

NEED FOR A STANDARDIZED REGULATORY FRAMEWORK IN FANTASY SPORTS

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ABSTRACT

Gambling, regarded as a vice, has been frowned upon by Indian society since ancient times. Many of India's gambling and gaming laws are archaic and may not be market-friendly. Andhra Pradesh, Karnataka, and Telangana have taken legislative measures to explicitly ban online skill-based games but with the ever-growing popularity of Online Gaming in India, several states have felt the need to make laws that allow, partially allow, or disallow gaming and gambling like Sikkim and Meghalaya. They have taken the lead in allowing Online Gaming operation in the state with a 'licence' system. The judicial discourse in this regard is noteworthy as various judgments have set forth principles that layout the jurisprudence of gambling and gaming laws in India. The Rajasthan High Court interpreted fantasy sports as a game of skill and therefore exempted it as a mere skill game similarly, the Bombay High Court also ruled in favour of fantasy sports as, according to it, does not involve risking money or playing stakes on the result of a game or an event. Hence, the same did not amount to gambling/betting. One major argument normally raised to support the banning of Online Gaming is that it will hamper the lives of the so-called downtrodden sections of society as they are deemed addictive and come with issues that can be ascribed to gambling, which in turn will push such sections of the society into poverty and debt. Whereas those who defend Online Gaming highlight revenue and employment generation's realistic and visible features.

I. INTRODUCTION AND OVERVIEW

Gambling, regarded as a vice, has been frowned upon by Indian society since ancient times. The ancient texts by various thinkers make it very apparent that gambling is problematic to the well-being of society. However, they differ in their approach towards addressing it. While there are works that call for a blanket ban and endorse a view of life without

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vice, some consider such activities unstoppable. The latter's view instead calls for strict regulation by the King.

Katyayana Smriti and *Brabhaspati's* Chapter on Gambling are good examples of the latter view.¹ In *Mahabharata*, *Pandavas* losing their territory and wife is often cited as an example to showcase the perils of gambling. However, as pointed out in the Law Commission Report,² it can be argued that had there been regulation on gambling, maybe *Yudhishtir* should not have staked his wife and brothers in a gamble.³

In modern India, relevant discussions on betting and gambling can be traced back to the Constituent Assembly Debates. On this issue, amidst vehement opposition to its constitutional recognition, Dr Ambedkar's views shaped the present legal discourse.⁴ He opined that even if they were not recognized in the Constitution, it does not mean that betting and gambling wouldn't happen. Rather by allowing a mention of the same in the State List (now, Entry 34, List II),⁵ it would enable a State Government to prohibit or regulate it as per the prevailing socio-economic realities of the state.

Therefore, from both the ancient and modern discussions on this subject, it is apparent that state legal recognition is deemed important. However, we reach a crossroads regarding prohibition (complete) or regulation. Since the matter has been left for the states to legislate upon, state policies and laws have been divided. This is a direct consequence of differences in various states regarding the existing unwritten principles and notions of morality.

The judicial discourse in this regard is noteworthy as various judgments have set forth principles that layout the jurisprudence of gambling and gaming laws in India. The primary marked difference between the two is the involvement of skill. Wagers placed relying on luck or chance cannot

¹ *Rejja v State Of Kerala*, 2004 (3) KLT 599; *State of Bombay v RMD Chamarbaugvala*, AIR 1957 SC 699

² Law Commission of India, *Legal Framework: Gambling and Sports Betting Including in Cricket in India*, (Report No. 276, July, 2018).

³ *ibid* Para 9.5, Chapter IX, *Conclusions and Recommendations*.

⁴ Lok Sabha Secretariat, *Constituent Assembly Debates* (Vol. IX, 6th Ed. 2014).

⁵ Constitution of India Entry 34, List 2.

be treated in the same plane as that of a game, which involves some degree of skill.⁶

This primer aims to provide insight into India's gaming and gambling laws (Central and State Laws). It also deals with the constitutional, contractual, and other applicable laws in this respect. This is written with the purpose of better understanding the issues relating to policy and regulatory developments in India.

II. CONSTITUTIONAL FRAMEWORK ON GAMING AND GAMBLING IN INDIA

The Constitution guarantees certain rights and allows for reasonable restrictions to be placed by the state to exercise these rights. Balancing these rights and restrictions requires time and great effort by various parties involved. In the course of these efforts, the jurisprudence of the subject is developed, which is further subject to modifications from time to time.

