The "Rule of Law" in British India, or a Rule of Lawyers? Indian Barristers *vs* the Colonial State

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RESÜMEE

Wie alle Kolonialregime hat auch das britische Empire sein Recht und Gesetz bei der kolonialen Expansion mit sich geführt. Im kolonialen Kontext Britisch-Indiens wurde die englische „rule of law" im letzten Drittel des 19. und zu Beginn des 20. Jahrhunderts zu einem äußerst umstrittenen Konzept. Basierend auf zeitgenössischen viktorianischen Diskussionen über die „rule of law", ihre Ambivalenzen und Ansatzpunkte für Kritik rückt der Beitrag die erste Generation indischer Barrister, ihre berufliche Tätigkeit und ihr öffentliches Engagement in Hochverratsprozessen in den Mittelpunkt. In den „Großen Wahabiten-Prozessen" 1864–1872 konfrontierten indische Anwälte die „rule of law" mit ihren Paradoxa. Durch ihre Multipositionalität als offizielle Repräsentanten der britischen Krone und zugleich *cultural brokers* im transkulturellen Kontext stritten sie für politische Rechte und trugen zur Herausbildung von Konstitutionalismus bei.

"A mockery of justice" and of the rule of law, a procedure "repugnant" to "civilised methods and principles" of "British justice" – that is how the first practising Native Indian barrister, Manmohan Ghose, commented on the high treason trial against the Manipur Princes before a Special Military Tribunal in 1891.[1]

When after a palace revolution in Manipur, the British Chief Commissioner of Assam in charge of the administration of Manipur had tried to arrest the leading General of the Manipur Army, he and four of his officers had been killed in the subsequent fight as

1 M. Ghose, Did the Manipur Princes Obtain a Fair Trial? Memorandum of Arguments on Behalf of Kula Chandra Sing, Maharaja, Regent of Manipur, and Tikendrajit Bir Singh, Jubrai, or Senapati of Manipur, submitted to the Government of India. Submitted by Mano Mohim Ghose, Lincoln's Inn, Barrister at Law, Advocate of the Calcutta High Court, London 1891. Barristers are specially trained lawyers educated at one of the four London Inns of Court exclusively entitled to plead before all British High Courts on behalf of the Crown ("right of audience" in superior courts). See R. Cocks, Foundations of the Modern Bar, London 1983; P. Polden, Art. "Barristers" in: The Oxford History of the Laws of England, Oxford 2010, vol. XI, 1017-1062.

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they were "taken prisoners, […], beheaded, and their bodies mutilated."[2] The Manipur General and a Senior Member of his staff, who had apparently ordered the execution of the British officers, were put to trial before a special military tribunal. Although Manipur was one of the rather small 600 Princely States, its strategic geographical position connecting Assam and North Burma put it on top of the political agenda of both Houses of Parliament. At Westminster, the events of the summer of 1891 were soon well-known as "The Manipur Disaster".[3] Legal debates arose on the question of whether or not legal defence of the accused would have to be admitted. From the onset, the special military tribunal had denied legal representatives, even though the process was to be a state trial on the charge of high treason for disloyalty to the Crown. In India, section 125 of the Indian Penal Code of 1860 defined "Waging War against the Queen" as "high treason", that is, "armed resistance, justified on [political] principles, to the established law of the land".[4] A prosecution under section 125 IPC was a most serious charge implying the death penalty or deportation for life. Yet, the Special Military Tribunal in the Manipur case was willing to accept only barrister Manmohan Ghose's written "Memorandum of Arguments" in defence of the Manipur Princes.

My argument is that it was to a considerable extent the first generation of Indian barristers, who entered the courtrooms of the Indian Empire in the late 1860s, who set out to confront the "rule of law" with its inherent paradoxes in the formative years of the Indian nationalist movement born between 1870 and 1890 – an aspect that has yet to receive adequate attention.[5] The cases on which these Indian barristers worked presented starting and leverage points for critique of colonial rule in two fora of justification: the public and the courtroom. This was especially true for the very prominent category of state trials dealing with "Offences against the (imperial / colonial) State", in which the validity of the English law and its principles as well as the promises of the "rule of law" were tested.[6]

2 1894 (43) East India (progress and condition). Statement exhibiting the moral and material progress and condition of India during the year 1891-92, and the nine preceding years. Twenty-eighth number (being the third decennial report), London 1894, 24.

3 All in all twenty-six Parliamentary debates between 6 April 1891 and 22 June 1891. See N. Sanajaoba (ed.), Manipur: Treaties and Documents (1110–1971), Vol. I, New Delhi 1993, 59-230.

4 K. Smith, Art. "Securing the State, the Institutions of Government, and Maintaining Public Order", in: The Oxford History of the Laws of England, Vol. XIII: 1820-1914, Oxford 2010, 334-351, 334.

5 See the incentives by R. Cocks, The Middle Temple in the 19th Century, in: R.O. Harvey (ed.), History of the Middle Temple, Oxford 2011, 285-336, 332sq; M. Mukherjee, India in the Shadows of Empire, A Legal and Political History 1774–1950, Delhi 2010, Ch. IV: "Vakil Ray"; M. Sharafi, Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947, Cambridge 2014.

6 My approach owes much to the studies of L. Benton, Law and Colonial Cultures. Legal Regimes in World History, 1400–1900, Cambridge 2001; N. Hussain, The Jurisprudence of Emergency, Colonialism and the Rule of Law, Ann Arbor 2006; E. Kolsky, Colonial Justice in British India: White Violence and the Rule of Law, Cambridge 2010; R. Kostal, Jurisprudence of Power: Victorian Empire and the Rule of Law, Oxford 2005; M. Wiener, An Empire on Trial: Race, Murder, and Justice under British Rule, 1870–1935, Cambridge 2009; and R. Singha, A Despotism of Law: Crime and Justice in Early Colonial India, Oxford 2000, whom I would like to thank for her generous advice and support.

The fact that legal counsel was denied a *viva voce* defence in court and had to present his defence in written form was indeed most unusual. Yet much in this case was quite characteristic of the debates on the validity of the "rule of law" and its principles in British India in the second half of the nineteenth century. To contemporaries, the "rule of law" meant "supremacy of the law", that is, a legal principle "whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes".[7] "Government by law and not by men" was supposed to offer procedural securities given under the English constitution against arbitrary state intervention. Consequently, in the context of State trials such as the Manipur high treason trial, constitutional questions on a variety of issues would arise. Manmohan Ghose, as barrister and exponent of the Crown, constantly had to deal with these questions with constitutional impact in his professional life.

As in this case, debates would start on a general level of (international) law, on the definition of imperial sovereignty, on the status of the Princely States, and on their rights and duties of allegiance to the British Crown.[8] The discussion would then centre on the independence of the judiciary and the separation of judicial and executive powers, and finally culminate in controversies over safeguards of political liberties against arbitrary state intervention in general. Would the traditional English liberties of the "rule of law", with its political liberties and legal safeguards securing the individual against arbitrary state intervention, also be valid in India? Ambivalences and paradoxes were ubiquitous in a regime constantly oscillating between the "rule of law" and a state of emergency.

Legal actors – British and Indian judges, lawyers, barristers – did engage in major debates on the character of the law, on the distinctive features between law and non-law, and on law and morals. Furthermore, they took positions in "jurisdictional politics" as "conflicts over the preservation, creation, nature, and extent of different legal forms and authorities".[9] Thus, state building proved to be a topic of contemporary discourse. It offered interesting options to barristers as go-betweeners who could profit from their multi-positionality and plural identities – not only to handle cultural translation, but to use their position for critique of the law from in-between.[10]

7 W. Cornish, M. Lobban, K. Smith, Art. "Rule of law", Oxford English Dictionary, 2011[3]; W. Cornish, M. Lobban, K. Smith, Art. "Government and People" and "Empire's Law", in: The Oxford History of the Laws of England: Volume XI: 1820–1914, English Legal System, Oxford 2010.

