First Report of the Justice Katju Commission to the BCCI

First Report of the Justice Katju Commission to the BCCI

1. By a resolution of the BCCI dated 2nd August 2016 a one man Commission headed by me was constituted to advise the BCCI about matters relating to the Supreme Court orders (of a two judge bench) in *BCCI vs. Cricket Association of Bihar*, Civil Appeal No. 4235 of 2014 & No.4236 of 2014 dated 22.1.2015 (reported as (2015) 3 SCC 251) and 18.7.2016, and interact with the Lodha Committee. Three learned counsels were also to assist me to furnish me with material that I desired for preparation of the report. Accordingly, Mr. Abhinav Mukerji, Advocate Supreme Court, Mr. Nithyaesh Nataraj and Mr. Vaibhav Rangarajan Venkatesh, Advocates, Madras High Court have provided me material that I required from time to time. Mrs. Neela Gokhale, Advocate, Supreme Court, Delhi was the Secretary of the Commission.

2. I thought it pointless to interact with the Lodha Committee in view of some fundamental issues I have raised in this report.

3. I am of the opinion that the judgment of the Supreme Court in *BCCI vs. Cricket Association of Bihar (supra)*, and the order dated 18.7.2016 are judgment and order per incuriam, as they have overlooked several earlier decisions of larger and coordinate benches of the Supreme Court which were binding on it.

4. By its order dated 18.7.2016 the Supreme Court has directed that most of the recommendations of the Lodha Committee in its report be implemented within 6 months.

5. I am of the opinion that this order is legislative in nature, and could not have been validly be passed by the Court, as it has been held in several decisions

of the Supreme Court that there is broad separation of powers in the Constitution, and it is not for one organ of the state to encroach into the domain of another. The Supreme Court could have no doubt forwarded the Lodha Committee recommendations to Parliament with their own recommendation that the Lodha Committee recommendations be enacted as law by Parliament, but to direct itself that the recommendations be implemented is clearly a legislative act not within the Court's domain.

6. I am repeatedly coming across cases where Judges are unjustifiably trying to perform executive or legislative functions. In my opinion this is clearly unconstitutional, and it is time now for the judiciary to learn self-restraint. In the name of judicial activism, Judges cannot cross their limits and try to take over functions which belong to another organ of the State.

7. Judges must exercise judicial restraint and must not encroach into the executive or legislative domain vide *Indian Drugs & Pharmaceuticals Ltd. vs. The Workman of Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC 408* and *S.C. Chandra and Ors. vs. State of Jharkhand and Ors. JT 2007 (10) 4 SC 272* (See concurring judgment of M. Katju, J.). Under our Constitution, the Legislature, Executive and Judiciary all have their own broad spheres of operation as they are three distinct organs of the State Government. It is against the constitutinal scheme for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be chaos.

8. As observed by the Supreme Court in *Divisional Manager, Aravalli Golf Course vs. Chander Haas (2008) 1 SCC 683*:

> "Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State, the

> legislature, the executive and the judiciary must have respect for the others and must not encroach into each other's domains."

The theory of separation of powers first propounded by the French thinker Montesquieu (in his book '*The Spirit of Laws*') broadly holds the field in India too. In chapter XI of his book, Montesquieu writes:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. "

9. Montesquieu's warning in the passage above quoted is particularly apt and timely for the Indian Judiciary today, since very often it is rightly criticized for `flagrant and unwarranted over-reach and encroachment into the domain of the other two organs of the state.

10. *In Tata Cellular vs. Union of India, AIR 1996 SC 11* (vide paragraph 113) a 3 Judge bench of the Supreme Court observed that the modern trend points to judicial restraint in administrative action. The same view has been taken in a large number of other decisions also, but it is unfortunate that many Courts are not following these decisions and are trying to perform legislative or executive functions. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the Judges preferences.

11. The Court must not embarrass the administrative or other authorities and must realize that these authorities have expertise in the field of administration while the Court does not. In the words of Chief Justice Neely, Chief Justice of the West Virginia State Supreme Court:

> "I have very few illusions about my own limitations as a judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting his own judgment for that of the administrator ".

12. *In Ram Jawaya vs. State of Punjab AIR 1955 SC 549* (vide paragraph 12), a Constitution Bench (5 Judge Bench) of the Supreme Court observed:

> "The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated, and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another ".

13. Similarly, in *Asif Hameed vs. State of Jammu and Kashmir, AIR 1989 SC 1899* a three Judge bench of this Court observed (vide paragraphs 17 to 19):

> "Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The

functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of peoples will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint."

14. Frankfurter, J. of the U.S. Supreme Court dissenting in the controversial expatriation case of *Trop v. Dulles (1958) 356 US 86* observed as under:

"All power is, in Madison's phrase, of an encroaching nature. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so ***since the only restraint upon it is self-restraint***. Rigorous observance of the difference between limits of power and wise exercise of power, between questions of authority and questions of prudence, requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, ***and this precludes the Courts giving effect to its own notions of what is wise or politic.*** That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The

> court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers. "

15. Unfortunately, despite these observations in the above mentioned decisions of this Court, some courts are still violating the high constitutional principle of separation of powers as laid down by Montesquieu. As pointed out by Hon'ble Mr. *Justice J. S. Verma*, the former CJI, in his Dr. K.L. Dubey Lecture:

> "Judiciary has intervened to question a mysterious car racing down the Tughlaq Road in Delhi, allotment of a particular bungalow to a Judge, specific bungalows for the Judges pool, monkeys capering in colonies, stray cattle on the streets, clearing public conveniences, levying congestion charges at peak hours at airports with heavy traffic, etc. under the threat of use of contempt power to enforce compliance of its orders. Misuse of the contempt power to force railway authorities to give reservation in a train is an extreme instance".

16. Recently, the Courts have strayed into the executive domain or in matters of policy. For instance, some orders passed by the Courts dealt with subjects ranging from age and other criteria for nursery admissions, unauthorized schools, criteria for free seats in schools, supply of drinking water in schools, number of free beds in hospitals on public land, use and misuse of ambulances, requirements for establishing a world class burns ward in the hospital, the kind of air Delhiites breathe, begging in public, the use of sub-ways, the nature of buses we board, the legality of constructions in Delhi, identifying the buildings to be demolished, the size of speed-breakers on Delhi roads, auto-rickshaw over-charging, growing frequency of road accidents and enhancing of road fines etc.

17. In my opinion these were matters pertaining exclusively to the executive or legislative domain. If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it. For instance, the Delhi High Court directed that there can be no interview of children for admissions in nursery schools. There is no statute or statutory rule which prohibits such interviews. Hence the Delhi High Court has by a judicial order first created a law (which was wholly beyond its jurisdiction) and has then sought to enforce it. This is clearly illegal, for Judges cannot legislate vide *Union of India vs. Deoki Nandan Agarwal, AIR 1992 SC 96.*

18. In the second and third Judges cases the Supreme Court practically substituted Article 124(1) of the Constitution by a new provision, creating a Collegium system of appointing Judges unknown to the Constitution, which was described as a ' sleight of hand ' by Lord Cooke.