As noted earlier, gambling is seen as a vice in Indian society. A tag that many Online Gaming start-ups in India are trying to get rid of. Therefore, naturally, morality is given due consideration in these matters while framing laws and policies that will impede constitutional rights. On the other hand, other considerations such as employment and revenue to the state exchequer are also given their due regard.

The bottom line is that some states in India have come to terms with the moral concerns and have tried to balance them with realistic considerations of employment, taxation, and better regulation. Whereas other states have upheld morality over other benefits due to their prevailing socio-economic situation in their state. This choice is necessitated because the impact of gambling and gaming is not exactly defined and is only determinable after giving regard to one's considerations.

At this point, it is also important to mention that the right to carry out any trade or business under Article 19(1)(g)⁷ and the freedom of trade,

⁶*Dr K.R. Lakshmanan v. State of Tamil Nadu & Anr*, AIR 1996 SC 1153.

commerce, and intercourse under Article 301⁸ of the Constitution have been denied to gambling activities after the two *Chamarbaugwala* cases by various courts in India.⁹ The justification is because these activities are *extra commercium*. Further, the parameter to classify something like gambling, as held by S.C. in various cases, is the involvement of 'substantial' skill (mere skill) or chance.¹⁰

In other words, an activity such as horse racing would not be construed as gambling since it involves mere skill which to somewhat determine the outcome based on objective parameters such as the fitness and inherent capacity of the horse, weight carried, and distance. Hence, constitutional safeguards will still be applicable, even within this interpretation, provided the activity is not classified as gambling.

As mentioned earlier, Dr Ambedkar's inputs have played a critical role in shaping the constitutional mechanism for states to bring in their legal frameworks for gaming and gambling in India. Currently, the same is placed under Entry 34, List II of the State List.¹¹ It is also pertinent to note that Lotteries are dealt with separately under Entry 40, List I of the Union List under Seventh Schedule of the Constitution.¹²

According to Article 246 of the Constitution, only the Parliament is empowered to amend or make laws for the matters under the Union List¹³. The State Lists empower the State Legislatures for the same. However, Articles 249¹⁴ and 252¹⁵ allow the Parliament to make laws for the matters under the State List in the national interest or due to the request of two or more states, respectively.

This is further relevant in light of the recommendation made by the Law Commission to enact a model law on this subject. If the Parliament

⁷ Constitution of India, art. 19 cl.(1)(g).

⁸ Constitution of India, art 301.

⁹ *Dr. K.R. Lakshmanan v. State Of Tamil Nadu And Anr*, 1996 AIR 1153.

¹⁰ *ibid.*

¹¹ Constitution of India, Entry 34, List 2.

¹² Constitution of India, Entry 40, List 1.

¹³ Constitution of India, art 246.

¹⁴ Constitution of India, art 249.

¹⁵ Constitution of India, art 252.

makes the law under Article 252, the other states (other than the consenting states) may also legislate on the same lines taking into consideration the national policy.¹⁶

III. OVERVIEW OF GAMING AND GAMBLING LAWS IN INDIA: CENTRAL AND STATE LAWS

For Online Gaming, a plethora of central and state legislations are applicable. It is highly suggested that both central and state-specific laws be kept in mind for better regulatory practices. The central laws cover a wide variety of areas, among other things, including statutory penalties.

Many of India's gambling and gaming laws are archaic and may not be completely relevant. A good example of obsolete laws in the List, as mentioned above, is the Prize Competitions Act, 1955,¹⁷ which mandates proper licencing procedures for prize competitions. The same is defined as a puzzle-based upon the building up, arrangement, permutation or combination, of letters, words, or figures for which a prize of not exceeding INR 1000.

The Parliament made this Act under Article 252 of the Constitution¹⁸ after the consent of certain states. However, many of those consenting states, including Maharashtra, Tamil Nadu, etc., have state legislation on 'Betting and Gambling'. Therefore, a relook of these laws is the need of the day.¹⁹

Games of chance and activities associated with the casino are read into the meaning of a designated business or profession after the 2013 amendment to the Prevention of Money Laundering Act.²⁰ Therefore, entities falling within this category might be required to keep records of their transactions, follow Know Your Customer (KYC) norms, etc. as per the relevant rules and regulations made under the Act.

¹⁶ Supra note 3 Para 9.5, Chapter IX, *Conclusions and Recommendations*.

¹⁷ Prize Competitions Act 1955, s 2(d) r/w s 4.

¹⁸ Constitution of India, art 252.

