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**UNBOXING THE
LEGAL POTENTIAL OF
THE SPORTS &
GAMING INDUSTRY:
REDESIGNING INDIA'S
WAY OF PLAYING**

FOREWORD BY JUSTICE DR. MUKUNDAKAM SHARMA

Former Judge, Supreme Court of India

NOTA BENE

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2022

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FOREWORD

Justice Dr. Mukundakam Sharma

Development of sports in India is a matter of national importance and relevance as it supports and encourages child and youth development and thereby laying the foundation of a robust, healthy and vibrating future generation of the country. India is a young country as presently the children and the young generation constitutes the largest number of total population of the country.¹ Sports development is basically a state subject yet as provided for under entries 10 and 13 of the Union List in the 7th Schedule of our Constitution, the Central Government has the responsibility to work for development of sports in the national and international level.

The Hon'ble Delhi High Court in *Civil Writ Petition No. 7868 of 2005*,² in the matter of *Indian Hockey Federation* vide its order dated 02.03.2010 held that the Central Government is fully competent to make regulations on National Sports Federations and Indian Olympic Association. While observing in the aforesaid manner, the Hon'ble Delhi High Court relied upon the aforesaid two entries namely entry 10 and 13 of List I of Union List. By making reference to the aforesaid entries the Hon'ble Delhi High Court observed that while a National Sports Federation has autonomy in the actual conduct of sports, government recognition is necessary to represent the country. It also observed that international sporting events are an essential part of diplomatic relations of the nations and several considerations like security concerns of players, apartheid and perceived human rights violations have guided notions in decisions to participate or not to participate in sporting events in different countries. In that context, it was also observed that political and diplomatic clearance are therefore required by the Indian teams before participation in the

¹ Ministry of Statistics and Programme Implementation, 'Youth in India' (Central Statistics Office 2017) <https://www.thehinducentre.com/multimedia/archive/03188/Youth_in_India-201_3188240a.pdf> accessed 7 February 2022.

² *Narinder Batra v Union of India*, 2009 SCC OnLine Del 480.

international tournaments and forums for which mostly government has the competence or the jurisdiction to undertake such exercise.

Basing on such sources, the National Sports Policy of 1984 was framed by the Govt. of India which was reformulated in the year 2001.³ Thereafter, the Ministry of Youth Affairs and Sports issued the formal guidelines to regulate sports through National Sports Development Code 2011,⁴ which made an effort to shift the entire responsibility of redressal of grievances in an inhouse format on the National Sports Federation (NSF) requiring them to constitute an internal machinery function. Thereafter, a Committee was again setup by the Central Government for revising the earlier Draft Bill for bringing about transparency and good governance in National Sports Federation. The Committee submitted the draft National Sports Development Bill, 2013,⁵ wherein for the first time, a recommendation was made for setting up an Appellate Sports Tribunal.⁶ While the draft bill made provision for the Central Government to prescribe the jurisdiction to be exercised by this Appellate Sports Tribunal but it also explicitly provided what the Tribunal could not adjudicate upon such as doping related cases for which the National Anti Doping Agency has been given the exclusive jurisdiction.⁷ It also prescribed that this Tribunal would not have any jurisdiction on matters concerning international federations for which appeal lies directly to court of arbitration for sports established in Switzerland.⁸ This Appellate Sports Tribunal therefore is the final Tribunal which jurisdiction could be invoked for redressal of grievances, once a person has exhausted the remedy of in-house format provided.

³ Ministry of Youth Affairs and Sports, 'National Sports Policy 2001' (Department of Sports 2001) <<https://yas.nic.in/sites/default/files/National%20Sports%20Policy%202001.pdf>> accessed 7 February 2022.

⁴ Ministry of Youth Affairs and Sports, 'National Sports Development Code of India' (Department of Sports 2011) <<https://yas.nic.in/sites/default/files/File918.compressed.pdf>> accessed 7 February 2022.

⁵ Ministry of Youth Affairs and Sports, 'Draft National Sports Development Bill, 2013' <<https://yas.nic.in/sites/default/files/File921.pdf>> accessed 10 February 2022.

⁶ *ibid* at 21-22.

⁷ *ibid* at 22.

⁸ *ibid* at 22.