19. In May 2016 the Supreme Court directed the government to create a Disaster Management Fund, clearly a case of judicial overreach as this was a purely legislative or executive function.

20. In the case of interlinking of rivers namely *Networking of rivers In Re (2012) 4 SCC 51*, the Supreme Court directed that all rivers in India should be interlinked. This was a glaring case of judicial overreach. Such a direction has serious financial, technical, administrative and even constitutional implications. It is estimated that implementing it would cost Rs.5 lakh crores. Moreover many states having riparian rights may not agree to it. Such a direction was clearly legislative / executive in nature and could not validly have been passed by the Court.

21. The Supreme Court in *Pravasi Bhalai Sangathan v. Union of India, AIR 2014 SC 1591: 2014 AIR SCW 1713: (2014) 3 SCALE 552* observed that the Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the judge is simply not authorized to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The Court cannot re-write, re-cast or re-frame the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. The Court does not have the power to issue a direction to the legislature to enact in a particular manner.

22. In *Mullikarjuna Rao v. State of Andhra Pradesh, AIR 1990 SC 1251: 1990 Lab IC 1019*, the Apex Court has held that Writ Court, in exercise of its power under Article 226, has no power even indirectly to require the Executive to exercise its law-making power. The Court observed that it is neither legal nor proper for the High Court to issue direction or advisory sermons to the Executive in respect of the sphere which is exclusively within the domain of the Executive under the Constitution. The power under Article 309 of the Constitution to frame rules is the legislative power. This power under the Constitution has to be exercised by the President or the Governor of a State, as the case may be. The Courts cannot usurp the functions assigned to the Executive under the Constitution and cannot even indirectly require the Executive to exercise its law-making power in any manner. The Courts cannot assume to itself a supervisory role over the rule-making power of the Executive under Article 309 of the Constitution.

23. While deciding the said case, the Court placed reliance on a large number of judgments, particularly *Narinder Chand Hem Raj v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh, AIR 1971 SC 2399: (1972) 1 SCR 940: 1971 Tax LR 1734*. *In State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla, AIR 1985 SC 910: (1985) 3 SCC 169: (1985) 2 SCWR 48*. The Supreme Court deprecated the practice adopted by the Courts to issue directions to the legislature to enact a legislation to meet a particular situation and opined as under:

> "...The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curb the evil of ragging, for otherwise it is difficult to see why, after the clear and categorical statement by the chief Secretary on behalf of the State Government that the Government will introduce legislation if found necessary and so advised, the Division Bench should have proceeded to again give the same direction. This the Division Bench was clearly not entitled to do. It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation."

24. In *Union of India v. Deoki Nandan Aggarwal, AIR 1992 SC 96: 1991 AIR SCW 2754: (1991) 3 SCR 873,* the Apex Court similarly observed:

> "It is not the duty of the Court either to enlarge the scope of the legislation.....The Court cannot re-write, re-cast or re-frame the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Court."

25. Similarly in *Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd., (1999) 6 SCC 82: AIR 1999 SC 1351: 1999 AIR SCW 1051*, the Supreme Court held that Court cannot fix a period of limitation, if not fixed by the legislature, as "the Courts can admittedly interpret the laws and do not make laws." The Court cannot interpret the statutory provision in

such a manner "which would amount to legislation intentionally left over by the legislature".

26. A similar view has been reiterated by the Supreme Court in the *Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294: AIR 2002 SC 2112: 2002 AIR SCW 2186,* observing that the Court cannot issue direction to the legislature for amending the Act or Rules. It is for the Parliament to amend the Act or Rules.

26. In *District Mining Officer v. Tata Iron and Steel Co., (2001) 7 SCC 358: AIR 2001 SC 3134: 2001 AIR SCW 2927*, the Supreme Court held that function of the Court is only to expound the law and not to legislate.

27. In *Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187: AIR 1990 SC 334: 1990 Lab IC 324*, it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority.

28. This view has been reiterated in *State of Jammu & Kashmir v. A.R. Zakki, 1992 Supp (1) SCC 548: AIR 1992 SC 1546: 1992 AIR SCW 1711*. [See also: *A.K. Roy v. Union of India, AIR 1982 SC 710: 1982 Cr LJ 340: (1982) 1 SCC 27; and Attorney-General for India v. Amratlal Prajivandas, AIR 1994 SC 2179: 1994 AIR SCW 2652: 1995 Cr LJ 426*].

29. In *Union of India v. Prakash P. Hinduja, AIR 2003 SC 2612: 2003 AIR SCW 3258: 2003 Cr LJ 3117*, the Supreme Court held that if the Court issues a direction which amounts to legislation and is not complied with by the State, it cannot be held that the State has committed Contempt of Court for the reason that the order passed by the Court was without jurisdiction and it has no competence to issue a direction amounting to legislation.

30. Thus, it is very clear that the Court has a very limited role and in exercise of that, it is not open to do judicial legislation. Neither the Court can legislate, nor has it has any competence to issue directions to the legislature to enact the law in a particular manner. The Supreme Court in *Bal Ram Bali v. Union of India, (2007) 6 SCC 805: AIR 2007 SC 3074: 2007 AIR SCW 5551* observed as under:

> "It is not within the domain of the Court to issue a direction for ban on slaughter of cows, buffaloes and horses as it is a matter of policy on which decision has to be taken by the Government. That apart, a complete ban on slaughter of cows, buffaloes and horses, can only be imposed by legislation enacted by the appropriate legislature. Courts cannot issue any direction to the Parliament or to the State legislature to enact a particular kind of law."

31. In *Suresh Seth v. Commr., Indore Municipal Corpn., AIR 2006 SC 767: 2005 AIR SCW 6380: (2005) 13 SCC 287*, the Supreme Court held as under:

> "The Court cannot issue any direction to the Legislature to make any particular kind of enactment. Under our constitutional Scheme Parliament and Legislative Assemblies exercise sovereign power to enact taws and no outside power or authority can issue a direction to enact a particular piece of legislation."

32. In *People's Union for Civil Liberties v. Union of India, AIR 2004 SC 456: 2003 AIR SCW 7233: (2004) 9 SCC 580*, the Supreme Court held as under:

"Court cannot go into and examine the 'need' of POTA. It is a matter of policy"

(See also: *Collector of Customs, Madras v. Nathella Sampathu Chetty, AIR 1962 SC 316: 1962 (1) SCJ 68: (1962) 3 SCR 786; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461; State of Rajasthan v. Union of India, AIR 1977 SC 1361: (1978) 1 SCR 1: 1978 (1) SCJ 78; Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536: JT 1996 (11) SC 283: 1997 (1) Supreme 684; and Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683: AIR 2008 SC (Supp) 360: 2008 AIR SCW 406).*

33. The Supreme Court in *Swamy Shraddananda alias Murali Manohar Mishra v. State of Karnataka, AIR 2007 SC 2531: 2007 AIR SCW 4513: 2007 (4) Supreme 329* held that the Court cannot legislate or amend the law. There is broad separation of powers under the Constitution and the Supreme Court must not ordinarily encroach into the legislative or executive domain. Reference in this regard can be made to *Indian Drugs and Pharmaceuticals Ltd. v. The Workman of Indian Drugs and Pharmaceuticals Ltd., (2007) 1 SCC 408*.