8 W. Lee-Warner, The Protected Princes of India, London 1894; The Collected Papers of John Westlake on Public International Law, ed. by L. Oppenheim, Cambridge 1914, Ch. X: The Empire of India. On "imperial constitutional law", see L. Benton, From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900, in: Law and History Review, 26 (2008) 3, 595-619; on legal "anomalous zones" and the "interrelation of geographic discourse, colonial legal politics, and international law", see L. Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400–1900, Cambridge 2010; D.S. Bell, Empire and International Relations in Victorian Political Thought, in: The Historical Journal, 49 (2006) 1, 281-298. As a challenge for the "imperial turn", see L. Benton, AHR Forum. Law and Empire in Global Perspective, Introduction, in: American Historical Review, 117 (2012) 4, 1092-1100, 1093sq.

9 L. Benton, Law and Colonial Cultures, 10 (6).

10 See also M. Pernau, Bürger mit Turban. Muslime im Delhi des 19. Jahrhunderts, Göttingen 2008, 13.

Hence, this paper analyses dimensions of transcultural statehood between Europe and Asia from the perspective of the law. To focus on the English "rule of law" as a "travelling (legal) culture/concept" and on Indian barristers as its agents in the second half of the 19th century represents a promising conceptual approach to discerning the long-neglected controversial processes of state-formation in the British Empire in all their complexities and ambiguities in their transcultural dimension. The entanglement of histories, the circulation of knowledge, and the transfer of (legal) technologies are some of the core issues of the "rule of law" in British India.[11]

In fact, the cases Indian barristers dealt with in their professional life represent a kaleidoscope of the difficulties the English law and its self-perception as a "rule of law" had to face in the colony after 1858. Empires have always brought their law with them. Yet the transition of the English law to India was by no means a simple transfer, but rather a very complex process of "dis- and re-embeddedment"[12] of "living law". For the English law was territorially bound, a "province of law", and stood for a legal form and discourse practice, a way of thinking, a style of legal reasoning deeply rooted in its sense of history, an amalgam of cultural memory and constitutional culture.[13] To relocate this "Common law mind" (*Pocock*) proved to be a real challenge for a "travelling culture". How did this "living law" react to the context of British colonial rule in India?

Moreover, was this really a debate on the relation between "metropolis" and "colony", or rather between "metropolis" and "metropolis in the colony"? In fact, what we do witness in the course of the debate is the creation of a third space of critique: "a single analytical field".[14] Empires as spaces of mobility, experience, and imagination offered to both colonisers and colonised a common framework of debate on the relevance of laws, rightful demands, and mutual obligations.[15] For this reason, a law-and-empire history is a history of processes of appropriation and negotiation: the story of the "rule of law" in British India to be told is a story of interaction, relations, and entanglements.[16] Ann Laura Stoler and Frederick Cooper's conceptual approach to empirical practice, which opened up the perspective of the transcultural dimension, is still challenging. Fortunately, the historiography on law and empire has shown a growing interest in the ambivalences of the "rule

11 See the editors' introduction: Dimensions of Transcultural Statehood; A. Flüchter, Structures on the Move: Appropriating Technologies of Governance in a Transcultural Encounter, in: A. Flüchter, S. Richter (eds.), Structures on the Move, Heidelberg 2010, 1-26.

12 A. Giddens, The Consequences of Modernity, Cambridge 1990, 29; A. Appadurai, Sovereignty without Territoriality: Notes on a Postnational Geography, in: S. Low, D. Lawrence-Zuñega (eds.), The Anthropology of Space and Place: Locating Culture, Oxford 2006, 337-349.

13 J.G.A. Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, Cambridge 1990, 37, 207.

14 A.L. Stoler, F. Cooper, Between Metropole and Colony: Rethinking a Research Agenda, in: A.L. Stoler, F. Cooper (eds.), Tensions of Empire: Colonial Cultures in a Bourgeois World, Berkeley 1997, 4.

15 With reference to Stoler / Cooper: S. Randeria, A. Eckert, Einleitung: Geteilte Globalisierung, in: id. (eds.), Vom Imperialismus zum Empire, Frankfurt a. M. 2009, 9-33, 14; see also M. Rolf, Einführung: Imperiale Biographien. Lebenswege imperiale Akteure in Groß- und Kolonialreichen, in: Geschichte und Gesellschaft, 40 (2014), 5-21, 10.

16 U. Baxi, The Rule of Law in India: Theory and Practice, in: R. Peerenboom (ed.), Asian Discourses of the Rule of Law, New York 2004, 324-345.

of law" in recent years. But although judicial agents have played some part in it, Indian barristers usually do not feature that prominently in these histories.
In order to highlight my working hypothesis of the law as a travelling concept and Indian barristers as its agents, I will deal first with contemporary Victorian notions of the "rule of law", its dilemmas, and bases for critique (Part I). This is followed by a brief sketch of the state of the art in historiography (Part II). Finally, I will concentrate on the Indian barrister Manmohan Ghose and his public commitment and professional activity in two high treason trials as "Scandals of Empire" (Part III).

1. The "rule of law" travels

The "rule of law" as "government by law and not by men" was one of the most powerful and most contested normative concepts of the British Empire. To the Victorian, the "rule of law" meant a judicial and constitutional doctrine, a combination of legal principles, values, and procedures, that is, both a concept of political *theory* and of judicial and political *practice*, venerated since the Glorious Revolution at the latest.[17]
In the second half of the 19th century, the "rule of law" owed its popularity largely to Albert V. Dicey, the eminent contemporary authority of British constitutional law and later Vinerian Professor of English law at Oxford.[18] In his celebrated *Introduction to the Law of the Constitution* (1885), Dicey defined the "rule of law" as "supremacy of the law" and "security given under the English constitution to the rights of individuals".[19] To him, the "rule of law" represented a "byword" of the English: he considered the English law to be "the most original creation of the English genius". Moreover, he saw the "rule of law" as "the distinguishing characteristic of the English constitution",[20] an opinion interpreted for the colonial context by James Fitzjames Stephen, Law Commissioner and heir of Thomas Macaulay's project of Anglo-Indian law codification. According to Fitzjames Stephen, law amounted to "the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience."[21] Fitzjames Stephens' remark

17 For a historical summary, see W. Holdsworth, A History of the English Law, Boston 1922-72, Vol. X; T. Bingham, The Rule of Law, London 2010; from the perspective of legal pluralists: B. Tamanaha, On the Rule of Law: History, Politics, Theory, Cambridge 2004; on legal comparison: L. Heuschling, État de droit, Rechtsstaat, Rule of Law, Paris 2002; from the point of view of political theory: R. Bellamy, The Rule of Law, in: R. Bellamy, A. Mason (eds.), Political Concepts, Manchester 2003, 118-130.

18 This was one of the most renowned professorships of law and the first to focus on common law.

19 A.V. Dicey, Introduction to the Law of the Constitution [1885], London 1889[3], 171, 172, 175. Joseph Raz enumerates eight criteria the rule of law has to fulfill: "1) All laws should be prospective, open and clear. 2) Laws should be relatively stable. 3) The making of particular laws should be guided by open, stable and clear rules. 4) The independence of the judiciary must be guaranteed. 5) The principles of natural justice must be observed. 6) The courts should have review powers. 7) The courts should be easily accessible. 8) The discretion of crime prevention agencies should not be allowed to pervert the law." J. Raz, The Rule of Law and its Virtue, in: id., The Authority of Law: Essays on Law and Morality, Oxford 2002 (1977), 210-229.

20 A.V. Dicey, Constitution, 171sq, 174, 175 (19).

21 F. Stephen, Legislation under Lord Mayo, in: W. H. Hunter, Life of the Earl of Mayo, vol. 2, London 1875, 143-226, 169.

on the compulsory character of the "rule of law" represents a kaleidoscope of the tensions between liberal ideals, myths, and the constraints of authoritarian governance. It was the same Fitzjames Stephen who spoke of military power as the second pillar of British governance in India.