¹⁹ P.C. Jain Committee, *Central Acts which are Not Relevant* (PMO India, 2014) <<https://www.pmindia.gov.in/wp-content/uploads/2015/01/Extracts-of-the-Committee-of-the-Report-Vol.I-.pdf>>

²⁰ Prevention of Money Laundering (Amendment) Act 2013, s 2(1).

India has laws regulating various forms of publication. They are also applicable to electronic media. Therefore, all relevant laws must be kept in mind while soliciting information. For instance, under the I.T. Rules, intermediaries must inform the user and remove content if asked by the appropriate government when hosting, publishing, transmitting, displaying, uploading, or uploading content related to or encouraging gambling.²¹ Moreover, there are also laws against solicitation of content deemed harmful for certain age groups or sexual content.

The Public Gambling Act, 1867²² (“**P.G. Act**”) is key legislation. While this Central Act may not be relevant, some states, out of their own volition, have enacted the same. All these states include those mentioned under List D (States without any state-specific Laws on Online Gaming). P.G. Act has been subject to several state amendments and judicial interpretations. Moreover, several states have based their state legislations following the P.G. Act as the model law like The Orissa Prevention of Gambling Act, 1955²³ and Tamil Nadu Gaming Act, 1930.²⁴

IV. LEGAL POSITION ON ONLINE GAMING IN INDIA

1. THE LEGAL POSITION IN THE STATES HAVING SPECIFIC LEGISLATION GOVERNING ONLINE GAMING

With the ever-growing popularity of Online Gaming in India, several states have felt the need to make laws that allow, partially allow, or disallow gaming and gambling. As a matter under the State List, the states have mooted several amendments to the P.G. Act or their state law on gambling and gaming. As a matter of fact, in the year 2021, states such as Karnataka have banned the operation of skill-based online games. On the other hand, there are states such as Uttar Pradesh that are planning to bring similar amendments to their existing law.²⁵

²¹ Information Technology (Intermediaries Guidelines) Rules 2011, rule 3(2)(b) r/w Rule 3(4).

²² The Public Gambling Act 1867.

²³ The Orissa Prevention of Gambling Act 1955.

²⁴ Tamil Nadu Gaming Act 1930.

²⁵ Lance Mannays, ‘Uttar Pradesh to have a stricter law to check gambling’ (*Hindustan Times* Feb 14, 2021, 10:04 PM) <<https://www.hindustantimes.com/india-news/uttar->

Therefore, given these changes being made to the state laws, it is even more important to do proper due diligence of the existing legal framework in the state. In this section, we have discussed some of the amendments made to these state laws.

i. States Legislation/Amendments Related to Licensing for Gaming/Online Gaming

The Indian states of Sikkim,²⁶ and Meghalaya²⁷ have taken the lead in allowing Online Gaming operation in the state with a 'licence'. When several other states have been mooting laws to ban Online Gaming, these states have taken a regulatory route. It adds to the exchequer's revenue as there are defined fees, penalties, and 'gaming royalty or tax' levied on the Online Gaming activities. Further, the state legislations lay out the procedures and criteria required to obtain a license. That said, without a license, Online Gaming activities are not permitted.

These developments are a testament to state regulation of Online Gaming and legislative recognition of skill-based games. For instance, Nagaland's state law identifies 'games of skill' under Schedule A. It also leaves the gate open to allow more additions to this schedule if such a game has been declared or determined to be 'games of skill' by domestic or international courts or games with domestic or international competitions or any other game that can be proven to be a game of skill. Further, the Act itself tries to categorize such skill-based games into skills that may be:

- card-based
- action/ virtual sports/adventure/mystery, and
- calculation/strategy/quiz-based.²⁸

ii. State Legislations/Amendments Related to Banning Online Gaming

[pradesh-to-have-a-strict-law-to-check-gambling-101617106789224.html](#)> accessed 2nd January 2022.

²⁶ Sikkim Online Gaming (regulation) Act 2008.

²⁷ Meghalaya Prevention of Gambling Act 1970.

²⁸ Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2016, s 3.

Andhra Pradesh, Karnataka, and Telangana have taken legislative measures to explicitly ban online skill-based games. For instance, Telangana's amendment reflects the game of skill as a wager or bet.²⁹ It extends the prohibition specifically to 'cyber space'.³⁰ It has prescribed a maximum punishment with a fine of one year to enforce the prohibition. It has prescribed a maximum punishment for repeat offenders with a fine of two years.