34. It is for the legislature to amend the law and not the Court. While interpreting a provision, the Court only interprets the law and cannot legislate it. (Vide: *State of Jharkhand v. Govind Singh, AIR 2005 SC 294: 2004 AIR SCW 6799: (2005) 10 SCC 437*).

35. In *Jinia Keotin v. K.S. Manjhi, (2003) 1 SCC 730*, Supreme Court observed:

"The Court cannot legislate...under the garb of interpretation...."

If a provision of law is misused and subjected to the abuse of process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary. (See: *Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain, AIR*

2000 SC 1578: 2000 AIR SCW 1297: (2000) 5 SCC 511). Hence, there should be judicial restraint in this connection, and the temptation to do judicial legislation should be eschewed by the Courts. In fact, judicial legislation is an oxymoron. (Vide: *B. Premanand v. Mohan Koikal*, *AIR 2011 SC 1925: 2011 AIR SCW 2546: 2011 Lab IC 2166*).

(See also: *Raghunath Rai Bareja v. Punjab National Bank*, *(2007) 2 SCC 230: 2006 AIR SCW 6446: 2007 CLC 3; Lily Thomas v. Union of India*, *AIR 2000 SC 1650: 2000 Cr LJ 2433: (2000) 6 SCC 224*).

36. In *V.K. Reddy vs. State of Andhra Pradesh J.T. 2006(2) SC 361 (vide para 17)* this Court observed:

> "The Judges should not proclaim that they are playing the role of law maker merely for an exhibition of judicial valour."

Similarly, the Court cannot direct the legislature to make a particular law vide *Suresh Seth vs. Commissioner, Indore Municipal Corporation & Ors. AIR 2006 SC 767, Bal Ram Bali vs. Union of India JT 2007 (10) SC 509*, but this settled principle is also often breached by Courts.

37. The 1998 case of *Jagadambika Pal's*, involving the U.P. Legislative Assembly, and the Jharkhand Assembly case of 2005, are two glaring examples of deviations from the clearly provided constitutional scheme of separation of powers. The interim orders of this Court, as is widely accepted, upset the delicate constitutional balance among the Judiciary, Legislature and the Executive, and was described by Hon'ble Mr. J.S. Verma, the former CJI, as judicial aberrations, which he hoped that the Supreme Court will soon correct.

Hon'ble Justice A.S. Anand, former Chief Justice of India has observed:

> "Courts have to function within the established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. Policy matters, fiscal, educational or otherwise, are thus best left to the judgment of the executive. The danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will, in the ultimate analysis, be counterproductive and undermine the credibility of the institution. Courts cannot create rights where none exists nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles. With a view to see that judicial activism does not become judicial adventurism, the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile; failure to bear this in mind would lead to chaos. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. It needs to be remembered that courts cannot run the government. The judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties."

38. The justification often given for judicial encroachment into the domain of the executive or legislature is that the other two organs are not doing their jobs properly. The present CJI Justice Thakur said in June this year that the Courts intervene when the executive fails in its duties. (http://indianexpress.com/article/india/india-news-india/chief-justice-of-india-ts-thakur-says-judiciary-intervenes-only-when-executive-fails-2838105/)

39. Even assuming this is so, the same allegation can then be made against the judiciary too because there are cases pending in Courts for half-a-century as pointed out by the Supreme Court in *Rajindera Singh vs. Prem Mai & others (Civil Appeal No. 1307/2001)* decided on 23 August, 2007. Should then the executive say to the judges that since you are not doing your duty properly as

you often take an inordinate time to decide cases yourselves, we will decide cases? Justice Thakur's argument cuts both ways.

40. If the legislature or the executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfil their expectations, or by other lawful methods e.g. peaceful demonstrations or necessary amendments through law. The remedy is not in the judiciary taking over the legislative or executive functions, because that will not only violate the delicate balance of power enshrined in the Constitution, but also the judiciary has neither the expertise nor the resources to perform these functions.

41. Of the three organs of the State, the legislature, the executive, and the judiciary, only the judiciary has the power to declare the limits of jurisdiction of all the three organs. This great power must never be abused or misused, but should be exercised by the judiciary with the utmost humility and self-restraint.

42. Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism’s unpredictable results make the judiciary a moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of inter- branch equality.

43. Second, judicial restraint tends to protect the independence of the judiciary. When courts encroach into the legislative or administrative fields almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. This would be counterproductive. The touchstone of an independent judiciary has been its removal from the political or administrative process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.

44. The constitutional trade-off for independence is that judges must restrain themselves from the areas reserved to the other separate branches. Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers. In *Lochner vs. New York 198 US 45(1905)* Mr. Justice Holmes of the U.S. Supreme Court in his dissenting judgment criticized the majority of the Court for becoming a super legislature by inventing a `liberty of contract theory, thereby enforcing its particular laissez faire economic philosophy. Similarly, in his dissenting judgment in Griswold vs. Cannecticut 381 U.S. 479, Mr. Justice Hugo Black of the U.S Supreme Court warned that ***'****unbounded judicial creativity would make the Court a day-to-day Constitutional Convention****'***.

45. In `*The Nature of the Judicial Process*' Justice Cardozo remarked : " The Judge is not a Knight errant, roaming at will in pursuit of his own ideal of beauty and goodness". Justice Frankfurter has pointed out that great judges have constantly admonished their brethren of the need for discipline in observing their limitations (see Frankfurters `*Some Reflections on the Reading of Statutes*'). In this connection I may usefully refer to the well-known episode in the history of the U.S. Supreme Court when it dealt with the New Deal Legislation of President

Franklin Roosevelt. When President Roosevelt took office in January 1933 the country was passing through a terrible economic crisis, the Great Depression. To overcome this, President Roosevelt initiated a series of legislations called the New Deal, which were mainly economic regulatory measures. When these were challenged in the U.S. Supreme Court the Court began striking them down on the ground that they violated the due process clause in the U.S. Constitution. As a reaction, President Roosevelt proposed to reconstitute the Court with six more Judges to be nominated by him. This threat was enough and it was not necessary to carry it out. The Court in 1937 suddenly changed its approach and began upholding the laws. `Economic due process' met with a sudden demise.

