At that time he was about to be appointed as a judge of the Calcutta High Court. But his services were needed for the above purpose. The Chief Secretary to the Bengal Government wrote to B.N. Rau :

> The appointment (with the Government of India) is likely to last for one year and might continue until the introduction of the provincial autonomy. Your name has been suggested for this appointment and before proceeding further, I should be glad to know your own views in the matter. Acceptance of the appointment would mean that you would have to forego any chance of acting in the High Court which might occur between now and the introduction of provincial autonomy, say, at the beginning of 1937.

Sir B.N. Rau accepted the offer and undertook the responsibility of reviewing all the existing laws and of suggesting the necessary adaptations and modifications. Ultimately, the Order-in-Council called the Government of India (Adaptation of Indian Laws) Order, 1937 was issued by His Majesty on March 18, 1937 and it came into force on April 1, 1937. The Order-in-Council ran to about 469 printed pages and covered thousands of provisions of laws which were adapted or modified. It demonstrated the 'enormous industry, the meticulous knowledge of the law of the land and the high standards of draftsmanship with which the work was accomplished'.

4. JUDGE OF THE CALCUTTA HIGH COURT, AND PROPOSAL REGARDING FEDERAL COURT (1939-44)

B.N. Rau was appointed as a judge of the Calcutta High Court in 1939. During the short period in which he functioned as the judge of the High Court, he wrote many important judgments. *G.P. Stewart* v. *B.K. Roy Chaudhury*[4] was one such decision rendered by him. In that decision, while construing section 107 of the Government of India Act, 1935

4. A.I.R. 1939 Cal. 628.

he explained the rule of repugnancy. This rule is usually invoked, where there are two laws made by different legislatures, both of which cannot be allowed to remain in operation simultaneously and one would have to prevail over the other. In the course of his judgment, B.N. Rau observed:[5]

> It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't", there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test; there may well be cases of repugnancy where both laws say "don't", but in different ways. For example, one law may say, "No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time" and another law may say, "No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time". Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for, to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified.

He then discussed the various authorities which laid down the test of repugnancy in Australia, Canada and England and concluded:[6]

> The principle deducible from the English cases, as from the Canadian cases, seems therefore to be the same as that enunciated by Isaacs J in the Australian 44 hour case (37 C.L.R. 466). If the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and to what extent in a given case, the dominant law evinces such an intention, must necessarily depend on the language of the particular law.

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5. *Id.* at 632-33.
6. *Id.* at 634.

It may be mentioned that these observations have been relied upon by a Constitution Bench of the Supreme Court of India in *Tika Ramji* v. *State of Uttar Pradesh.*[7] The lucid and felicitous language used by B.N. Rau in explaining the legal principle of repugnancy in the judgment in *G.P. Stewart* shows the extent of contribution he would have made to the development of constitutional law of the country, if he had been elevated to the Federal Court as originally planned by Sir Maurice Gwyer, the Chief Justice of the Federal Court of India. That there was such a proposal is evident from the letter dated October 22, 1945, written by Lord Wavell to Lord Pethic-Lawrence. B.N. Rau was actually sent to the Calcutta High Court to enable him to acquire the qualification of five years' service in the High Court for being appointed as a judge of the Federal Court of India. But that was not to be, as his services were required elsewhere, before he could complete five years.[8] When he was again offered the judgeship of the Calcutta High Court in 1945 after he relinquished the post of the Prime Minister of Jammu and Kashmir, he declined the office of judgeship by writing to the Viceroy's Private Secretary thus:[9]

> If personal prospects were all, a decision would have been easy; but I have now reached a stage in my official life when they ought to cease to count, and I have therefore to look at the matter from another point of view. The big thing before India is now Federation. I have spent, off and on, over a dozen years in the study of constitutional law in general and the Indian Constitution in particular; and within the limits permitted to me, I have had some share in the working out of the details of the federal scheme now taking shape. If, therefore, I have any choice, I should like to stay on here until Federation, in whatever form it ultimately comes, is an accomplished fact. This will mean the abandonment of any prospects in the High Court, or anywhere else *via* the High Court, but such things are inevitable.

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7. (1956) S.C.R. 393.
8. See "Prime Minister of Jammu & Kashmir", *infra* p. 12.
9. See also "Rau Court of Inquiry", *infra* p. 8.

His desire to be the creator of constitutional law rather than the interpreter ultimately prevailed. Then he was appointed as an officer on special duty with the status of a secretary in the Governor-General's Secretariat on the reforms side.[10]

5. RAU COURT OF INQUIRY (1940)

Even during the time he was holding the post of a judge of the Calcutta High Court, B.N. Rau was required to attend to two other important assignments. Soon after he was appointed as a judge of the High Court of Calcutta, B.N. Rau was requested to shoulder the responsibility of a wage adjudication at Bombay. There was a dispute raised by employees of the G.I.P. Railway (The Great Indian Peninsular Railway), regarding the payment of dearness allowance to them and their other conditions of service. Government of India thought that the best way to evolve an appropriate formula regarding the determination of the dearness allowance payable to the railwaymen was to constitute, under the Trade Disputes Act, 1929, a Court of Enquiry under the chairmanship of a High Court judge. Accordingly, B.N. Rau was appointed as the chairman of that body, which came to be known as the 'Rau Court of Enquiry'. The Court of Enquiry submitted its Report in 1940. The Court found that the claim for dearness allowance was justified, as the need for its payment arose out of the rise in prices for which the employees were not responsible. But it recommended payment of dearness allowance at a flat rate, and not as a percentage of the basic salary of the official concerned. The Report was criticised by some on the ground that it was inequitable. But the immediate effect of the Report was that the government commenced to supply essential articles to its officers and servants at concessional rates. This had the effect of neutralising in a substantial measure the effect of increasing prices. The Rau Court of Enquiry was the forerunner of a series of committees and pay commissions appointed subsequently to go into the question of dearness allowance. In fact, Rau turned out to be a path finder in an evergrowing and complex area of labour relations.

10. See "Officer on Special Duty", *infra* p. 16.