit-Baltistan).¹⁹ The elite Muslim leadership were led by an ideology of Islamic exceptionalism and Muslim brotherhood and not universal brotherhood so they could not digest the fact of enfranchisement of non-Muslims, read Hindus in the Indian sub-continent (who because of their numbers would presumed to be the majority and also running the government of independent India) whom they had subjugated and brutalized for centuries (a fact the elite Muslim leadership including Indian intelligentsia are not even willing to accept leave alone apologize for a real and long-lasting truth and reconciliation among Hindus and Muslims in the Indian subcontinent and resolving the communal problem from its roots).²⁰

The Muslim League as programmed by the colonialists was like

a fine-lish bone (Ilish or Hilsa is a Bengali delicacy) stuck in the throat of the national movement which could be removed by a 'rice-ball of equal citizenship', turned into a Frankenstein monster leading to the formation of one of the most oppressive theocratic-military-autocratic states in the world, with its best-known exports being terrorists and obscurantist seminarians in the rest of the world including to its own real-self "India". In order to keep up its farcical identity it needs to keep hating India and Hindus. The contrast is for anyone to see how the Pakistan project vanished in 1971 itself when West Pakistanis butchered 3 million East Pakistani Muslims leading to the creation of Bangladesh apart from, of course, systematic persecution, killing, forced conversions to Islam of Hindus, Sikhs and Christians in what remains of Pakistan. It is the same Islamic colonialism and systematic destruction of Indian (Hindu-Buddhist-Jain-Sikh) identity of Khiljis, Lodis, Aurangzeb, Butshikan; Iqbal and Maudidi (as ideologues) that non-Muslims are reminded of, all across the Indian sub-continent which feeds into the exclusivist Hindutva ideology of self-preservation and assertion of Hindu identities, with some trying to copy their Islamic counterparts with limited success in ideology, but definitely not in perpetrating terrorist violence.

It was this Islamic exceptionalism as represented by the Muslim elites through their colonially promoted organisation of Muslim League that found greater space and obvious pandering by the colonial regime as against the nationalist Muslims who were in large numbers in the Kisan Sabha movement led by Swami Sahajanand Saraswati; as workers in the trade union movements across the country, including among others, by those of Basawon Singh and Dr Abdul Bari; in the Indian National Army of Netaji Subhas Chandra Bose; or in the formation, leadership and activities of the Congress Socialist Party (CSP); in the revolutionary movement of Hindustan Socialist Republican Army (HSRA) and others and indeed in the Indian National Congress itself.²¹ But all these multitudinous Muslim voices of the common masses of Muslims were completely side-lined and only the venal, narrow, elite and one might be tempted to say upper-caste-upper-class Muslims as represented by the Muslim League was given importance and responsibility bigger than its boots. The author of the present volume also commits the same error of assuming Muslim League as the sole representative of Muslim interests as a given fact and an organization which could be equated with the Indian National Congress which was leading India's national movement for freedom.

As far as India is concerned, the Constitutional project has been a

success despite some shortcomings with Muslims and other minorities holding high constitutional offices including that of President and Chief Justice of India. In fact, not too long ago, India simultaneously had a Muslim President, Sikh Prime Minister and the president of the ruling party came from a Catholic background married into a Hindu-Parsi family.²² Through Elangovan, Professor Baxi is right in characterizing the Constitution as a text determined under the benign guidance of the Congress “oligarchs”, but *a la* Vilfredo Pareto, it is always the case with the elites circulating themselves and determining the course of political societies, including democracies (Elangovan 2019: 7-8). Therefore, it is neither new nor necessarily bad because of it. In fact, it has been the good fortune of India that its elites who set out to draft our Constitution had years of incarceration and sacrifice behind them, had deep commitment to democracy and were moved by a deeper conviction to create an egalitarian society. Elite, constituting mostly of urban middle-class they might have been, but they were also acutely aware of being a “subject race” of an empire and despite all their personal achievements it was a subjecthood they shared with their other lesser fortunate Indians, which made them rise to the occasion and the moment of constitution-making. These “elites” (if that’s the word Professor Baxi prefers to use) knew that they were creating history and they wanted to create a successful Constitutional document for posterity just like the Americans had done in the late 18th century for the oldest living democracy. Interests leading to political conflicts might have been the complex undertone of the process of constitution-making but the very fact that all these members of constituent assembly were able to frame India’s Constitution is the hallmark of the final and conclusive consensus, even democratic consensus that they reached. This reading of the present work might offer a perfunctory critique of Professor Partha Chatterjee’s remarkable but pessimistic view of nationalism where he has rightfully pointed out the subjugation and near disenfranchisement of the majority of peasantry which unfortunately continues unabated.²³

