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## Eternal judiciary over ever-changing politics

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renzierte und gedankenreiche Buch von Bigot wesentlich beiträgt, kann, wie man sieht, die retrospektive Aufklärung derjenigen aktuellen Fragen voranbringen, die bei der Homogenisierung des

europäischen Rechtsschutzes gegen die Administrationen im »Mehrebenensystem« auftreten. ■

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## Eternal Judiciary over Ever-changing Politics\*

The title might appear provocative, a contradiction in terms even. However, Abhinav Chandrachud's monograph on the history of the Bombay High Court during the Raj offers a much nuanced view on the judicial history of colonial India, and, to an extent, on the British Empire as a whole. His starting point is but a simple interrogation, albeit seldom treated in the legal historical literature: »why did the Bombay High Court transition so seamlessly from colonialism to independence?« (299). Even more so, why did British and Indian colonial judges not only retained their positions post-1947, but moreover were promoted whilst unabashedly seeking to "maintain the high traditions that the British had left behind" (2)?

Pursuing the reflexions of Marc Galanter on the unsuccessful attempts to replace the British legal frame post-independence,<sup>1</sup> Abhinav Chandrachud focuses on the institutional reasons for this failure. Through the biography of the Bombay High Court – its judges, barristers, solicitors, as well as a random, yet exhaustive, sample of five hundred cases – the author argues that unlike other branches of colonial administration, the Bombay high judiciary was largely perceived as legitimate by the Indian population. Three main reasons contributed to this otherwise paradoxical situation. First, the decolonisation of the Court personnel was all but already achieved when midnight struck on 15<sup>th</sup> August 1947, with a majority of Indian over British judges, a slow transition which started in the 1880s. Secondly, the racial discrimination that

other branches of government sustained was almost (although not entirely) absent within the daily functioning of the Court, where seniority held sway both in the elevation to the bench and in choosing who would write judgments. Finally, despite a structural link to the executive in the fact that judges – unlike in England – were not formally independent but served at the »pleasure« of the Crown, the Bombay High Court showed a »cultural« independence both in its composition, where Indian judges gradually coming from elite legal familial dynasties were less prone to political activism, and in its decisions which – with the notable exceptions of high profile political cases – show a staggeringly low conviction rate of 50 per cent.

Drawing from its intimate knowledge of the Bombay High Court, of which he is now an advocate, Abhinav Chandrachud makes use of a wide array of archival sources and methods, allying a critical reading of biographies and private papers in light of their sometimes hagiographical tendencies, to a quantitative analysis of cases and of prosopography to explicit the cordial relations between Indian and British judges both in and outside the Court. Divided into six rather formal thematic chapters – a perhaps unfortunate remnant of the doctoral dissertation from which this work was adapted – *An Independent, Colonial Judiciary* thus presents a far-reaching study able to cross the disciplinary boundaries between law and history.

\* ABHINAV CHANDRACHUD, *An Independent, Colonial Judiciary: A History of the Bombay High Court during the British Raj, 1862–1947*, New Delhi: Oxford University Press 2015, 345 p., ISBN 978-0-19-945330-6

1 MARC GALANTER (1972), *The Aborted Restoration of »Indigenous« Law in India*, in: *Comparative Studies in Society and History* 14, 53–70.

Indeed, although anchored in the ›Law and Society‹ tradition, the author nevertheless keeps his distance to a scholarly movement that more often than not links law to issues of identity. Within this tradition, legal discourse and practice are increasingly being relegated to merely one factor among many others within colonial history and its postcolonial aftermath, notably through the study of but a few high impact cases as mere illustrations of a wider context.

Not shying away from legal analysis, notably in regard to the provisions which theoretically undermined the High Court's independence vis-à-vis the executive, the author nonetheless counterbalances this ›black letter‹ approach with social and anthropological data in order to explain the skilful manoeuvring it took to avoid the full implementation of these norms. Moreover, the exploration of a larger sample of cases helps cast a different light within the inner workings of the Court. The overall approach might dissatisfy the historian and the lawyer alike. The former might point out the specificity of Bombay within the Indian colonial framework, the scarce references to vernacular sources and broader political background within which the Court operated among other ›factors‹, whilst the latter will undoubtedly shriek at the very concept of ›cultural independence‹ applied to a legal institution. They would both be wrong.

*An Independent, Colonial Judiciary* is in fact an essay on Indian legal culture: how it originated, progressively perceived itself as disconnected from the historically bounded colonial State and, the greatest feat of all, convinced others it had done so. The actual veracity of this situation applied to the Indian political and social contexts is almost beside the point, although the author makes a convincing case for it. In fact, the most interesting aspect of this study lies in the reflexivity of its object: how judges and the legal profession at large have come to consider themselves beyond politics; products of, yet detached from, the social and economic

settings of their time; how they gradually created a vacuum in order to perceive themselves as ahistorical and thus survive the changes happening around them.

It is through this reflexive aspect that the epistemological approach of Abhinav Chandrachud becomes purposeful and indeed necessary. For only by focusing narrowly on a specific legal institution and shifting other ›factors‹ to the background can one accurately understand and make sense of the Court's inner workings and atmosphere, so different from the rest of colonial administration. Similarly, the analysis of the colonial legal framework greatly benefits from a close study of the actors in charge of its implementation – both in terms of how it affects others and, perhaps more importantly, how it affects themselves.

As such, *An Independent, Colonial Judiciary* is much more than another case study on how the British ›rule of law‹ progressively escaped its initial inceptors. It also provides the genealogy upon which the contemporary Indian high judiciary has come to claim its independence from the Indian political and, to an extent, democratic spheres. In this regard, this study must be read in conjunction with the author's previous work on the Indian judiciary and its insulation,<sup>2</sup> of which the recent constitutional debates around judicial appointments are but the latest avatar.

Abhinav Chandrachud's monograph thus not only renews part of the ›Law and Society‹ scholarship in re-focusing it on legal issues, but also paves the way for further studies on the genealogy of Indian legal institutions. Indeed, to the author's own admission, his findings would need to be corroborated through the institutional biographies of other colonial High Courts and tribunals in order to be fully generalizable. Accordingly, *An Independent, Colonial Judiciary* is a stepping stone, albeit an important one. ■

2 ABHINAV CHANDRACHUD (2010), The Insulation of India's Constitutional Judiciary, in: *Economic and Political Weekly* 45, 38–42.