The aforesaid Bill, 2013 however was not formalised and implemented. The same continued to be in the draft form only without completing the process of forming and making a legislation on the subject. The Central Government setup another committee in the year 2017 for drafting a National Code for good governance in sports. The said Committee deliberated upon and submitted a draft code titled “National Code for Good Governance in Sports 2017”.⁹ The aforesaid effort of the Central Government found a way to the Hon’ble Delhi High Court. A detailed order in that regard was passed by the Hon’ble Delhi High Court in *CM Application No. 32770 of 2017 in Writ Petition (C) 195 of 2010*.¹⁰ In the said order, a reference was made to the request of the Central Government to take back the draft policy with a statement that the Union Ministry of Sports would take further consultations from the concerned stakeholders and finalise the policy. While allowing the aforesaid request, the Hon’ble Delhi High Court in its order dated 16.11.2018 held that the final policy would be framed in the light of the relevant judgements of the Supreme Court and the Hon’ble Delhi High Court as well as the stand of the Central Government in the affidavits in the court. A liberty was also granted by the Hon’ble Delhi High Court to the Writ Petitioner that it can approach the Hon’ble Delhi High Court once again, if it feels aggrieved by the policy or any element thereof.

In order to complete the aforesaid process and statement made before the Hon’ble Delhi High Court, the Central Government constituted a Committee in the year 2019 to review the Draft Code, 2017 and give its recommendations.¹¹ The aforesaid constitution of a new Committee was challenged before the Hon’ble Delhi High Court by filing a fresh

⁹ ‘(Draft) National Code for Good Governance in Sports, 2017’ <<https://yas.nic.in/sites/default/files/Draft%20National%20Code%20for%20Good%20Governance%20in%20Sports.pdf>> accessed 10 February 2022.

¹⁰ *Rahul Mehra v Union of India* (Delhi HC, 16 November 2018) <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=272858&yr=2018> accessed 10 February 2022.

¹¹ ANI, ‘Sports Ministry forms expert committee for reviewing National Sports Code draft’ *Business Standard* (28 November 2019) <https://www.business-standard.com/article/news-ani/sports-ministry-forms-expert-committee-for-reviewing-national-sports-code-draft-119112800222_1.html> accessed 10 February 2022.

application being *CM Application No. 52582 of 2019*.¹² The Hon'ble Delhi High Court after hearing the Counsel appearing for all the parties passed an order on 06.12.2019 wherein it *prima facie* held that the court has failed to understand why another Committee had to be constituted to review the draft National Sports Code unless it intends to undoing the work already undertaken by the Central Government to prepare the Draft National Sports Code and good governance code for sports.¹³ It was also observed that the same would delay the process of finalising the draft code which has been available with the Central Government since 2017.¹⁴ Consequently, the order of the constitution of a new Committee was stayed by the Hon'ble Delhi High Court with a direction to the secretary to file an affidavit in that regard. These background facts are stated in order to show that the efforts of the Central Government to formulate legislation or specific guidelines with regard to sports did not and could not fructify and the same is still in a fluid stage.

The fact remains that the sports environment in our country has improved tremendously. However, sports related issues have also become complicated and assumed various disturbing facets involving regulatory, legal and other risks. There are concerns expressed by various individuals and sports enthusiasts that there should be a proper national legislation to regulate sports and the Sports Federation in the country. Mr. Aruneshwar Gupta, a senior advocate of the Supreme of India, has stated that there is certainly a need for enacting a National Sports Act in our country.¹⁵ According to him, the compilation of several orders on the existing rule structure under National Sports Development Code of India, 2011 is wholly insufficient and incapable of dealing with future of the sports industry. He categorically emphasises that without a National Sports Association (Registration, Recognition and Regulation) Act, Sports

¹² *Rahul Mebra v Union of India* (Delhi HC, 6 December 2019) <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=296545&yr=2019> accessed 10 February 2022.

¹³ *ibid* at 5.

¹⁴ *ibid* at 9.

¹⁵ 'Senior Advocate Aruneshwar Gupta on Sports Law, the BCCI & more' *Bar & Bench* (7 June 2021) <<https://www.barandbench.com/apprentice-lawyer/senior-advocate-aruneshwar-gupta-on-sports-law-the-bcci-more>> accessed 10 February 2022.