46. The moral of this story is that if the judiciary does not exercise restraint and over-stretches its limits there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence, of the judiciary (in fact the mere threat may do, as the above example demonstrates). The judiciary should, therefore, confine itself to its proper sphere, realizing that in a democracy many matters and controversies are best resolved in non-judicial setting.

47. In *Dennis vs. United States (United States Supreme Court Reports 95 Law Ed. Oct. 1950 Term U.S. 340-341),* Justice Frankfurter observed:

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore, most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."

48. In our opinion, the higher one goes in the judicial hierarchy the more self-restraint there must be. The Supreme Court is at the apex of the judicial hierarchy, and so must act with the greatest care and self-restraint, as there is no Court above it to correct its errors. But, it must be said with regret, what I have actually witnessed in recent times is often the reverse, and the Court has often flagrantly trespassed into the legislative and/or executive domain.

49. I am reminded of the Pakistan Supreme Court which by a judicial order dismissed a Prime Minister, overlooking the fact that a Prime Minister holds office as long he has the confidence of Parliament, and there is no further requirement that he must also have the confidence of the Supreme Court. The Pakistan Supreme Court showed utter lack of self-restraint expected of a superior court.
(https://beenasarwar.com/2012/06/21/the-pakistan-supreme-court-has-flouted-all-canons-of-constitutional-jurisprudence/)

50. Now coming to the Supreme Court order dated 18.7.2016 directing implementation of most of the Lodha Committee recommendations, in my view this is a clear case of the judiciary taking over legislative functions. There are a series of recommendations of the Lodha Committee which have been directed by the Court to be implemented, but it is not necessary to go into all of them. Some of the glaring transgressions in the report are:

(a) An age cap of 70 years has been fixed on BCCI and state cricket association office bearers,
(b) Maximum tenure of President of BCCI and non-eligibility of a member for a third term.
(c) Bar on an elected office bearer holding any office or post in a sports or athletic association or federation apart from cricket;

(d) Bar on being an office bearer of the BCCI for more than a cumulative period of 9 years;

(e) The Associations shall grant automatic membership to former international players hailing from the State.

(f) The Associations shall not have proxy voting.

(g) The Associations shall appoint an Electoral Officer, an Ethics Officer and an Ombudsman.

(h) Comptroller & Auditor General of India shall be a member having financial and regulatory oversight of the BCCI.

(i) The Association shall abide by the principles of Transparency laid down in Rules framed by the Lodha Committee.

(j) The BCCI is to adopt the Memorandum, Rules and Regulations as framed by the Lodha Committee

(k) Astro Turf is to be used on stadium grounds even though the same is contrary to ICC directives.

(l) Rather than stadiums being built, grounds for cricket are to be built and other sports ought to be played on the grounds as well to develop sporting culture. This too is contrary to ICC directives.

(m) One state shall have only one vote, and other existing full members shall be de-recognised as full members.

(n) Cooling off period.

51. It may be noted that the BCCI is a society registered under the Tamil Nadu Societies Registration Act, 1975. Neither the said Act nor rules framed therein mandate that the BCCI shall have to carry out the above recommendations. In fact it is for the BCCI itself, or the State Legislature or Parliament to impose such restrictions on the functioning of an autonomous private society. If the Courts are allowed to impose such an age cap, then why cannot the Supreme Court say that all Ministers and Members of Parliament shall cease to hold office

on attaining the age of 70? This would be usurpation by the judiciary of a function of Parliament. It has been held by several decisions of the Supreme Court that the Courts cannot fix the age of superannuation as that is an executive function (Vide *T.P George vs State of Kerala 1992(Supp) 3 SCC 191 (para 6)*)

52. The recommendations which have been directed to be implemented, e.g. age cap, one state one vote rule, maximum tenure of the President of BCCI, non-eligibility for members of a third term, cooling off period, etc. are all legislative in nature and not within the court's domain.

53. The BCCI is registered as a society under the Tamil Nadu Societies Registration Act, 1975. A society registered under that Act has to frame its rules, and the society can amend its rules by following the prescribed procedure. How can the Court amend its rules? It may be stated that section 36(1) of the Tamil Nadu Societies Registration Act, 1975, provides for the power of the Registrar to inquire into the affairs of a registered society, which reads as thus

> "(1) The Registrar may, of his own motion or on the application of a majority of the members of the committee of a registered society or on the application of not less than one third of the members of that registered society, or, if so moved by the District Collector hold or direct some person authorised by the Registrar by ordering writing in this behalf to hold, an inquiry, into the constitution, working and financial condition of that registered society.
>
> (2) An application to the Registrar under sub-section (1) shall be supported by such evidence as the Registrar may require for the purpose of showing that the applicants have good reason for applying for an inquiry.
>
> **(**3**)** The Registrar may require the applicants under sub-section (1) to furnish such security as he thinks fit for the costs of the proposed inquiry, before the inquiry is held.
>
> **(**4**)** All expenses of, and incidental or preliminary to the inquiry shall, where such inquiry is held-

(a) on application, be defrayed by the applicants therefor or out of the assets of the registered society or by the members or officers of the registered society, in such proportions as the Registrar may, by order in writing, direct ; and

(b) on the District Collector's or Registrar's motion, be defrayed out of the assets of the registered society, and shall be recoverable as an arrear of land revenue.

(5) An order made under sub-section (4) shall, on application, be enforced by any civil court having local Jurisdiction in the same manner as a decree of such court.

(6) A person holding an inquiry under this section shall at all reasonable times have free access to all the books, accounts and documents of the registered society, and shall have power to call upon the registered society and the officers of the registered society to produce such books, accounts; and documents and furnish such statements and other information in relation to its business as he may direct.

(7) It shall be the duty of all persons who are or have been officers of the registered society to furnish the inquiring officer with all the books, accounts and documents in their custody or power relating to the registered society.

(8) A person holding an inquiry under this section may summon any person who? he has reason to believe, has knowledge of any of the affairs of the registered society and may examine such person on oath and may summon any person to produce any books, accounts or documents belonging to him or in his custody if the person holding the inquiry has reason to believe that such books, accounts. Or 'documents contain any entries relating to transactions of the registered society.

9) The result of the inquiry shall be communicated to the registered society and to the applicants, if any."

Similar provisions exist in the statutes of other acts. Reading of the said provisions shows that if there is any complaint about the constitution or functioning of the society, a complaint can be made to the Registrar or the district collector about the same and request the Registrar to hold an enquiry in that connection. Under Section 36(9) the registrar can pass orders as he deems fit. Hence if there was any complaint about the constitution or functioning or

financial condition of BCCI, there is a remedy prescribed in the Act itself. The court or the committee appointed by it cannot take over the said function of the Registrar and cannot pass orders in that connection.