The slogan of the "rule of law" played a crucial role in "Victorian visions of global order"[22] and the self-perception of "Britishness".[23] Its key role in British "imperial and missionary nationalism"[24] was re-inforced by the establishment of history as an academic discipline. To use historian Richard Cosgrove's words: "In Victorian England, especially after 1870, the development of a national narrative focused on constitutional history as its primary vehicle."[25] Such an interpretation of history was an integral part of both Whig history and young analytical jurisprudence and easily merged with the British civilising mission: "The particularity of the Anglo-Saxon heritage, the long legacy of free institutions and parliamentary government, enabled them to establish a different pattern of imperial rule from that of their European neighbours. If the 'backward' peoples of the East were to be taught the rule of law and respect for the individual, the British were uniquely equipped to fulfil the task."[26]

Similarly, just as the combat terms of "rights", "citizenship", and "public/private sphere", the "modern" "rule of law" belonged to the major justification narratives that sought to legitimate the "modern state" and its institutions, in contrast to the "medieval" "oriental despotism" of the Mughal Empire in India.[27] The "rule of law" represented one of the mightiest moral justifications of British imperialism and one of the most visible manifestations of British control and governance. It seems necessary to disentangle these seemingly homogenous justifications and to hand them back to political philosophy and history with all their contradictions, "in the same way as suspect coins return to their owners in an Indian bazaar"[28] and well aware of the fact that in the colonial encounter, the categories of this global currency are no longer to be taken for granted.

The claim of a monolithic "rule of law" stood in contrast to the empirical legal pluralism of Indian society and to the fact that Indian legal actors were used to acting according to this multi-positionality. In fact, at the beginning of the British presence in India, the English legal order had been only one among many judicial systems and of rather experimental character.

22 D. Bell, Victorian Visions of Global Order, especially the contribution by S. den Otter, "A legislating Empire": Victorian Political Theorists, Codes of Law, and Empire, Cambridge 2008, 89-112.

23 W. Cornish, M. Lobban, K. Smith, "Empire's Law", 235 (7); *Englishness* vs *Britishness*: K. Kumar, Nation and Empire, English and British Identity on Comparative Perspective, in: Theory and Society, 29 (2000), 575-608.

24 Ibid.

25 R. Cosgrove, A Usable Past: History and the Politics of National Identity in Late Victorian England, in: Parliamentary History, 27 (2008), 30-42, 30.

26 Ibid.

27 N. Hussain, Jurisprudence of Emergency, 4 (6).

28 D. Chakrabarty, Postcoloniality and the Artifice of History: Who Speaks for Indian Pasts? In: Representations, 37 (1992), 1-26, 21sq.; L. Benton, "Not just a concept": Institutions and the "Rule of law", in: The Journal of Asian Studies, 68 (2009) (Special Issue: J.K. Ocko, D. Gilmartin [eds.], State, Sovereignty, and the People: A Comparison of the "Rule of Law" in China and India), 117-122..

The charter of the East India Company of 1600 granted the Company to administer justice to its employees in the Province towns and to issue legal norms for the administration of justice into the colonial territories. From 1726 onwards, English Common law Courts of the Crown were responsible for this task in Madras, Bombay, and Calcutta. The Regulating Act of 1773 then made the Supreme Court of Calcutta answerable solely to the Crown and thus independent of the EIC-executive. The Supreme Court should be guided by common law in civil law procedures except in cases of inheritance or family law, which had to be decided according to the "personal laws" (e.g. Hindu or Muslim law), norms, and customs of the social groups and religious communities, by a presiding English judge assisted by Native legal experts. At the beginning, the intention had been to apply "Indian law" to "Indian" civil law cases and "to add as little as possible by analogy or inference from the known authoritative rules."[29] In her article in this volume, Gauri Parasher has highlighted the difficulties in determining what these laws, norms, and customs might be, and in discerning the way in which both claimants and defendants might use the blurring of definitions in a strategic way.[30]

Even in the 1830s with its zeal for legal reform and codification, three different systems of administration of justice had continued to co-exist in the three Presidency towns of Bombay, Madras, and Calcutta. This had corresponded to a dual system of courts and of law, which was divided into the Supreme Courts of the Presidencies responsible to the British Crown and administering English law to English citizens, and the Courts of the East India Company (Company Courts) led by Indian administrators presiding over Native subjects' demands between civil and penal law, and between English law and the "personal (Muslim or Hindu) laws" according to the social and religious status of plaintiff and defendant.[31]

It had been just this segmentation of the political, social, and religious landscapes on the Indian continent that had made it possible for the "tree of English liberties" to strike roots in India.[32] Only the Indian Revolt of 1857 had curbed considerably the enthusiasm for experiments.[33] With the transfer of power from the EIC to the Crown in 1858, the British legal order was systematically centralised and institutionalised by convoking nine Law Commissions to codify Anglo-Indian law (in which the Indian Penal Code liter-

29 L.I. Rudolph, S. Hoeber Rudolph, Barristers and Brahmans in India: Legal Cultures and Social Change, in: Comparative Studies in Society and History, 8 (1965), 24-49, 32, 41; M. Sarkar, Justice in a Gothic Edifice, The Calcutta High Court and Colonial Rule in Bengal, Calcutta 1997, 29; E. Stokes, The English Utilitarians and India, Oxford 1963.

30 For a parallel in the disputation process between Muslim and Christian norms in British India in the 19th century, see: N. Chatterjee, Muslim or Christian? Family Quarrels and Religious Diagnosis in a Colonial Court, in: American Historical Review, 117 (2012)4, 1101-1122.

31 J.P. Green, Empire and Liberty, in: id. (ed.), Exclusionary Empire: English Liberties Overseas 1600–1900, Cambridge 2009, 18; R. Travers, Contested Despotism, in: ibid, 191-219.

32 J.P. Greene, English Liberties Overseas, Cambridge 2009; S. Kaviraj, Modernity and Politics in India, in: Daedalus 129 (2000), 137-162, 143; L. Benton, Law and Colonial Cultures (6); M.C. Finn, Law's Empire: English Legal Cultures at Home and Abroad, in: Historical Journal, 48 (2005), 295-303.

33 T.R. Metcalf, Ideologies of the Raj, Cambridge 1995, 43-49; T.R. Metcalf, The Aftermath of Revolt: India 1857–1870, Princeton 1964.

ally travelled various times from London to Calcutta and vice versa with its drafters), by establishing a legal counselling body within the Governor's Executive Council, and last but not least, by declaring the Calcutta High Court in 1862 to be the highest court of appeal in India de facto answerable to discuss all constitutional questions arising from the colonial encounter.[34] All positions were now principally open to Native Indian experts. If the eminent Victorian Albert V. Dicey had thought the English constitution to be the result of "innumerable battles" at Court, it was also in the arena of the courtrooms of the Indian continent that barristers, English and Indian, fought for the constitution of the Empire.

It was above all the first generation of Indian barristers who helped to confront the "rule of law" with its inherent paradoxes. After three years of formation at one of the four London Inns of the Court (Middle Temple, Inner Temple, Lincoln's Inn, Gray's Inn), they had been called to the Bar and were entitled to plead before all British High Courts as representatives of the Crown. They returned to India and entered the arena of the newly chartered High Court of Calcutta at the end of the 1860s. They specialised in courtroom advocacy, gave legal opinions as experts, and drafted legal pleadings.[35] The lawyers' role as exponents of the "rule of law" and cultural brokers embedded in a multipolar network of legal, religious, and social pluralism is of paramount interest. For the management of legal pluralism in India, they had to find professional ways of appropriating knowledge, cope with the transfer of legal technologies, and participate in the circulation of knowledge.[36]

Even if Native Indian barristers are the centre of interest in this study – an approach that might be criticised for its elitist focus – my consideration here is neither "collaboration"[37] nor "mimicry". Instead of limiting the analysis to a binary scheme of collaboration and resistance, I concentrate on the dialogical structure and process of interaction in the colonial encounter. According to Homi Bhabha, the issue then at stake is the "ambivalence produced within the rules of recognition of the dominating discourses as they articulate the signs of cultural difference and re-implicate them within the deferential relations of colonial power […]".[38] The "colonial identity" "lies between the colonized and the colo-

34 See India High Court Act (1861). Prints of Letter Patent for High Court 1865 at Calcutta, IOR, L/PJ/5/423. Files of the Establishment of High Courts, 1862–1865, IOR/L/PJ/5/422. The newly chartered Calcutta High Court was interpreted as the "literal embodiment of the belief that ours is 'a government of laws, and not of men'," P.W. Khan, Freedom, Autonomy, and the Cultural Study of Law, Chicago 1999, 155.