Industry in India would be unable to expand. His opinion definitely has relevance and importance in the present scenario. There was a further study in this regard which was published in *India Law Journal (ILJ)* wherein a similar suggestion is given that we must have a uniform code for sports in order to meet the increasing demands of the changing scenario.¹⁶ The study opines that there are several issues faced by the Indian sports including inefficient or inappropriate deployment of funds, mistakes in management, non-accountability for results, prejudice in selection procedure for national teams and undemocratic or unethical electoral practices in sports bodies. In order to root out these unwarranted issues, the study suggested that India needs a national legislation for promotion, development and uniform regulation for sports in India. The other suggestion is that sports being in the State list, the same should be brought to the concurrent list so that the Central Government can make appropriate legislation so as to regulate and promote sports industry in the country.

When such a legislation is brought the same could definitely include provisions for promotion of sports right from the school level by integrating sports with education by making it a compulsory subject of learning up to the secondary school level. The suggestion was also to constitute a Sports Commission in India to discharge an advisory role to help and guide the Ministry of Sports and Youth Affairs regarding sports and also to support talent identification and to promote a faster development and participation in sports at all levels, to ensure an adequate allocation of funds and resources through various national and provincial sports federations, to monitor and to take measures to ensure proper use of funds allocated by the Sports Commission to Sports Federations and also to oversee the implementation of sports policies in India. These are definitely concrete suggestions given which should be considered by the appropriate authority after consulting all the stakeholders. A decision in that regard could be taken by bringing in an

¹⁶ Gaurang Kanth, 'Emergence of Sports Law in India' *India Law Journal* <https://www.indialawjournal.org/archives/volume3/issue_2/article_by_Gaurang.html> accessed 10 February 2022.

all comprehensive legislation so as to meet the present day demand of sports development and promotion in the country.

The Central Government also constituted the National Board for Anti-Doping in Sports (The National Anti-Doping Bill, 2021) for exclusively dealing with the matters relating to doping related cases.¹⁷ However, the international body namely the International Anti Doping Agency derecognized and suspended the said National Anti Doping Agency on the presumption that the said agency is a part of the Government Agency.¹⁸ However, subsequently upon pointing out with strong reasons that said National Anti Doping Agency of India is totally or separate legal entity and works of its own and not under the instructions of the Central Government and the said International body being satisfied with the aforesaid stand taken by the National Anti Doping Agency has restored back its affiliation and recognition to the National Anti Doping agency once again by communication sent by it to the National Anti Doping laboratory.¹⁹ This National Anti Doping laboratory is now governed by a policy framed called the National Anti-Doping Bill, 2021. This paves the way for the agency to carry out its work independently and also enables it to garner some resources from its functioning, so as to enable it to use such resources for its development.

Similar efforts are also being taken by the Central Government to establish a regulatory framework on the online gaming industry and also for addressing the menace and fallout of sports fraud by framing a bill called the Sports (Online Gaming & Prevention of Fraud) Bill, 2018.²⁰ The gaming laws, in specific, date back to the colonial era when the Public Gambling Act was enacted in the year 1867. The same was the only central legislation on the subject of gaming. The said law mainly

¹⁷ National Anti-Doping Bill, 2021, LS Bill No. 160 of 2021, ch III.

¹⁸ PTI, 'WADA suspends India's National Dope Testing Laboratory' *The Economic Times* (23 August 2019) <<https://economictimes.indiatimes.com/news/sports/wada-suspends-indias-national-dope-testing-laboratory/articleshow/70797395.cms?from=mdr>> accessed 10 February 2022.

¹⁹ PTI, 'Suspended NDTL gets back WADA recognition: Sports Minister Anurag Thakur reveals' *The Times of India* (23 December 2021) <<https://timesofindia.indiatimes.com/sports/more-sports/others/national-dope-testing-laboratory-suspension-revoked-sports-minister-anurag-thakur-reveals/articleshow/88454241.cms>> accessed 10 February 2022.

²⁰ Sports (Online Gaming & Prevention of Fraud) Bill, 2018, LS Bill No 259 of 2018.