54. It is well settled that the High Court cannot take over the function of the statutory authorities under any Act. For instance, this Court in *G. Veerappa Pillai's Case AIR 1952 SC 192*, held that the High Court cannot direct the Regional Transport Authority (RTA) to grant a bus permit, because in that event, the High Court itself will be acting as the permit granting authority. The power to grant a bus permit is with the RTA and not the court. It has also been held by the Supreme Court in various cases that the High Court was clearly in error in issuing a mandamus directing the District Magistrate to grant a licence under a statute. When a statute confers power on an authority and casts a duty to perform any function, the court cannot in exercise of writ jurisdiction supplant the licensing authority and take upon itself the functions of the licensing authority.

55. Similarly, in many other decisions of the Supreme Court it is stated that if the statute empowers a certain authority to perform a certain function, that authority alone can perform that function, and the court cannot usurp that power vide *State of UP v Section Officer Brotherhood and Another 2004 8 SCC 286, U.P. State Road Transport Corporation and Another v Mohammed Ismail and Others 1991 3 SCC 239, State of U.P. and another v Raja ram Jaiswal and Another 1985 2 SCC 131 and Ragupathy v State of UP 1998 4 SCC 364***.** In the *State of UP v Raja ram Jaiswal Case*, the facts were that under the relevant statute, the district magistrate was empowered to grant cinema license but the High Court directed the district magistrate to grant the license. The Supreme Court in appeal set aside the high Court judgment and held that it is only the district magistrate that can grant the license and not the High Court. The High Court cannot usurp the powers of the licensing authority and issue a mandamus to that effect. Further, In

the Ragupathy Case, there was a policy of the state government to have Mandal Headquarters in the State of U.P. The High Court while quashing the location of Mandal HQ setup by the state government directed that they be set up at some other places and not as directed by the state government. In appeal, the Supreme Court set aside the High Court and observed as under:-

> "Even assuming that any breach of guidelines was justiciable, the utmost the High Court could have done was quash the impugned notification in a particular case and direct the government to recorder the question. There was no warrant for the High Court to have gone further and direct the shifting of the Mandal Headquarters" .

56. Section 37 of the Tamil Nadu Registration of Societies Act, empowers the registrar to cancel the registration of the society after giving it a hearing, if the business of the society is being conducted fraudulently or not in accordance with its Memorandum/bye laws and under Section 38 the Registrar can also do the same, if any unlawful activity is being carried out by the society. It is well settled in law that the court cannot take over or usurp the functions of a statutory authority.

57. It may be further be added that the State of Maharashtra and Gujrat have three members' association under their respective State enactments. Under Article 19(1) (c) it is the right of any association to function independently. However, in violation of this fundamental right, the Supreme Court has directed, upon the recommendations of the Lodha Committee, that only one of these associations may be recognised as a Full member. This again is contrary to the provision of law and the statute under which the state associations are established.

58. In my considered opinion the judgment and order of the Supreme Court are clearly per injuria. A decision is said to be per incuriam if it overlooks a statutory provision or earlier binding judicial precedent. (See *State of U.P. v.*

Synthetics & Chemicals (1991) 4 SCC 139; M.P. Housing Board v. BSS Parihar (2015) 7 SCC 263) The judgment of the Supreme Court in *BCCI vs. Cricket Association of Bihar* was given by a two member bench of Justices Thakur. J and Khalifulla.J. The bench has overlooked decisions of larger benches of the Supreme Court which said that the Court should not encroach on to the domain of the legislature or executive, and should respect the Separation of Powers in the Constitution. These were binding decisions. In fact even decisions of coordinate (equal strength) benches are binding, though if a subsequent bench disagrees it may refer the matter to a larger bench, but it cannot itself give a contradictory judgment.

The Supreme Court in the case of *Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others reported in (2000) 4 SCC 262* observed as under:

> "The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

In a Constitution Bench judgment of the *Supreme Court in Union of India v. Raghubir Singh (1989) 2 SCC 754*, Chief Justice Pathak observed as under:

> "The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

In *Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and others (2001) 4 SCC 448* a Constitution Bench of the Supreme Court ruled that a

decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness.

A Constitution Bench of the Supreme Court in *Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673* has observed that the law laid down by the Supreme Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

A three-Judge Bench of the Supreme Court in *Official Liquidator v. Dayanand and Others (2008) 10 SCC 1* again reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in *State of Karnataka and Others v. Umadevi (3) and Others (2006) 4 SCC 1* is binding on all courts including this court till the same is overruled by a larger Bench. The ratio of the Constitution Bench has to be followed by Benches of lesser strength. In para 90, the court observed as under:-

> "We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Court's refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed."

In *Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others (2009) 15 SCC 458*, the Supreme Court again reiterated the settled legal position that Benches of lesser strength are bound by the judgments of the Constitution Bench and any Bench of smaller strength taking contrary view is per incuriam.

59. In the case of *Sundeep Kumar Bafna v State of Maharashtra, (2014)16 SCC pg. 623* it has been held that in order to to guard against the possibility of inconsistent decisions on points of law by different Division Benches the rule has been evolved, in order to promote consistency and certainity in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on another Division Bench of the same number of judges.

60. Apart from the above I may mention that rights of membership, the qualification, including age limit, and election of office bearers, and the right to participate through voting, are all matters covered by the Tamil Nadu Societies Registration, Act, 1975 and the Rules and bye laws of BCCI, and any decision in these matters has to be consistent with and not violative of the provisions of the said Act. These areas cannot be the subject matter of judicial review for the reason that Article 19(1)(c) of the Constitution of India guarantees the fundamental right to form associations or unions; and as held by this Hon'ble Court in a catena of cases including *Zoroastrian Cooperative Housing Society Ltd. v. District Registrar, Coop Societies (2005) 5 SCC 632 and Damyanti Narang v. UOI (1971) 1 SCC 678*, which said that even a legislation by which members are introduced in a voluntary association without any option of being given to the existing members to keep out the persons whom they don't wish to associate with, or any law which takes away the membership of those who have voluntarily joined it, would violate Article 19(1)(c).

61. In their zeal to purportedly "clean" up cricket, the Supreme Court and the Lodha Committee have passed orders and directions completely contrary to law. They have lost sight of the fact that the field is completely occupied by State enactments eg. The State Societies Registration Act as well as Parliamentary legislation, eg. Section 25 of the Companies Act, the Indian Trust Act, the Societies Registration Act etc. The BCCI and its constituents are governed by statutory enactments and rules framed thereunder. It is wholly illegal and invalid for any Court or local commission appointed by a Court to pass orders or directions contrary to the statute or rules/ bye laws made thereunder. If the statute permits the BCCI and the affiliated State units to have their independent and present system of management and functioning, neither the Supreme Court nor any committee appointed by it can interfere with the same, and the said acts will be wholly illegal and contrary to the rule of law which is a basic principle of democracy as declared by the Supreme Court itself as well as contrary to constitutional principles. Such a precedent of the Supreme Court as this case would enable all judges be it in the Supreme Court or the High Court to completely disregard statutory enactments and constitutional provisions and pass orders and direction at their whims and fancies completely unsupported by law. Such direction would be flagrantly illegal, null and void ab-initio. To give an example, suppose the maximum punishment prescribed in the I.P.C for a certain crime is 10 years imprisonment, can a Judge say that in view of the horrible, brutal and vicious nature of the crime, he will disregard the statute and impose a death sentence in the case? This will be totally destructive of the rule of law. One can understand the zeal of the Supreme Court and Lodha Committee in wanting to clean the world of cricket. But does this justify throwing to the winds all constitutional principles, statutes like the Societies Registration Act, and rules/bye laws of the BCCI and the State Cricket Associations? In its desire, like Hercules, to clean the cricketing Augean stables, should the Supreme Court act,

to use Justice Cardozo's words, like a *"Knight Errant roaming at will in pursuit of his own ideal of beauty and goodness"*?