An effort should be made for compilation along with notes and a detailed introduction to all the 29 judgements which Rau delivered as a judge of the Calcutta High Court, on both civil and criminal matters.²⁴ The author of the present work could have given us a summary of his legal ideas in his brief career as a High Court Judge before he was called by Wavell as an Officer on Special Duty in Delhi.

Rau’s arguments for successfully defending (Sir Tej Bahadur Sapru and Jawaharlal Nehru headed the defence council) the three accused – Captain Shah Nawaz Khan, Captain P.K. Sehgal

and Lieutenant Gurbaksh Singh Dhillon – in the Indian National Army (INA led by Netaji Subhas Chandra Bose) trial for sedition and waging war against the King of England could have been analysed and/or given as an appendix to the work.²⁵

For modern readers who do not know the period and Rau well enough, a selective appendix of his works would have been extremely helpful for readers to both understand Professor Elangovan but also to reach their own conclusions about the great jurist.

This work should inspire the process of editing the complete works of Sir Benegal Narsing Rau. It will not only place him in context but also start new researches and works on him and his contribution where this first full-length book would always be the starting secondary work. It is in this respect pioneering for researchers to take up subjects hitherto forgotten or deliberately forgotten due to the politics of remembrance.

Notes

1. I am using the “third absent” in a different context but drawing from the title of Norberto Bobbio’s work *The Third Absent* (II Terzo Assente) Sonda, Milano, 1989.
2. *See*: Mithi Mukherjee (2010)
3. cited from Mukherjee (2010: 186)
4. *See*: Granville Austin, (2015)
5. *See*: Ayesha Jalal, 198.5
6. Perhaps the lone exception is that of K.T. Shah, who understandably gave the nationalist critique of the act. *See*: K.T. Shah, 1937.
7. *See*: Rafiq Zakaria (2011), R.C. Pradhan (2008), Sekhar Bandopadhyay (2004)
8. *Ibid.* *See*: Ram Bahadur Rai (2013) which details the programs carried on by Muslim League especially in East Bengal.
9. The world is divided into Dar-al Islam (land of Islam) and Dar-al-Harb (land of non-Muslims) and one such Dar-al-Harb of India has to be turned into the land of Islam, Pakistan being the first step in that direction. The subjugation of India and conversion of all “idolatrous Hindus” by Islam (one school perhaps, but politically the most important and influential school also giving “intellectual” weight to terrorist violence against India) is theorized in Ghazwa-e-Hind or conquest of India called “The Book of Jihad”. For more, *See*: Jamal Malik (2008: 50). Also, *See*: <https://sunnah.com/nasai/25/91> (last accessed: September 18, 2019); Canadian Islamic scholar Tarek Fatah explaining it in Hindi: <https://www.youtube.com/watch?v=L1a8SSi1I14> (last accessed: 18 September 2019).
10. *See*: Leonard Mosley, (1961) *The Last Days of the British Raj* London, Weidenfeld and Nicolson.
11. The undisputed leader of the peasant movement in its anti-colonial-anti-zamindari stance, Swami Sahajanand Saraswati, had expressed the doubt whether “maulanas” and elite Muslim leaders (as against the common Muslim masses, and Swamiji’s “God”, the peasants including Muslim peasants) would remain with Gandhi in the Indian freedom movement after the Khilafat