focussed on prohibiting gambling and betting by drawing up an exception for games of skill. However, the law at that stage did not bring out any distinction between a game of skill and a game of chance. However, now there is a tremendous growth in online gaming and fantasy sports. Huge monetary prizes are being offered which is making and bringing a significant element of competitions, but they are still governed by the Prize Competitions Act, 1955.²¹ This legislation fails to recognise and deal with the various continuous development in this sector. In view of the above shortcomings, the aforesaid Sports (Online Gaming & Prevention of Fraud) Bill, 2018 was introduced in the Parliament in order to bring about recognition to the various continuous development in that arena and to establish a regulatory framework for the online gaming industry and to root out the incidents of sports fraud in India. The aforesaid Bill when introduced in the Parliament could not be passed but thereafter the same has not been re-tabled. Besides in 2018 itself, the Law Commission of India prepared a report titled “Legal Framework: Gambling and Sports Betting including in Cricket in India”.²² This report highlighted the need to regulate the gambling industry, thereby suggesting and recommending for the growth of the industry. The Law Commission of India in the said report suggested the need for formulating and adopting a regulation in view of the fact there are instances of unauthorized betting and gambling and that such unauthorized betting and gambling has brought about a very adverse effect in our society.²³ Such illegal betting and gambling activities has given rise to growth of illegal trade and commerce and corrupt practices such as spot fixing and match fixing being employed in sports particularly in cricket.

Therefore, there have been discussions amongst various stakeholders seeking for regulating the gambling and betting industry by pointing out some of the advantages of such regulation such as generation of considerable revenue, generation of employment, development of

²¹ Prize Competitions Act, 1955, Act No 42 of 1955.

²² Law Commission of India, ‘Legal Framework: Gambling and Sports betting including In Cricket In India’ (Report No. 276, 2018).

²³ *ibid* ch. IV, para 4.6-4.18.

tourism as it may work as a complementary industry and would also work for protection of the vulnerable sections of the society.

The same was also followed by the draft discussion paper released by NITI Aayog in 2020 titled “*Guiding Principles for the Uniform National Level Regulation of Online Fantasy Sports Platforms in India.*”²⁴ This discussion paper was framed and released so as to bring about formalisation of certain guidelines for this fantasy sports industry in India. However, all these efforts remained incomplete and did not bring about the desired objectives.

Therefore, it is evident that both in the arena of sports development and gaming industry, no concrete legislation or positive and all-round guidelines governing all the areas are formulated or enacted or adopted. In contrast to this position, the countries and regions like the European Union, People’s Republic of China and South Korea had begun formalising national legal frameworks for their sports and gaming sectors. The central idea of such legal frameworks by those countries aimed at increasing accountability and enabling governmental support for growth and development of such sports and games. In the recent past, there have been cases of match fixing and betting sites particularly, in relation to cricket and other sports activities. In order to deal with this menace of high profile corruption in the sports and gaming industry and also doping concerns proactive legislations and regulations are the need of the hour.

In this regard, it is seen that some states such as Uttar Pradesh, Madhya Pradesh and Delhi have adopted the legislation namely the Public Gambling Act, 1867, whereas some other states made their own amendments to the same. Some other states have enacted their individual legislations to regulate gaming and gambling activities within their territorial jurisdiction. The states of Sikkim²⁵, Nagaland²⁶ and Meghalaya²⁷

²⁴ NITI Aayog, ‘Guiding Principles for the Uniform National Level Regulation of Online Fantasy Sports Platforms in India’ (Draft for Discussion, 2020) <https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf> accessed 10 February 2022.

²⁵ The Sikkim Online Gaming (Regulation) Act, 2008, Act No. 23 of 2008.

²⁶ The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015, Act No. 3 of 2016.

²⁷ The Meghalaya Regulation of Gaming Act, 2021, Act No. 9 of 2021.

have licensing regime for online games whereas Meghalaya and Nagaland have licensing regime for online skill games. Most of such state laws grant specific exemption for games of mere skills. Similarly, the states of Telangana²⁸, Andhra Pradesh²⁹ and Tamil Nadu³⁰ recently amended their respective state gaming laws by diluting to express exemption provided to skill games. On 3rd August, 2021, the Madras High Court struck down the Tamil Nadu Gambling and Police Laws (Amendment Act), 2021, as being ultra vires to the Constitution. The Kerala High Court relying on the decision of the Madras High Court in its recent Judgement of September, 2021 set aside the notification issued by the State Govt. which banned online Rummy for stakes declaring the same to be arbitrary/illegal and violative of Fundamental Rights guaranteed under the Constitution. The court in this regard held that states cannot be a criterion to decide whether a game is based on a skill or chance. Casino, in general, has been considered to be a game of chance and therefore hit by the prohibition under most gaming laws. Very recently, a Division Bench of Karnataka High Court struck down an amendment to the Karnataka Police Act, 1963 banning all forms of gambling in the State including online gambling in the state in order to “curb menace of gaming through the internet, mobile apps.” There are varying opinions with regard to recognition of Poker as a game of skill. The states of Nagaland and Meghalaya have categorised Poker as a game of skill whereas the High Court of Gujarat has opined that Poker is a game of chance.³¹