62. Such can never be the case as this would then entrench on the functions assigned under the Constitution to Parliament and State Legislatures and to the executive. This would then be the subjective view and opinion of individual judges not based on legal principles. This is what the Supreme Court bench and the Lodha Committee have done – imposed their subjective opinion contrary to what is expressly permitted by law. There cannot be any tyranny of the unelected in our constitutional scheme.

63. It may be mentioned that in the Supreme Court order dated *22 January 2015 reported as (2015) 3 SCC 251*, it had been directed that the Lodha Committee should submit its recommendations to the BCCI for its consideration. There was no direction that Lodha Committee report must be accepted. In fact I am informed that this was also the view expressed orally by the Supreme Court to counsels who appeared during the hearing when a concern was raised before the Supreme Court objecting to appointment of such a committee which would compromise the independence of the BCCI. The Supreme Court had specifically stated in its judgment dated 22.01.2015 that the recommendations of the Lodha Committee would be only recommendatory and be made to the BCCI. Thus, the matter stood finally disposed of on 22.01.2015 and the review petition against that judgment was also dismissed on 29.07.2016 and thus the matter had attained finality and the court became *functus officio*.

In the case of *SBI v S.N. Goyal 2008 8 SCC 92*, it has been held that:-

> "Therefore a judge becomes functus officio when he pronounces, signs and dates the judgement (subject to section152 and power of review)"

Hence, as per settled law of the Supreme Court, once a judgment has been pronounced finally, a party can file a petition u/s 152 CPC for correcting clerical errors or a review petition. In the instant matter a review petition was already

filed and was dismissed. Further, there was no section 152 petition filed by any party. Hence, one's mind boggles in trying to understand how the Supreme Court and under which provision of law reopened the entire matter merely because the Lodha Committee submitted the Committee's report to the Registrar General of the Supreme Court without even an accompanying application. The Supreme Court judgement dated 18.07.2016 has not even dealt with this issue as to how a disposed of matter was reopened.

It was probably for the reason that Supreme Court mandated that the Lodha Committee send its recommendations only to the BCCI that the Lodha Committee did not put any concrete proposal to the office bearers of the BCCI some of whom had appeared in their independent capacity before the Committee. Accordingly the Committee did not seek detailed views of the BCCI or its members before it finalized its recommendations and it had only put some questions to BCCI members. Paragraph 120.4 of the judgment dated 22.1.2015 reported as *(2015) 3 SCC 251* reads as under:

> "The Three member Committee is also requested to examine and make suitable recommendations to BCCI for such reforms in its practices and procedures and such amendments in the memorandum of association, rules and regulations as may be considered necessary and proper on matters set out by us in para 119 of this order".

64. The Lodha Committee elicited some information regarding BCCI functioning from various sources but did not put before BCCI what it proposed to do. Annexed as **Annexure A** to this report are the serious lapses committed by the Lodha Committee as set out in the affidavits of the BCCI which were filed before the Supreme Court dated February 2016 and March 2016.

65. The Lodha Committee recommendations which have been directed to be implemented state *inter alia* in the following words:

1) "The electoral process will have to be transparent and independent, for which an Electoral Officer (a retired Central or respective State Election Commissioner) will have be appointed. In the event that no such person is available, any other former State Election Commissioner, preferably from a neighbouring State may be appointed. This officer would conduct and supervise the entire process of elections from the filing of nominations to the declaration of results and the resolution of any disputes and objections during the election.

It is also necessary to have an independent selection committee in which the Governing body of the State Association will have no say, and also for the cricket committees manned only by former players to have an independent say on coaching and evaluation of team performance, apart from the selection of players.

2) The policies of BCCI regarding dispute resolution and Conflict of Interest, as well as the norms for Agents' Registration will have to apply to the State Associations as well. In order to administer this, the associations may also appoint an Ombudsman-cum-Ethics Officer. It would be open to multiple States to have a single Ombudsman / Ethics Officer so as to reduce expenditure. The person so appointed shall be an eminent person well versed in adjudicatory processes and it will be his/her task to decide all disputes between the Association and any of its constituents (Districts, Clubs, etc.), or between the constituents, or complaints of any player or member of the public, by following the principles of natural justice before rendering a decision.

3) As Ethics Officer, it shall be his duty to administer the principles of Conflict of Interest and recommend such action as may be deemed fit as far as an Office Bearer, Employee, Player, Team Official or other individual connected to the State Association is concerned. Needless to say, if it is an issue that concerns the BCCI as well, the Ethics Officer of the BCCI shall proceed to decide the issue. The Ethics Officer shall also decide all issues concerning the violation of the Agents' Registration norms as far as players of the State are concerned.

4) Each State Association will necessarily have a website that carries the following minimum details:

i. The Constitution, Memorandum of Association and Rules & Regulations, Bye-Laws and Office Orders and directions that

govern the functioning of the Association, its Committees, the Ombudsman and the Ethics Officer.

ii. The list of Members of the Association as well as those who are defaulters.

iii. The annual accounts & audited balance sheets and head-wise income and expenditure details.

iv. Details of male, female and differently abled players representing the State at all age groups with their names, ages and detailed playing statistics.

v. Advertisements and invitations for tenders when the Association is seeking supply of any goods or services (exceeding a minimum prescribed value), or notices regarding recruitment, as also the detailed process for awarding such contracts or making such recruitments.

vi. Details of all goals and milestones for developing cricket in the State along with timelines and the measures undertaken to achieve each of them.

vii. Details of all office bearers and other managerial staff (including CEO, COO, CFO, etc.)

viii. Details of directives from the BCCI and their compliances.

5) These websites will have to be maintained and updated at least on a quarterly basis. All the above information will have to be maintained at the registered office of the State Association and when sought, the same shall be shared with the applicant on the payment of a reasonable fee, as may be prescribed by the Association.