Other than Telangana, which has cemented its ban across the state, there is the state of Karnataka, whose legislature has given the nod for a similar ban extended to online skill-based games.³¹

2. The Legal Position in the States Not Having any Specific Legislation Governing Online Gaming

As mentioned earlier, the states without specific legislation have enacted the P.G. Act with or without modifications. Fortunately, under such a framework, jurisprudence has evolved to exclude games of 'mere skill' from the applicability of the Act.³² This has allowed several Online Gaming start-ups to flourish in these states.

i. Discussion on the Legality of Gaming and Gambling

With different explanations for what exactly is to be considered under 'gambling', the question evolved 'whether it is a game of skill or chance?' The question has been answered by various courts and by various state legislatures. A game of skill cannot be considered as gambling for the fact that mere skill was applied. But a game of chance is different altogether.

Any game based on chance or the luck factor is still prohibited or restricted in India. As explained in *Shri K. L. Mansukhani v. Senior Inspector*.³³

²⁹ Telangana Gaming (Amendment) Act, 2017, s 2(2).

³⁰ Telangana Gaming (Amendment) Act, 2017, s 2(1).

³¹ The Karnataka Police (Amendment) Compliance Act 2021, s 2(1).

³² The Public Gambling Act, 1867, s 12.

³³ *Shri K. L. Mansukhani v. Senior Inspector* SCC Online Bom 843 and Black's Law Dictionary, 6th Edition, Pg. 679.

"a practice or Act of gambling. An agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the winner's property and to which all contribute. The gaming elements are the presence of price or consideration, chance and prize or reward."

ii. Relevant Judicial Pronouncements

In one of the cases,³⁴ the Supreme Court was faced with whether to consider 'Rummy', a popular card game in India, as a game of chance or as a game of skill. While ruling that it is a game of skill, it observed that Rummy necessitates some talent because the card's fall must be memorised, and the game's construction necessitates substantial skill in holding and discarding cards. As a result, we cannot conclude that Rummy is a completely random game. It is primarily and predominately a skill game.

In the same judgment, the court further added that merely because there is an element of luck involved due to shuffling of the deck of cards while dealing does not make Rummy a game of chance. This reasoning has been reiterated by several courts across the country, including the Supreme Court itself, in many subsequent cases.

In *Dr K.R. Lakshmanan v. State Of Tamil Nadu*,³⁵ the Supreme Court held that mere skill would mean a substantial degree or a preponderance of skill. It also reiterated that the presence of an element of luck in itself does not make the game that of a chance or luck. In this case, the court dealt with whether horse racing falls within the meaning of gambling (refer to Section 2).

The '*Dream 11* cases' are worthy of mention. It is a fantasy game that allows its users to select a total of 11 players (cricket), and points are assigned by criteria established by the company. All the selected player's points in the game would ultimately reflect upon the actual performance of the selected players in that particular game. The game attained popularity among the people and was subjected to a number of challenges in various High Courts and the Supreme Court.

³⁴*State Of Andhra Pradesh v K. Satyanarayana & Ors*, 1968 AIR 825.

³⁵*Dr. K.R. Lakshmanan v State Of Tamil Nadu And Anr*, 1996 SCC (2) 226.

The Rajasthan High Court interpreted fantasy sports as a game of skill and therefore exempted it as a mere skill game.³⁶ It observed that the users exercise their superior knowledge, judgment and attention while making their selection. Similarly, the Bombay High Court³⁷ also ruled in favour of fantasy sports as, according to it, "*does not involve risking money or playing stakes on the result of a game or an event. Hence, the same did not amount to gambling/betting.*" Some of these cases reached the Supreme Court as a Special Leave Petition and were dealt with by the court similarly.

iii. Parameters from Judicial Pronouncements

For a game of skill, a certain amount of expertise is required. It might as well require practice, attention, and knowledge. With this, experience is also a key factor. Although there is a factor of chance in a game of skill, yet mere chance factor does not overthrow a skill. Due to this, many companies are introducing real money-based games, which cannot be considered betting due to the skill factor. Recently emerged games like *Dream 11*, *M.V.P.*, *Gamezy*, etc., are good examples of a skill game including real money, but are not considered betting.

For a game of chance, no expertise is required. It is solely based on the luck factor, or just a little skill is required. Due to the highly volatile nature of gambling games, they are addictive and prohibited. A chance-based game requires less expertise and experience and is good for short-term winning amounts. But when it comes to forming strategies, using skill, or performing a future step after figuring the past steps, then a game of chance fails.

iv. Position in Contract Law

Section 30 of the Contract Act³⁸ talks about the wager. Sir William Anson defined wager as "*a promise to give money or money's worth upon the determination*

³⁶*Chandresh Sankhla S/O Jagdish v. The State Of Rajasthan*, Civil Writ Petition No. 6653/2019.