35 P. Polden, "Barristers" (1).

36 See the editors' Introduction to this volume.

37 R. Robinson, Non-European Foundation of European Imperialism: Sketch for a Theory of Collaboration, in: R. Owen, B. Sutcliffe, Studies in the Theory of Imperialism, London 1972, 117-142.

38 H. Bhabha, Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree outside Delhi, May 1817, in: id., The Location of Culture, London 2004, 145-174, 158. See also M. Freeden, A. Vincent, Comparative Political Thought, London 2012, commenting on Bhabha, Location of Culture, 175: "The colonial mentality is thus more incoherent and ambivalent than many post-colonial cultural critics will acknowledge. It is far simpler intellectually to posit an originary pre-colonial or subaltern perspective, exemplifying say Eurocentrism or India, than to do the really hard work and recognize significant multifaceted cultural differences and interweaving within each perspective." M. Freeden, A. Vincent, Comparative Political Thought, 14 (38).

nizer".[39] In a similar way, Martin Fuchs underlines that these in-between moments in which cultures, identities, socialities, and societies encounter one another should not be conceived of as spaces of "quasi extra-territoriality" (to his mind obviously quite popular in debates on interculturality), but as spaces of a common ground in which rules of recognition have to be negotiated. In his opinion, the idea of a "third space" between two parties could falsely convey the notion of an initial separation/segregation, instead of understanding segregation and the drawing of boundaries as a result and product of the process of interaction itself.[40] Here my conceptual framing meets with the question of the transcultural dimensions of statehood. I am especially interested in the way in which this common third space is fashioned, including those "reserves which hadn't earlier seemed capable of being linked in".[41] How did contemporary legal actors deal with these transcultural aspects within the third space? Was this transcultural dimension used as an argument, and if so, in which way? I opt for a dynamic handling and openness for the influence of experiences and contexts. From this perspective, barristers as exponents of the "rule of law" embody various entangled histories and cultures. My concern is to show Indian barristers as cultural brokers of legal pluralism against a monistic state in this third space and to analyse "in-between-moments", that is, moments in which battles over political rights and the character of the imperial constitution were fought in the public sphere of the Empire and the arena of the courtrooms of the Raj. In these "significant moments when the rule of law was put to its test",[42] technologies of governance and statehood were open to debate, became objects of reflection[43] and critique, and "display[ed] the importance of the hybrid moment of political change".[44] The history of the "rule of law" in British India and Indian barristers as its agents thus is a story of creating entanglements – and drawing boundaries.

2. The State of the Art: The "rule of law" in historiography

How is this reflected in the historiographical scholarship in the field of empire studies? Some historians consider the plea for a thorough analysis of the "rule of law" in the

39 M. Freeden, A. Vincent, Comparative Political Thought, 14 (38).

40 M. Fuchs, Kampf um Differenz. Repräsentation, Subjektivität und soziale Bewegungen: das Beispiel Indien, Frankfurt a. M.1999, 11: "Das Bild des dritten Raumes zwischen zwei anderen unterstellt eine ursprüngliche Separierung, statt Separierung selbst als Produkt des Interaktionsprozesses zu begreifen." On the relevance of both analyzing the common ground and the drawing of boundaries in a history of relations, also see: J. Osterhammel, Kulturelle Grenzen in der Expansion Europas, in: Saeculum, 46 (1995), 101-138; and lately: A. Epple: Lokalität und die Dimensionen des Globalen, in: Historische Anthropologie, 21 (2013), 4-25, 16.

41 W. Welsch, Transculturality – the Puzzling Form of Cultures Today, in: M. Featherstone, S. Lash (eds.), Spaces of Culture: City, Nation, World, London 1999, 194-213; id., Was ist eigentlich Transkulturalität?, in: L. Darowska, T. Lüttenberg, C. Machold (eds.), Hochschule als transkultureller Raum? Beiträge zu Kultur, Bildung und Differenz, Bielefeld 2010, 39-66.

42 P. Fitzpatrick, Tears of the Law: Colonial Resistance and Legal Determination, in: K. O'Donovan, G.R. Rubin (eds.), Human Rights and Legal History, Oxford 2000, 126-148, 128; U. Mehta, Liberalism and Empire, Chicago 2007.

43 W. Steinmetz, M. Albert, Be- und Entgrenzungen von Staatlichkeit im politischen Kommunikationsraum, in: Aus Politik und Zeitgeschichte, 20-21 (2007), 17-23.

44 H. Bhabha, Location of Culture, 41 (38).

colonial and imperial context and the role of legal actors less as an attractive task for the devil's advocate than an outright provocation. Because of the part the "rule of law" played in "imperial and missionary nationalism" and the Whig interpretation of history, and because Indian barristers could be perceived as collaborators in the mere rhetoric of the "rule of law", it still represents a challenge to the historiography of the British Empire. In its early stages as a profession, historiography in Britain had been constitutional history – a British *Sonderweg*. It shared its evolutionary thinking and a strong belief in progress typical of modernisation theories. Of course, colonialism always had its critics; yet, a systematic analysis of the ambivalences of the "rule of law" only seemed to become possible when Empire, the politics of history, and historiography moved apart after the end of empire. Finally, Empire history has now ceased to be an all-embracing *histoire totale*; instead it acknowledges the pluralism of methods and perspectives and, at last, considers ambivalences and paradoxes as its constituent features.

On these new basic assumptions, "state"/"statehood", law, and the constitution have thus re-entered the stage of research.[45] Under the impact of cultural history, area studies, and postcolonial and subaltern studies, Empire history now tends to reconsider the relations between metropolis and colony and to perceive the colonial encounter no longer as a one-way communication. In contrast, with reference to Derrida's *différance*, the relation between metropolis and colonies is seen as a "playing movement", that is, a process in which meaning is produced not through juxtapositions, but through the continuous transition between metropolis and colony.[46] Under these premises, a new reflexive Empire history tends to link legal history, the history of concepts, and discourse theory.

The "rule of law" is part and parcel of both English/British and Indian political and legal culture, a fact that has so far largely been neglected in historiographical scholarship. Recently, Partha Chatterjee has underlined the remarkable continuity of techniques of law and governance from the colonial to the post-colonial period (in its double sense), from Empire to Indian independence, with all its promises: although justifications differed, techniques for the most part stayed the same.[47] This is one more reason to consider the "rule of law" as a shared and entangled history ("*geteilte Geschichte und verwobene Moderne*")[48] of the British Empire and the Republic of India.

This said, the analysis of the "rule of law" should finally take profit from the reflexive impetus of postcolonial and subaltern studies and pay attention to actors that have been blind spots to research. If postcolonial, subaltern, and cultural studies take their mission

45 See U. Baxi, The Rule of Law in India: Theory and Practice, in: R. Peerenboom (ed.), Asian Discourses of the Rule of Law, New York 2004, 324-345; U. Baxi, The State's Emissary: The Place of Law in Subaltern Studies, in: P. Chatterjee, G. Pandey (eds.), Subaltern Studies VII, Delhi 1992, 247-254; S. Kaviraj, The Imaginary Institution of India, Politics and Ideas, New York 2010.

46 A.L. Stoler, F. Cooper, Tensions of Empire (14).

47 P. Chatterjee, A. Çubukçu, Empire as a Practice of Power: Empire as Ideology and as Technique. The Legitimation of Imperial Practices, in: Humanity, 3 (2012) 2, 2012. P. Chatterjee, The Black Hole of Empire: History of a Global Practice of Power, Princeton 2012.