6) The cost of construction of a stadium runs into hundreds of crores. On the other hand, formation of a cricket playing ground costs a small fraction of the cost of a stadium. It makes more sense to have cricket playing grounds in each District, rather than having one or two stadia in a State. In fact, the Committee learns that some members are merely collecting the grants from BCCI and

depositing them in a Bank so as to accumulate sufficient funds necessary for taking up construction of a stadium. The result is some smaller States have neither a stadium nor well developed cricket playing grounds. BCCI should therefore encourage the State Associations to:

a. Have as many cricket playing grounds and fields instead of multiple stadia, which will enable greater usage and access to greater number of players.
b. Convert existing grounds and fields into turf wickets so that international standard facilities are made available even from a young age.
c. To make the existing stadia amenable to other sports by providing for alternate surfaces to be laid (Astroturf for hockey, Carpet for tennis, etc.) so that income may be generated and there would be all round development of sport, care being taken not to damage the pitch. But they should not be used for public functions where thousands will stomp on the ground.

7). The above recommendations relating to State Associations (Full Members) will also be applicable to the 4 associations relegated to the category of Associate Members and who are entitled to disbursement of the grant from the BCCI.

In an effort to present the recommendations made by the Committee in brief, the following synopsis of our proposals are set out:

1. <u>Membership</u>

   'One State, One Vote'

   Only cricket Associations representing the States would have voting rights as Full Members of the Board, thereby ensuring equality among the territorial divisions. Any other existing members would be Associate Members.

2. <u>Zones</u>

   'Zones for Tournaments alone'

The Zones would be relevant only for the purpose of the tournaments conducted amongst themselves, but not for nomination to the governance of the Board or to the various Standing Committees.

3. State Associations

'State Associations - Uniformity in Structure'

The Associations that are the Members would necessarily have to restrict the tenures of office bearers and prescribe disqualifications, do away with proxy voting, provide transparency in functioning, be open to scrutiny and audit by the BCCI and include players in membership and management. They would also have to abide by the conflict of interest policy prescribed by the Board, and divorce the Association from the social club, if any.

4. Office Bearers

'Limited Tenures & Cooling Off'

While all the existing office bearers (President, Vice-President, Secretary, Treasurer and Joint Secretary) are retained in honorary positions, the number of Vice Presidents is pruned from five to one. Their duties have been realigned. The President is shorn of his say in selections. The additional vote for the President at meetings is deleted. The terms of these Office Bearers continue to be of 3 years, but with a maximum of 3 such terms regardless of the post held, with a cooling off period after each such term.

5. Governance

'Governance separated from management'

The 14 member Working Committee is replaced by a 9 member Apex Council (with one-third independent members) consisting of the Office Bearers of the BCCI, an elected representative of the General Body, two representatives of the Players Association (one man and one woman) and one nominee from the C&AG's office. Terms of eligibility and

disqualification are specified with a bar on Ministers and government servants.

6. Management

'Professionalism in management'

Professionalism is brought in by introducing a CEO with strong credentials assisted by a team of managers to handle non-cricketing affairs. The large number of Standing Committees and Sub-Committees created by the BCCI has been reduced to two essential ones that would advise the CEO with reference to tours, technical aspects and tournaments.

The selection, coaching, performance evaluation and umpiring are to be handled by Cricket Committees manned only by former professionals. Specific provisions have been made to encourage cricket for women and the differently-abled.

7. The IPL

'Limited Autonomy for IPL'

The Governing Council of the IPL is reduced to 9, but includes 2 representatives of the Franchisees and nominees of the Players' Association and the C&AG's office.

8. Players

'A voice for Players'

There shall be a Cricket Players' Association affording membership to all international and most first class men and women retired cricketers. This Association shall discharge assigned functions with the financial support of the BCCI. It shall be brought into existence by an independent steering committee.

9. Agents

'Arm's length for agents'

Players' interests are protected by ensuring that their Agents are registered under the prescribed norms administered by the BCCI and the Players' Cricket Association.

10. Conflict of Interest

'Avoidance of conflicts'

Detailed norms have been laid down to ensure there is no direct or indirect, pecuniary or other conflict or appearance thereof in the discharge of the functions of those persons associated or employed by the BCCI, its Committees, its Members or the IPL Franchisees. These norms shall be administered by an Ethics Officer.

11. The Ombudsman and the Electoral Officer

'Independent monitors'

Provision has been made to have an independent ombudsman to resolve grievances of Members, Administrators, Players and even members of the public as per the procedures laid down. Similarly, an independent Electoral Officer to oversee the entire electoral process is also mandated.

12. Functioning

'Transparency'

The BCCI must provide the relevant information in discharge of its public functions. All rules and regulations, norms, details of meetings, expenditures, balance sheets, reports and orders of authorities are to be uploaded on the website as well.

13. Oversight

'Accountability'

An independent auditor to verify how the Full Members have expended the grants given to them by the BCCI, to record their targets and milestones, and to submit a separate compliance report in this regard.

14. Betting & Match-fixing

'Legalization for betting and Criminalization for match-fixing'

A recommendation is made to legalize betting (with strong safeguards), except for those covered by the BCCI and IPL regulations. Also a recommendation for match/spot-fixing to be made a criminal offence.

15. Ethics for Players

'Awareness and sensitization'

Provisions to be made for lectures, classes, handbooks and mentoring of young players."

66) A reading of the above and other recommendations show that the Lodha Committee has run amuck in the missionary zeal of a Crusader brushing aside all laws and rules to fulfil its holy aim and obtaining the Holy Grail.

67) Apart from this another shocking aspect is that the Lodha Committee Report has a draft Memorandum and Articles of Association which is expected to be forcibly adopted by the BCCI. This draft requires the BCCI to get itself de-registered as a Society under the Tamil Nadu Societies Registration Act, 1975 and re-register itself as a society under the Societies Registration Act, 1860 Act XXI of 1860. (See Article 1(A) (e). This too has been accepted by the Supreme Court as part of the report. This could never have been validly done and is completely illegal.

68. In this context it has to be stated that the State Cricket Associations are societies registered under their respective Societies Registration Act or

Companies Act or Charitable Trusts Acts of different States, or law as enacted by Parliament e.g. Indian Trust Act, Indian Companies Act. Each of these legal entities have different rules and regulations governing them in all aspects. To direct by a judicial order that these associations of citizens must have uniformity in constitution or governance is violative of the State Acts and Rules of State associations. It may be noted that this direction of the Supreme Court impinges on the jurisdiction and powers of individual State Legislatures granted under the Constitution. In this regard it may be noted that List II entry 32 and 33 of the 7th Schedule of the Constitution reads as under:

> "32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.
> 33. Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements."

69. The Lodha Committee has clearly gone overboard in its missionary zeal, in seeking to provide a panacea for all ills affecting the cricket world, forgetting its limitations. The Lodha Committee has made a new constitution of BCCI from definition to dissolution and directed State Associations to follow the same. This again is clearly illegal.

Like Alexander the Great cutting the Gordian Knot in its uninhibited and unbridled frenzy, the committee has cast aside all principles of the Constitution, the law and propriety and is conducting a witch hunt.

