

## Bingham Centre Events

### Harish Salve SA on Judicial Activism in India

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On 28<sup>th</sup> November 2013, Harish Salve SA spoke on '**Judicial Activism and the Rule of Law: Lessons from India**'. This was a public lecture held under the joint auspices of the Bingham Centre and ALBA, the Constitutional and Administrative Law Bar Association. Mr Salve drew upon his experience as a senior advocate appearing before the Supreme Court of India, as well as his spell in Cabinet-level office as Solicitor-General in 1999-2002.

India's Supreme Court has handed down many notable decisions during its six decades of existence, some widely celebrated and others more controversial. Following its establishment in 1950, the Court was careful not to undermine the elected institutions of the new state and proceeded cautiously but firmly in its interpretation of basic rights, relying in part on a narrow view of 'due process' which US Supreme Court Justice Felix Frankfurter had urged the drafters of the Indian Constitution to adopt. The right to property proved particularly contentious in a time of land reform. During this era the Court also came to the conclusion that the Constitution possessed a 'basic structure', and decided that constitutional amendments would not be recognised if they threatened to destroy this. However, in 1976 the courts reached their lowest point when the recently declared Emergency brought laws that authorised detention without trial and judges were reluctant to grant *locus standi* even to the detainees themselves to challenge their detention. The rule of law had been an inspiration to young Indian lawyers in their opposition to the Emergency, Mr Salve said.

Following the lifting of the Emergency, the Supreme Court worked hard to regain lost ground. *Locus standi* was considerably widened to enable 'well-meaning citizens' to bring cases even if they were not directly affected, and for judges themselves to refer possible breaches of rights for investigation when they had first read about them in the newspapers. The narrow conception of 'due process' was replaced by one which enabled the courts to read the constitutional right to life together with the Directive Principles of the Constitution as standing for the right to live with dignity. This moved Upendra Baxi in 1985 to write that the Supreme Court had finally become 'the Supreme Court for Indians' rather than 'an arena of legal quibbling for men with long purses'.

Mr Salve explained how the judicial activism of the courts gained further momentum during the crisis of 1991-1992 when a coalition government seemed to look to the courts to resolve the stand-off over the Ayodhya mosque before it was destroyed. Since 1991 the courts have claimed even greater political space to require government action in areas where it is most needed by the poor and politically marginalised. The Supreme Court has continued to develop its case law in the areas of the right to health, to a clean environment, freedom of expression and liberty, among others. For example, in the city of Delhi, the courts decided that to reduce severe pollution both public transport and private taxis would have to run on



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liquefied natural gas rather than petroleum products. Remedies have become ever more ambitious, including orders to a state legislature to convene within a stipulated time and pass certain legislation, followed by an order that the proceedings of the state legislature be videotaped! The courts had also assumed responsibility for appointing judges, although this recently led to proposals being introduced in the Indian Parliament that would amend the Constitution to establish an external judicial appointments body.

Mr Salve argued that, overall, the contribution of the courts to Indian democracy has been tremendously positive. However, he sounded a cautionary note in respect of recent decisions, including a case in which judges set aside government telecommunications licenses that had been designed to make mobile phone access more affordable, and others in which they have initiated extremely wide-ranging criminal investigations such as the current inquiry into 'black money'. It is possible that in some of these cases the courts might find themselves out of their depth. By providing such a compelling narrative of the history of the Indian courts and their constitutional decisions to date, Mr Salve demonstrated the rule of law issues at stake and left his audience to wonder what the next chapter of that history would be.