48 S. Randeria, Geteilte Geschichte und verwobene Moderne, in: J. Rüsen et al. (eds.), Zukunftsentwürfe: Ideen für eine Kultur der Veränderung, Frankfurt a. M. 2000.

of ideological critique seriously and hold on to their demand to give a voice to all the actors implicated in the political process, then the time has come to focus on judicial actors and their professional activities, for instance, British and Indian lawyers, judges, judicial agents of the Indian civil service, and Indian barristers, of course.[49] As Frederick Cooper deliberated: "[I]f we wish to study power from 'below' [or from in-between], can we afford to miss the importance of making claims for resources, rights, or access on an empire on the basis of belonging – a claim that rulers of empire needed to take seriously?"[50]

3. Indian Barristers: On cultural brokers, hybrid regimes, and in-between moments

The first generation of Indian barristers entered the High Court of Calcutta in the late 1860s. Between 1868 and 1878, twenty-four Indian barristers were called to the Indian bar in Calcutta, a kind of vanguard of an expanding judicial profession in India.[51] In the last quarter of the 19th century alone, 424 Indian candidates left the most "cosmopolitan" of the four London Inns of Court, namely Middle Temple. Manmohan Ghose, virtually the first Indian barrister to practice in Calcutta and a member of Lincoln's Inn, belonged to a group of six Indian lawyers who became barristers, the others being Pherozeshah Mehta (Lincoln's Inn), Badruddin Tyabji (Middle Temple), W.C. Bonnerjee (Middle Temple), Lalmohan Ghose, and Anandamohan Bose, who together would form the nucleus of the Indian National Congress.[52] In London, they had studied together with Surendranath Banerjea und Romeshchandra Dutt to pass their barrister exams or to receive admission to the Indian Civil Service and had gotten into contact with Dadabhai Naoroji and his efforts to organise an All-India Association.

Indian legal advisers had been present in the colonial law courts since 1793, that is, Muslim or Hindu legal counsels (*Maulvis* or *Pandits*) who had to provide their legal opinion in cases of colliding juridical norms.[53] However, lacking so far were judicial actors who were entitled to apply English common law in the Indian courtroom, to plead and prosecute cases in the High Courts, or to deliver judgements as representatives of the Crown and contribute to the development of case law. Neither had they been in a position to

49 R. O'Hanlon, Recovering the Subject. Subaltern Studies and Histories of Resistance in Colonial South Asia, in: Modern Asian Studies, 22 (1988) 1, 189-224.

50 F. Cooper, Introduction, Colonial Questions, Historical Trajectories, in: id., Colonialism in Question: Theory, Knowledge, History, Berkeley 2005, 3-32, 30.

51 J. McLane, Indian Nationalism and the Early Indian Congress, Princeton 1964, 52-54; B.B. Misra, The Indian Middle Classes, Oxford 1961, 316; A. Seal, The Emergence of Indian Nationalism. Competition and Collaboration in the later Nineteenth Century, Cambridge 1986, 123-130.

52 M. Sarkar, Justice in a Gothic Edifice (29).

53 L.I. Rudolph, S. Rudolph, Barristers and Brahmans, 41sq. (29); M. Galanter, The Study of the Indian Legal Profession, in: Law & Society-Review, 3 (1968/69) 2/3: Special issue devoted to lawyers in developing societies with particular reference to India, 201-218.

advise the Governor-General in the Executive's Law Council, nor did they participate in the Law Commissions established to codify applicable law in India. This scope of functions was new to barristers, who earlier had to defend their contested discursive positions.[54] The legal system of the "rule of law" was to be perceived not only as a "body of rules" but also as a "body of men".[55] Who were these barristers, and how did they act and interact with society? "What is the legal system they staff, support and produce?"[56] To answer these questions, let us follow the traces of Manmohan Ghose, the very first practising Indian barrister.[57]

3.1 Barristers and their public commitment

Manmohan Ghose (1844–1896), son of a Subordinate Judge, member of a Kayastha family of Bikrampur (Dacca), and friend of the eminent reformer Rammohan Roy, was educated at Lincoln's Inn. He was called to the bar in 1866 and joined the High Court of Calcutta as an advocate in 1867.[58] He was the founder of the fortnightly *Indian Mirror* (1861), committed to the Indian National Congress, and supported Bethune College, the first women's college in India, as well[59]; this is why he also took part in the Age of Consent Controversy in 1891.[60] In various publications, he fought for reforms of the Indian Civil Service (INC) and a competitive admission procedure equally open to Native candidates.[61] In the same way, he argued for the separation of (executive and judicial) powers at the district level. He also entered the debate on the Ilbert Bill, as he supported Courtney Ilbert's attempt to confer jurisdiction on Indian judges to try Europeans in criminal cases at the district level.[62] As a delegate of the Indian Association, he travelled to Great Britain several times (1887, 1890, 1895) on the occasion of parliamentary elections to engage in lobbying activities.[63]

54 Quotation: M. Sarkar, Justice in a Gothic Edifice, 48 (29).

55 See M. Galanter, Indian Legal Profession, 202 (53).

56 Ibid.

57 Cf. D. Lambert, Reflection of the Concept of Imperial Biographies, in: Geschichte und Gesellschaft, 40 (2014), 22-41, 30sq.

58 See Inner Temple Admission Data Base.

59 "The Effects of English Education upon a Bengalee Society", 29 April 1869, printed in Hindoo Patriot 17 May 1869. In 1873, nominated as Member of the Committee of the Bethune College: A Short Life of Manmohan Ghose, Barrister-at-Law, Calcutta 1896.

60 An amendment to the Indian Penal Code sought to raise the age of consent for sexual intercourse for married and unmarried girls alike from 10 to 12 years. Introduced as a bill in the Governor's Legislative Council in 1891, it was hotly debated for interference with an orthodox Hindu code. M. Sinha, Colonial Masculinity: The "Manly Englishman" and the "Effeminate Bengali" in the Late Nineteenth Century, Manchester 1995, 163sq.

61 M. Ghose, The Open Competition for the Civil Service of India, by MG: of the Calcutta University and Lincoln's Inn, London 1866; The Union of Judicial and Executive Functions in the Magistrates of British India outside the Presidency Towns. A Collection of Opinions of Eminent Executive and Judicial Authorities from 1793 to 1883, Calcutta 1896.

62 M. Ghose, Necessity of Maintaining the Independence of the Judiciary in India, in: The Imperial and Asiatic Quarterly Review, and Oriental and Colonial Record, 31-40, answered by Sir Charles A. Elliott, The Separation of Judicial from Executive Power in India, in: ibid., Oct. 1896, 233-253; A Short Life of Manmohan Ghose, 24 (59).

63 M. Cumpston, Some Early Indian Nationalists and Their Allies in the British Parliament, 1851–1906, in: English Historical Review, 76 (1961), 279-297, 291.

In her path-breaking study "India in the Shadows of Empire" (2010), which has influenced my own approach to the topic considerably, Mithi Mukherjee has recently underlined the importance of lawyers for the formation of Indian politics. Mukherjee considers lawyers virtually as "enunciative personae" of the political in India.[64] She argues that the idea of politics dominant in the Indian National Congress of trying to gain grounds and possibilities for political participation was largely determined by the logic and procedures of the law; even political petitions in the INC were submitted in the style of courtroom pleadings. If the language of the law created and legitimised the colonial state, it was also in the language of the law that Indian lawyers articulated demands for political participation. Referring to an analogy between the legal and the governmental systems, a delegate of the Second Indian National Congress in 1886 pointed out: "In every case before a court of justice both sides are heard and each side has the opportunity of proving to the judge the justice of his cause. Here it is a court of injustice. Government has all its own way, and we have no one to plead for us and to controvert the arbitrary claims of the government."[65] In 1906, Madan Mohan Malaviya, another eminent member of the INC, argued for elected Indian representatives to be nominated to the Indian Legislative Council as part of the executive: "The sole privilege of selecting one's own counsel is not denied even to the most abandoned of criminals under British rule. Why then should it be denied to the loyal and intelligent subjects of her Gracious Majesty?"[66]