70. In my considered opinion, the Lodha Committee went clearly overboard in its desire to seek popularity and play to the galleries like a Knight in Shining Armour and blazing sword battling demons and monsters to win public acclaim and cheers. It has transgressed all norms of legality and propriety unmindful of the havoc it has caused and is causing.

71. The order of 18.7.2016 is nothing but an unwarranted attempt by the Court at the behest of the Lodha Committee at enacting legislation which tramples upon the rights of citizens and associations and seriously impinges on the legislative functions of not only Parliament but also respective State Assemblies. In fact the judgment has also delegated judicial functions to the Lodha Committee when it illegally holds as under:

> "There is prima facie a possibility of conflict of interest arising out of the franchisees representation in the Governing Council. Be that as it may we do not consider it necessary to finally pronounce on this aspect which can be better left to the Committee to re-examine in the light of what has been observed earlier. We make it clear that if upon reconsideration of the matter the Committee takes a view that the induction of the nominees of the franchisees will not result in any conflict of interest, it shall be free to stick to its recommendations in which event the recommendations shall be deemed to have been accepted by this court to be formalized and carried out in such manner as the Committee may decide."

The above observation clearly implies that the composition of state cricket associations and their right of those forming associations under Article 19(1) c remain unaffected under the Judgment dated 18.7.2016. That being so the Lodha committee had no power, even assuming that the Supreme Court Order dated 18.7.016 is within its jurisdiction, to give direction to stop elections, and retrospectively apply the report. It is surprising that the Lodha Committee has even gone to the extent of threatening contempt proceedings if its 'farmans' and 'fatwas' are not obeyed.

The Supreme Court has observed in Para 10 of its order dated 18.07.2016 as follows:-

> "It is noteworthy that neither the BCCI nor the intervenors have found fault with the revised Memorandum of Association as proposed by the committee"

In this connection, two things need to be mentioned 1) Alteration of the Memorandum of BCCI can only be done by special resolution of the society vide section 12 of the TN Societies Registration Act and 2) BCCI through affidavits filed in Feb and March 2016 have vehemently opposed the recommendations of the Lodha Committee including the proposed recommendations amending the Memorandum of Association. Hence, with respect to the Supreme Court, it has not made a factually correct observation.

Similarly, the Supreme Court at Para 61 has observed as follows:-

> "The grievance sought to made on behalf of citizens who have formed the state associations does not stand scrutiny no matter none of those on whose behalf the argument is advanced is before this court to make such grievance"

This argument is also factually not correct. In fact, Mr. Chandu Borde (the former Indian test cricketer) and Mr. Niranjan Shah (the President of the Saurashtraa Cricket Association) were present before the Court in their individual capacity as members of State Cricket Associations.

It may also be mentioned that the power to impose punishment is with the Court, and this power cannot be outsourced, but the Court has outsourced it to the Lodha Committee. If this power can be validly outsourced, what prevents the Court from outsourcing its powers to impose punishments under the IPC to the Munsif, a Municipality or even a private body?

74. It has subsequently come to light that the Lodha Committee with unbridled and intemperate vigour and zeal has started to enlarge its scope and functioning and has written to the BCCI and State Associations to apply the recommendations retrospectively and to stop all electoral processes. Annexed herewith to this report are its letters as **Annexure B**. It has threatened Contempt

of Court proceedings if the directives are not obeyed [**Annexure C**] and is issuing fatwas and firmans.

In this connection it may be noted that elections to these bodies are governed and regulated by the statutes under which they are registered and their Rules/Bye Laws. How can the Lodha Committee interfere with their elections? The Supreme Court itself has observed in its order dated 18.07.2016 that the State Associations are not covered by the judgment of the Supreme Court and the recommendations were only recommendations qua the BCCI, till they were accepted by the Court. If it is alleged that there is any illegality in the elections of the societies, the same could be challenged in Court, but where is the power to stay the election? The Lodha Committee is behaving like Don Quixote fighting with the wind mills, and like an unbridled horse with a bit in its teeth at full gallop crushing and trampling all obstacles in its path. I am reminded of Mirza Ghalib's sher:

'Rau mein hai rakhsh-e-umr kahaan dekhiye thame

Nai haath baag par hai, na paa hai rakaab mein

The *Sher* means: "*The horse of the times is on the gallop, let us see where it stops/The rider has neither the reins in his hands, nor his feet in the stirrup*."

75. I may also note that the Supreme Court by its final judgment and order dated 22 January 2015 reported as *(2015) 3 SCC 251*, in the matter of *CAB Vs BCCI* had only set up the Lodha Committee to give its recommendations to the BCCI and had not made any further direction that these recommendations are binding and shall be implemented. The direction in the aforesaid judgment and Order has been quoted herein above. One would have thought that this was the end of the matter as the judgment finally disposed of the case and the Court was functus officio. Surprisingly the Lodha Committee furnished its report to the

Supreme Court and on that the Supreme Court, strangely revived the matter suo moto and passed the Order dated 18.7.2016.

76. I am constrained to say that this trend started by the Supreme Court, may next result in issuing directions to regulate and control media, Bollywood, functioning of political parties etc. which also involve substantial public interest, on the allegation that there is lot of malaise in those fields. In the Times of India report dated 06.08.2016, it is reported that Justice Thakur stated in open Court in a case relating to all All India Football Federation [AIFF] that this football body may require 'the BCCI treatment'. Is it proper for a judge particularly a judge who is the Chief Justice of India to speak like this in court? Should there be no self-restraint by the Judges of the Superior Courts? Should now a witch hunt begin against the AIFF also?

There is a malaise in the judiciary too. A section of the judiciary has become corrupt and populist, and there is often inordinate delay in deciding cases etc., because of which the litigants suffer great hardship. Who then would regulate and control the judiciary? Who will guard the Praetorian guards? If the salt has lost its flavour, wherewith shall it be salted? [Bible: New Testament: Matthew: 5:13]. The judgment of the Supreme Court will open up a Pandora's Box, and there will be no end to this trend.

In Lewis Carroll's "Alice in Wonderland" there was a character called the Queen of Hearts. Whenever she sees anybody, she shouts "off with his head". When someone said what about first issuing a charge sheet, holding a trial and giving a verdict, she replied "all that can come later, first off with his head." I regret to say that the Supreme Court bench as well as the Lodha Committee have behaved like the Queen of Hearts.

77. In view of the above, I recommend that the BCCI should file a review petition in the Supreme Court against the order dated 18.07.2016, and ask for the matter to be referred to a larger bench, preferably a Constitution Bench (i.e. a bench of 5 Judges) in view of the grave constitutional and legal issues involved. The Supreme Court ought to hear the review in open Court so that there is no miscarriage of justice as the order of the Supreme Court has gravely damaged the delicate constitutional balance in the constitution between the executive, legislature and judiciary.

NB:- This is only my first report. More reports to follow.

JUSTICE MARKANDEY KATJU (RETD.)
(FORMER JUDGE SUPREME COURT OF INDIA)

August 6, 2016