- Movement was over. For more, *See*: Walter Hauser with Kailash Chandra Jha 2015: 196-197.
12. Gail Minault 1982: 131.
 13. R.C. Majumdar (ed.), (1988: 336) Also, *See*: Arun Shourie (2012) specially the introduction.
 14. This is a point emphasized repeatedly by the journalist, writer and Canadian Islamic scholar, Tarek Fatah. *See*: Tarek Fatah, *The Tragic Illusion of an Islamic State*, Kautilya Books, New Delhi, 2017.
 15. Dr Subhash Kapila, SAAG, "Pakistan's 2020 Perspectives Dismally Suggest Failed State Syndrome", *Eurasia Review*, 3 July 2019, cf.: <https://www.eurasiareview.com/03072019-pakistans-2020-perspectives-dismally-suggest-failed-state-syndrome-oped/> (last accessed: September 18, 2019).
 16. Jim Mattis, the former Defence Secretary in President Trump administration called Pakistan the most dangerous country in the world, (Cf.: Ellen Loanes, Mattis says "the most dangerous country in the world is Pakistan", *Insider*, September 3, 2019, <https://www.insider.com/jim-mattis-pakistan-dangerous-country-2019-9>, last accessed: September 18, 2019); Yashwant Raj, Pakistan 'most dangerous country' in the world, says ex-US defense secretary, *Hindustan Times*, 4 September 2019, cf. : <https://www.hindustantimes.com/world-news/pakistan-most-dangerous-country-in-the-world-says-mattis/story-siUuli7XvoV3573EMttP0O.html> (last accessed: September 18, 2019).
 17. The fact highlighted by William Dalrymple. For more, *See*: William Dalrymple, *A Deadly Triangle: Afghanistan, Pakistan, and India*, Brookings Institution, Washington DC, cf. <http://csweb.brookings.edu/content/research/essays/2013/deadly-triangle-afghanistan-pakistan-india-c.html> (last assessed: September 18, 2019); Also, *See*: <https://www.youtube.com/watch?v=rb3YeEVTQjo> (last assessed: September 18, 2019).
 18. This is a terminology used by C. Christine Fair who has spent years studying the terrorist "infrastructure" in Pakistan. For more, *See*: C. Christine Fair, *In Their Own Words: Understanding Lashkar-e-Tayyaba*, Oxford, 2019. Also, *See*: Fair says, "Pakistan keeps a petting zoo of terrorists", cf.: <https://www.youtube.com/watch?v=VIO5zEz6Ms> (last assessed: September 18, 2019).
 19. *See*: C. Christine Fair, *Fighting to the End: The Pakistan Army's Way of War*, Oxford, 2016. Also, *See*: Christine Fair explaining the UN Security Council resolution on Kashmir https://www.youtube.com/watch?v=_aoYNQrOOu0 (last accessed: September 18, 2019).
 20. On the gradual movement towards Partition of the Indian subcontinent Professor Bimal Prasad's *Pathway to India's Partition* trilogy is detailed and remarkable. (Bimal Prasad: Vol. 1. (1999), Vol.2. (2000), Vol.3. (2009))
 21. *See*: Raghav Sharan Sharma (2017) and Mohammad Sajjad (2014) to cite just two recent books on the subject among scores of others.
 22. Dr. A.P.J. Abdul Kalam was the President of India, Manmohan Singh was the Prime Minister and Sonia Gandhi was the leader of the ruling party married to late Rajiv Gandhi whose mother Indira Gandhi was a Kashmiri Hindu and father Firoz Gandhi was a Parsi (Zoroastrian).
 23. *Ibid* pp. 10-11. It also puts the dreams of Swami Sahajanand Saraswati and Subhas Chandra Bose's *kisan-majdoor raj* a much more distant dream.
 24. Elangovan mentions this in endnote 65 of the introduction (Elangovan 2019: 32).
 25. Elangovan 2019: introduction, endnote 69, p. 33.

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