Lawyers sought to redefine the relation between government and the people by applying the judicial frame to political practice. It was in the language of the law that they articulated critiques, demands for participation, and political visions of the political order. And in the same way that Indian barristers, as elected representatives in executive bodies, now took care to ensure compliance with the "rule of law" in the Anglo-Indian courtroom, they would be vigilant about the Executive's compliance with the "rule of law" by means of public proceedings, in full respect for the rules of procedure and the commitment to binding precedents, in order to put an end to what was perceived as arbitrary rule exercised by the colonial government.[67]

Obviously, barristers reasoned in terms of the "rule of law" in the political sphere, but how did they deal with politics in their judicial practice? Of particular interest is understanding "the character of the legal imagination of those who consider themselves, and are considered by others, to be the spokespersons for the rule of law […]. What is the legal imagination of those who are deeply committed in their professional and personal lives to the rule of law?"[68] It seems necessary to focus on the courtroom, the legal practice and lines of professional reasoning, and the way the barristers handled English law; after all, in their capacity as barristers, they were responsible for implementing the "rule of

64 M. Mukherjee, Shadows of Empire, xxv (5).
65 Report of the Second Indian National Congress held in Calcutta, 1886, quoted by M. Mukherjee, Shadows of Empire, 123 (5).
66 Malaviya, Speeches and Writings of Pandit Madan Mohan Malaviya, Madras s. d., 3.
67 M. Mukherjee, Shadows of Empire, 109 (5); J. McLane, Indian Nationalism and the Early Congress, 359 (51).
68 P.W. Khan, Cultural Study of Law, 164 (36).

law" and its promises and procedures, as well as for securing rational discourse within the courtroom. In fact, they had to find professional solutions in accordance with law and justice.

3.2 Barristers and their cases

The cases that barristers like Manmohan Ghose worked on in their professional lives can be subdivided roughly into two categories: firstly in cases of legal pluralism referring to personal laws and the social, cultural, and religious status of claimant and defendant, and secondly in cases dealing with the legal centralism of the colonial State.[69]

Cases of legal pluralism dealt with "the presence in a social field of more than one legal order",[70] mainly in civil law cases concerning family law (marriage, divorce, inheritance, religious endowments). In contrast, Manmohan Ghose worked mainly as a criminal lawyer.[71] To those reported criminal law cases referring to questions of legal pluralism on which Ghose worked belongs the Gonesh Sundari case. Here Ghose acted as legal representative of the influential Hindu reform organisation Brahmo Samaj in order to return a young Hindu woman, who had converted to Christianity and chosen to live on the compounds of the protestant Church Missionary Society in Calcutta, into the custody of her family.[72]

What became most evident in a case like this was the fact that under the conditions of legal pluralism, the exclusiveness of the "rule of law" diminished, while the need for justification on the contrary grew.[73] In the imperial courtroom as a forum of justification, English common law encountered already existing law systems like, for instance, Hindu or Muslim law, with their own style of reasoning. Opposing claims of natural law and positive law, personal law and customary law, universalism and particularism were articulated in different "languages of claim-making and counter-claim making"[74] and led to various legal repertoires being mobilised against each other. Barristers had to deal with these diverging lines of reasoning and strategies of justification. In fact, (legal) reasoning could be interpreted as a translation between these different systems of recognition.[75] From a conceptual point of view, these cases of legal pluralism open up new perspectives

69 J. Griffith, What is Legal Pluralism? in: Journal of Legal Pluralism, 24 (1986), 1-56; M. Galanter, Justice in Many Rooms, in: The Journal of Legal Pluralism and Unofficial Law, 13 (1981) 19, 1-47; F. von Benda-Beckmann, Who's Afraid of Legal Pluralism? in: Journal of Legal Pluralism, 47 (2002), 37-82; P. Berman, The New Legal Pluralism, in: Annual Review of Law and Social Science, 5 (2002), 225-242.

70 Recently, Paul D. Halliday has commented on the classics of the debate and legal pluralism's turn to legal pluralities in the hands of historians: P. D. Halliday, Laws' Histories: Pluralisms, Pluralities, Diversity, in: R.J. Ross, L. Benton (eds.), Legal Pluralism and Empires, 1500–1850, New York 2013, 261-277.

71 A Short Life of Manmohan Ghose, 21sq. (59).

72 Bengal Law Reports, Vol. V, p. 418: The Queen versus Vaughn and another. In the matter of S.M. Ganesh Sundari Debi alias Mani (11 May 1870). Cf. A Short Life of Manomohan Ghose, 16 (59).

73 F. von Benda-Beckmann, Who's Afraid of Legal pluralism?, 69 (69).

74 F. Cooper, Introduction, Colonial Questions, Historical Trajectories, 30 (50).

75 For the translational turn, see: D. Bachmann-Medick, Cultural Turns in den Kulturwissenschaften, Reinbek bei Hamburg 2010; M. Fuchs, Kampf um Differenz (40).

on "patterns of competition, negotiation, [and] interaction"[76] between different legal orders and legal actors, including state/non-state actors and interest groups. That is why the transfer of English law to India usually serves as a classic example of the collision of norms and "legal pluralism".

An equally important position in Manmohan Ghose's list of cases and professional career seem to represent "state trials" dealing with "offences against the state, government and its institutions", that is, political trials, which "aimed directly at defending the state's integrity and security"".[77] In these trials, innumerable battles over political rights such as personal freedom, freedom of expression, freedom of assembly, and the safeguard of individual liberty against arbitrary state intervention were fought in two fora of justification: firstly, in the arena of the courtroom of the Raj, and secondly, in the public sphere of the British Empire. Thus, state trials were "star trials" and oftentimes proved to be downright "Scandals of Empire"[78]: great discursive events on the legal validity and legitimacy of law, and as such "interpretative moments of society".[79]

State trials in India referred to a long tradition of English state trials and the battle against the despotic sovereign, above all during the Glorious Revolution. Even in the 19th century they were not completely out of fashion, for the British working class and reform movement of the first half of the 19th century as well as Irish nationalists were still to be dealt with in state trials.

The most prominent charge in Indian state trials was "Waging War against the Queen", considered as high treason, the "most heinous offence known in the English law", and defined as "armed resistance, justified on [political] principles, to the established law of the land",[80] the second being seditious libel as "usually preceding high treason". In English law, high treason could mean, firstly, "encompassing or imagining the sovereign's death", secondly, "levying war against the sovereign" (including revolts, rebellions, riots, and sedition "with a general public and national dimension"), and, last but not least, "being adherent to the sovereign's enemies in times of war, including the strategic support of the enemy".[81]

76 J. Griffith, What is Legal Pluralism?, 39 (69).

77 K. Smith, Securing the State, 334 (4); A. Krischer, Das Verfahren als Rollenspiel? Englische Hochverratsprozesse im 17. und 18. Jahrhundert, in: Zeitschrift für Historische Forschung 44 (2010), 211-251.

78 Cf. N. Dirks, Scandal of Empire. India and the Creation of Imperial Britain, Cambridge, Mass. 2006; F. Bösch, Öffentliche Geheimnisse: Skandale, Politik und Medien in Deutschland und Großbritannien 1880–1914, München 2009, 5.

79 R. Christenson, Political Trials. Gordian Knots in the Law, New Brunswick 1991; J.R. Phifer, Law, Politics and Violence: The Treason Trial Act of 1696, in: Albion: A Quarterly Journal Concerned with British Studies, 12 (1980), 235-256, 238.