³⁷*Gurdeep Singh Sachar v. Union of India*, Criminal P.I.L. No. 16 of 2019.

³⁸ The Indian Contract Act 1872, s 30.

*and ascertainment of an uncertain event.*³⁹ Such agreements are deemed to be void and unenforceable. This is more relevant in the instance of gambling or betting. Therefore, all gambling and betting activities, except horse racing, cannot be legally enforced without any provision for the contrary.

In other words, a casino or the losing player could refuse to make good on their promise to pay the winner the earnings accruing out of the result of gambling and betting activities. Even then, without a statutory provision to the contrary, the promise cannot be enforced in a court of law.

V. ISSUES IN ONLINE GAMING SECTOR

Online gaming's success in recent years can be ascribed to the general popularity of card games like Rummy and the evergreen craze for the game of cricket in India. That said, the rise in popularity of this activity gave rise to several legal issues. These issues could be dealt with from a public policy perspective or simply a regulatory perspective, or a mix of both.

One major argument normally raised to support the banning of Online Gaming is that it will hamper the lives of the so-called downtrodden sections of society as they are deemed addictive and come with issues that can be ascribed to gambling, which in turn will push such sections of the society into poverty and debt. Whereas those who defend Online Gaming highlight revenue and employment generation's realistic and visible features.

While this conflict of socio-economic ideals is very real and each side has reasons to justify their stance, the negative impact alone may not be sufficient to warrant a ban. In 2018, the Law Commission, in its report,⁴⁰ has discussed this conflict of views in detail. However, in its conclusion, it has recommended that gambling be further divided into 'proper gambling' and 'small gambling'.⁴¹

³⁹ Sir William Reynell Anson, *Anson's Law of Contract* (26 ed, Oxford University Press 1984).

⁴⁰ Supra note 2.

⁴¹ Supra note 3, Para 9.8(7), Chapter IX, *Conclusions and Recommendations*.

Proper gambling would allow high stakes in a game; on the other hand, small gambling would not involve such stakes. This would effectively rule out the concerns regarding endangerment of lower-income groups.

This arrangement may not be suitable for some 'Online Games' which already involve lower stakes. However, the moot point here is that several safeguards can be placed up to a respectable level if the activity comes under regulatory discussion instead of an outright ban.

VI. PROSPECTIVE POLICY FRAMEWORK

The prospective regulatory frameworks that we have suggested aligning with the Law Commission Report.⁴² Regulation seems to be a better alternative than an outright ban. This could lead to better compliance with the law, more state revenue and better protection against endangerment of certain groups. There can also be safeguards against any illegal or unaccounted cash flow, ultimately reducing money laundering and corruption.

These safeguards could include licensing, Know Your Customer (KYC) measures, including making P.A.N. and Aadhaar mandatory for the Gaming companies. Also, measures for loaning for such activities can be initiated in the regulatory space, which could, in turn, reduce the instances of loan sharking or perpetual debt.

Further, several protection mechanisms can be legally enforced in the regulatory space. This could include privacy norms, daily cash limits or volume limits, payment mechanism norms, etc. Many of these mechanisms or safeguards are already recognized under various statutes. Hence proper regulation of Online Gaming would not be very difficult as the existing framework can be utilized.

Lastly, a model law or central legislation made under either Articles 249 or 252 of the Constitution could help facilitate this touted regulatory setup. It would provide the much-needed general guidance and clarity.

VII. CONCLUDING REMARKS

⁴² Supra note 2.

Regulation is the key. The current fee for all setup has led to the legal policy heading in two opposite directions or no direction at all. A complete ban disregards policy measures, and a no-law/obsolete legal setup raises several issues, such as lack of protective mechanisms or loss of revenue. A regulatory setup would open up many avenues for the regulators for better regulation and overall compliance. The regulatory measures would help assuage several genuine concerns from all corners. Further, the regulation would set the course of jurisprudence in one direction. While the courts have been doing their bit via their sound legal justifications, the problem seems to stem from the legislative side.

As discussed in the article, mechanism like daily cash limit and volume limits would be helpful to save lives of the so-called downtrodden sections of society as they are more prone to addiction in this game. But the most important thing is a uniform central legislation to cover this matter. The clutter created in this field is due to different state legislations taking different approach in this matter and this can only be solved by a uniform central legislation.