80 K. Smith, Securing the State, 340 (4).

81 J.H. Baker, An Introduction to English Legal History, Oxford 2000, 599.

In his first case as a barrister, Manmohan Ghose participated in one of the most famous of these state and "star trials",[82] namely, "The Great Wahabi trial".[83] At the time, Ghose was an assistant to two of the most pugnacious lawyers of the Empire, Thomas Chisholm Anstey and Thomas Dunbar Ingram. Anstey was a converted Roman Catholic barrister of Middle Temple, who – now practicing at the Bombay Bar – had been Attorney-General of Hong Kong and lately been sacked for his controversy with the local Governor; he was also still a persistent contributor to debates on the validity of colonial law.[84] Ingram, an Irish barrister (Lincoln's Inn), was at the time professor of jurisprudence in Hindu and Islamic law at Presidency College, Calcutta.[85]

Between 1864 and 1872, several processes concerning "Waging War against the Queen" were led in Patna against the leaders of the so-called "Wahabi" movement, which had led – after having declared "holy war" – several military campaigns against the British Army, partly during the Indian Rebellion.[86] The movement had tended to establish a parallel sovereign government and disposed of an elaborated organisational structure, including ministerial posts, a system of tax collection, itinerant preachers, and supporters in the British Army. The British military campaign against the Wahabi movement had caused 847 British casualties in 1863.[87] Since 1865, several British inquiries had led to severe charges of high treason, in which the leaders of the Wahabi movement had been sentenced to death, life-long imprisonment, or deportation.[88]

In 1869, in the course of further investigations, Ameer Khan, a 75-year-old Muslim merchant, and the alleged banker of the Wahabi movement, had been arrested in his house in Calcutta and incarcerated outside the jurisdiction of the High Court in a provincial jail. Some days later he had been transferred to a jail in Calcutta, without any legal assistance and without being informed about what the accusation was. At the beginning of August 1870, the presiding judge of the Calcutta High Court, Justice Norman, received Ameer Khan's petition of habeas corpus, which was addressed to the Super Intendant of the Alipor Jail, "commanding him to bring before the Court the body of Ameer Khan."[89]

82 The Great Wahabee Case, being a Full Report of the Proceedings in the Matter of Ameer Khan and Hashmadad Khan before the Honourable Mr. Justice Norman, in the High Court of Calcutta. Calcutta 1870.

83 The case is, for instance, in the recent compilation by A. G. Noorani, Indian Political Trials, 1775–1947, Oxford 2008, 93-114.

84 S. Lee, "Anstey, Thomas Chisholm (1816–1873)", rev. K.D. Reynolds, Oxford Dictionary of National Biography, Oxford University Press, 2004 [http://www.oxforddnb.com/view/article/581, accessed 4 April 2014].

85 D.J. O'Donoghue, "Ingram, Thomas Dunbar (1826–1901)", rev. M.-L. Legg, Oxford Dictionary of National Biography, Oxford University Press, 2004 [http://www.oxforddnb.com/view/article/34105, accessed 4 April 2014].

86 B. Metcalf, T.R. Metcalf, A Concise History of Modern India, Cambridge 2006^2, 128sq. See most recently: J. Stephens, The Phantom Wahhabi: Liberalism and the Muslim Fanatic in mid-Victorian India, in: Modern Asian Studies, 47 (2013) 1, 22-52, who stresses the British politics in suppressing an "imagined Wahhabi conspiracy, which it portrayed as a profound threat to imperial security".

87 Annual Report of the Administration of the British Presidency 1865-66 (IOR, V/10/25), 1868-69 (IOR, V/10/32), 1870-71 (IOR, V/10/37), 1871-72 (IOR, V/10/43).

88 The Record of the Bengal Government, No. XLII, Papers Connected with the Trial of Moulvie Ahmedooollah of Patna, and Others, for Conspiracy and Treason, Calcutta 1868, IOR, V/23/102/42.

89 B.L.R., Vol. VI., p. 392, In the Matter of Ameer Khan (Supplemental to the Weekly Reporter, II, 609-640 (writ of habeas corpus) + 6 B.L.R, VI, 456 (bail).

During this first year of incarceration, Ameer Khan had repeatedly tried to submit a petition to the General Governor and the Vice-Governor of Bengal in order to be informed about the reasons of his imprisonment. All he received was the answer that he had been arrested according to the Bengal Regulation Act III of 1818, which enabled the Governor to arrest suspects in case of threat to public safety without the obligation to give reasons on the basis of a regulation updated in 1858.[90]

The trial against one of the bankers of the movement, a merchant from Calcutta, would go down in the history of famous Indian trials, not least because of the fundamental constitutional questions on the validity of English legal principles in India, prerogatives, and the limits of colonial rule that were raised during the trial. In this case study, an Indian subject asserted his claim on habeas corpus and the "rule of law" in the Indian colony in the High Court of Calcutta. How did his legal representatives argue and appeal to the validity of the "rule of law"?

When, in August 1870, the High Court of Calcutta heard the case, the High Court and the public of the Empire debated intensely whether Ameer Khan's arrest was legal.[91] In contemporary constitutional literature, habeas corpus was considered a key element of the "rule of law" to the safeguarding of personal liberty. Habeas corpus[92] has been praised as the most important legal instrument safeguarding individual freedom against arbitrary state action in the metropolis. In his "Introduction to the Study of the Law of the Constitution" (1885), Albert V. Dicey defined habeas corpus in the chapter on the "rule of law" as representing the adequate legal means to enforce the "right to personal liberty", that is, "a person's right not to be subjected to imprisonment, arrest, or physical coercion in any manner that does not admit of legal justification".[93] Habeas corpus was a venerated principle of the "rule of law", considered the "glory of the English law" and "worth a hundred constitutional articles guaranteeing individual liberty".[94]

The Court had to sort out whether this safeguard against arbitrary imprisonment was valid in India. The case raised fundamental questions: were Indian subjects entitled to the protection of habeas corpus? Did the Magna Charta also apply to India? On the one hand, there was the obligation of the Sovereign to protect its subjects – in short, the Sovereign's obligation to protect. On the other hand, the subjects had a duty of allegiance vis-à-vis their Sovereign. In what way were these two sides to the medal interrelated: the Sovereign's obligation to protect and the subject's duty of allegiance? Was the Governor authorised to suspend political liberties such as habeas corpus if the public order was in danger? In other words, could habeas corpus be suspended in a state of emergency? Could a prisoner lawfully be transported to a territory outside the jurisdiction of the High Court where the protection of a writ of habeas corpus did not apply? These con-

90 34 Geo. III c.54.

91 Bengal Law Reports, VI, 392, In the Matter of Ameer Khan.

92 J. Farbey, R. Sharpe, S. Atrill, The Law of Habeas Corpus, Oxford 2011[3]; P.D. Halliday, Habeas Corpus: From England to Empire, Harvard 2010.

93 A.V. Dicey, Constitution, 194 (19).

94 Ibid., 187 (19).

siderations are why Ameer Khan's habeas corpus petition gave rise to such detailed comments.

After nine days of hearing, 160 pages of verbatim minutes testifying of heated debates and about forty pages documenting the opinion of the court filled the *Bengal Law Reports*. It represented nothing less than a "Best of" – indeed, a most impressive panorama of British constitutional history. It is amazing how arguments of the English constitutional debates of the 16th and 17th centuries concerning "reciprocity", "allegiance", "trust", the "rule of law", fundamental rights, political liberties, and the democratic basis of political authority and legitimacy, which had once unsettled the metropolis, now resounded in the colonial context.[95] They recall the English struggle against the power of an absolute sovereign and hint at the potentially despotic character inherent to the English constitution. The Bill of Rights (1689) and the Petition of Right (1628) could be used in a tactical way *either* to plead for political liberties of the individual *or* to legitimise the use of arbitrary power by the king in cases of state of emergency. Quotations of famous English political trials now resounded in the colonial courtroom and could be employed *both* as a point of reference to invoke the "traditional", "English liberties", "justice and fairness" under the "rule of law" *and* to legitimise cultural difference and the use of force.

After a series of appeals, the Privy Council in London as the Highest Court of Appeal reviewed the case and decided to set it aside for further consideration. In fact, the case found a more pragmatic solution than principled decision: while a decision on the fundamental question of the validity of the Magna Carta and all common law principles in India was studiously avoided, Ameer Khan was released in January 1871 – just to be arrested again, this time with correct legal warrants.[96] Evidently, the form of colonial governance, the colonies' share in the social contract, and the relation of colonial rule and the "rule of law" were subject to discussion. It was also in the courtroom arena of British India that debates about prerogatives and the limitations of colonial governance arose – topics of paramount importance for the constitution of the Empire.[97]

In the "Case of the Manipur Princes" trialled for high treason by a Special Court in 1891, that is, almost twenty years later in one of the last trials of his long career, Manmohan Ghose referred to "traditional English liberties" to outline various violations of the "rule of law" during the process. As the British Government had denied Ghose's application for appeal, he had only the opportunity to submit a written statement, widely published in India. [98] In this "Memorandum of Arguments" entitled "Did the Manipur Princes Obtain a Fair Trial?", Ghose criticised the trial as a "mockery of justice". Provided the Princes owed allegiance to the British Crown at all – given the semi-sovereign status ("small sovereignty") of the Indian Princely States in international law, which seemed highly disputable to contemporaries[99] – according to English common law, a charge of

95 J.M. Kelly, A Short History of Western Legal Theory, Oxford 1992, 207.

96 See J. Stephens, Phantom Wahabi, in: Modern Asian Studies, 47 (2013) 1, 36.

97 N. Hussain, Jurisprudence of Emergency, 75, 79, 93sq. (6).

98 M. Ghose, Did the Manipur Princes Obtain a Fair Trial? (1).

99 W. Lee-Warner, The Protected Princes of India, London 1894; The Collected Papers of John Westlake on Public

high treason would have had to be judged by a High Court, not by a special tribunal. "The Manipur Princes were not, and could not have been tried under the Indian Penal Code or any other British law", Ghose argued. "Nor was the Court which tried them constituted under any legal authority derivable from any act of Parliament, or any legislative enactment of the Governor-General in Council. I must, therefore, take it that in creating this special tribunal at Manipur, the Government of India was simply exercising the right of a conquering Sovereign Power […]".[100] Ghose decried a procedure repugnant to "civilised methods and principles". During their process before the Special Court, the Manipur Princes were deprived of the right to be defended by Counsel, an advantage "which is enjoyed […] by every subject of Her Majesty throughout her dominions" – that is, "that no man should be condemned unheard has always been of the cardinal principles of British justice".[101] Thus, "one of the cardinal principles of British justice" was violated. Even though Ghose accepted the possibility of providing a written statement, he nevertheless underlined, on insisting on the power of face-to-face interaction, "the vast difference between arguing a case viva voce and submitting a written defence"[102]: "In the one case any objection that may be raised to a particular line of argument may be met and answered; any proposition, whether of fact or of law, the correctness of which may at first be doubted by the Court, may be supported and established by further discussion; and any points which might be erroneously weighing against the accused in the mind of the judges, but which could not have been anticipated by counsel, might be satisfactorily explained away."[103] Only this interaction would give the opportunity to change preconceived minds: "after full discussion, and when all the apparent objections have been satisfactorily answered, those views are admitted to be just and sound".[104]

Ghose expected that the case of the appellants should "receive the same calm and judicial consideration which a properly constituted judicial tribunal in England would have accorded to it".[105] Yet, with regard to the manner in which the trial had been conducted so far, he feared that these objects would probably not be attained. The Special Court was composed of two military officers and one political officer without any legal training – "and, judging from the methods of procedure adopted during the trials, it seems clear that the Court, as a whole, was far from being familiar with the procedure followed during criminal trials in British India or in any part of Her Majesty's dominions".[106] In addition, each of the accused persons had been subjected to an "inquisitorial examination", "a procedure utterly repugnant to the humane traditions of British justice, and which, had

International law, edited by L. Oppenheim, Cambridge 1914, Ch. X: The Empire of India. L. Benton, From International Law to Imperial Constitutions (8).

100 Ibid., 3.
101 Ibid.
102 Ibid.
103 Ibid.
104 Ibid, 2.
105 Ibid., 4.
106 Ibid., 4.

it been adopted by a judge or magistrate in British India, would have called forth severe censure from the High Court to which he might be subject".[107]

Neither "fairness" nor a public process following "civilised principles and methods" – in short, the "rule of law" – were guaranteed. In the end, Ghose expressed his hope "[…] that the Government of India will hold the scales of justice evenly; and its ultimate decision in the case of this unhappy Prince will be such as to proclaim to the Eastern World, that the British Government, although powerful enough to crush all its enemies, will not […] follow Asiatic examples, and wreak indiscriminate vengeance; but that, no matter how grave the crisis, and how strongly national passions may have been aroused, British justice will always assert itself, and take care to distinguish the innocent from the guilty".[108]

Ghose insisted on the rather literal interpretation of the Indian Penal Code and application of English legal principles of the "rule of law" – instead of paying too much attention to the local "necessities" and "circumstances" the British liked to refer to "with respect to local circumstances". If Ghose wanted to strengthen the claim of universalism of the English "rule of law" and its validity, he also cared to set bounds to the seemingly "transcultural" British argumentation that "Indian circumstances" might be too particular for the "rule of law" to acquit itself of its promises in the British Raj. And if the validity of the "rule of law" – and its chances of ever being attained in India – was threatened by so-called "Oriental despotism", Ghose seems to argue, with reference to the ubiquitous semantics of so-called Oriental despotism, that it was less to be expected from "Oriental" than from "despotism", in other words, on the part of colonial cultures of violence. The rule of law had to insist on drawing boundaries of interpretation: If it yielded to "necessities and circumstances", both the rule of law and its legal actors – that is, Native Indian and British barristers, judges, and vakils alike – would lose their supremacy to the predominance of the executive and to the logic of the state-of-emergency exception. "No one exists in one context [of debate, contestation, and interaction] only."

In fact, cases of high treason, like Ameer Khan's Great Wahabi Trial and the trial of the Manipur Princes, soon filled veritable compilations of "great Indian political trials".[109] They served as precedents and repertoires of argumentation and critiques of colonial rule. To the public in British India, they soon became a household word. They proved to be the basis of the self-empowerment of the courts against the executive, a process steadily fostered by the work of Native Indian barristers.

107 Ibid., 5.

108 Ibid., 58.

109 See e.g. S.R. Chowdhury, Ten Celebrated Cases Tried by the Calcutta High Court, in: The High Court at Calcutta. Centenary Souvenir, 1862–1962, Calcutta 1962, 187-203; A.G. Noorani, Trials (83).

4. Conclusion

This short glance at the rule of law in British India in the 19th century might have shown that debates on constitutional issues relevant to metropolis and colony, to the English constitution and the constitution of Empire, are best described as entangled histories – a perspective useful even for the "rule of law" in the 20th century.

After 1900, the tension between violent conflicts over the form of state/statehood, "good government" and reform movements would intensify. To name just a few examples: in the northwestern parts of India, the combat against the perceived threat of "religious fundamentalism" by the Wahabis would be replaced by ideological campaigns against communism. Mass protests against the Rowlatt Act of 1919 suspending habeas corpus permanently, even in times of peace after the state of emergency declared in the First World War had ended, led to the Amritsar Massacre, at which soldiers opened fire on a peaceful assembly. Gandhi, a barrister (Inner Temple), would intensify his passive resistance movement against colonial rule and search for effective alternatives of legitimate opposition. The way in which the British government would deal with political opposition, mass protests, and revolts and in which they would handle sedition and high treason in India was closely monitored by trade union movements in Britain in the 1920s. For metropolis and colony alike, it was crucial if a form of "dissent management" prevailed, if "sub-cultures of assent" and "sub-cultures of dissent" were acknowledged as contributors to a common third space of debate on the constitutional politics of the Empire. [110]

Without any doubt, the "rule of law" was one of the most contested concepts of political theory and judicial practice. However, in the end, it was much more than just "political rhetoric". The rule of law was revealed to be part and parcel of the process of state formation. At the intersection of British and Indian history, the concept of the "rule of law" was of paramount importance for the constitution of the British Empire and the formation of the modern Indian democracy. Moreover, it represented decisive moments in which both the constitution of the Empire and the imaginary institution of India were renegotiated. Therefore, the "rule of law" is of paramount interest both to Empire history and to the history of modern India in the sense of a "shared history and entangled modernity".

What, then, does transculturality mean? I have assumed, in my case study, that transculturality might best be defined as this "in-between moment" of self-reflexivity: as a moment in which the rule of law was put to the test.

110 M. Freeden, A. Vincent, Comparative Political Thought (38); M. Freeden, Liberalism Divided: A Study in British Political Thought, 1914–1939, Oxford 1986.