The Supreme Court has held betting on horse racing to be a game of skill and consequently entitled to skill game exemption in the gaming laws. Further, there is a specific exemption for betting on horse racing in most gaming laws. The Hon’ble Supreme Court in the case of *Dr. K.R. Laxmanan v. State of Tamil Nadu*³² held that betting on horse races exist independently as a skill game without having to rely on specific exemption available to such betting in gaming laws. Then again the issue

²⁸ The Telangana Gaming Act, 1974, Act No. 27 of 1974.

²⁹ The Andhra Pradesh Gaming (Amendment) Act, 2020, Act 43 of 2020.

³⁰ The Tamil Nadu Gaming Act, 1930, Act 3 of 1930.

³¹ *Dominance Games Pvt. Ltd v State of Gujarat* 2017 SCC OnLine Guj 1838.

³² *K.R. Laxmanan v State of Tamil Nadu*(1996) SCC 2 226.

whether sports betting is a game of skill or not is pending adjudication before the Hon'ble Supreme Court in the case of *Geeta Rani v. Union of India*.³³ The Petitioner therein has sought for a comprehensive legislation for regularisation of sports both by the Central Government as also by the State Governments. The High Courts of Punjab & Haryana³⁴, Bombay³⁵ and Rajasthan³⁶ have upheld the fantasy sports as a game of skill thereby exempting such sports from the prohibition under the Gaming Laws. The states like Nagaland and Meghalaya have enacted licensing regimes for offering fantasy sports.

One facet of this discussion is to highlight the fact that the Indian Courts have generally accepted the dominant factor test that has been followed in the courts in the USA³⁷ distinguishing between games of skills and that of games of chance. This test requires assessment and determination of the issue as to whether chance or skill is the dominating factor while determining the outcome of the game. However, certain categories of gaming through gambling are regulated by specific legislations such as Lotteries (Regulation) Act, 1998 and Prize Competitions Act of 1955 etc. Considering the ambiguity that still persists in these areas and also in view of prevailing conflicting ideas and decisions, it is absolutely necessary for the Central Government to go ahead and to frame legislations/guidelines determining the criteria for determination of what constitutes game of skill including the criteria that would satisfy the preponderance test of skill versus chance that has been historically adopted by the Indian Courts. While doing so notice should be taken of all the decisions rendered by the various courts and an attempt should also be made to get the case pending in the Supreme Court decided as the laws laid down by the Supreme Court are the laws of the country.

Therefore, in order to eliminate all disputes and controversies and to plug all the loopholes in the sports and gaming industry and to make both the areas hassle free, India needs pro-active effort from the Ministry of

³³ *Geeta Rani v Union of India* WP(C) No 000287/2017.

³⁴ *Varun Gumber v Union Territory of Chandigarh* 2017 Cri LJ 3836.

³⁵ *Gurdeep Singh Sachar v, Union of India and Ors.* (2019) 75 GST 258.

³⁶ *Chandresh Sankhla v State of Rajasthan* 2020 SCC Online Raj 264.

³⁷ *Morrow v State*, 511 P.2d 127, 129 (1973).

Sports and Youth Welfare for framing a cohesive and all comprehensive legislations which could be in the format of a legislation/code or guidelines both in the arena of sports and gaming industry in India, so as to tap the abundant scope, skills and talents that are available to us and spread all over.

In this context, I appreciate the enthusiasm expressed and efforts taken by the RGNUL Student Research Review to highlight the dire need of comprehensive legislations/adoption of regulations code or guidelines both in the field of sports and also in the arena of games and their mechanism. They have done immense research on the subject with genuine interest for betterment and taking forward the concept of Sports and gaming industry of our country to a new height.

**Justice Dr. Mukundakam Sharma,
Former Judge, Supreme Court of India**

EDITORIAL NOTE

The Sports and Gaming Industry is rising at a rapid pace in India. A report titled “Sporting Nation in the Making” (2021) stated that the total sports industry spends of India has surpassed Rs. 9500 Crore¹ while another report has highlighted that the sports sector in India is likely to increase by five times to reach a value of \$100 billion by 2027 against \$27 billion in 2020².

Numerous events are indicative of the growing focus towards the sports and gaming industry. E-Sports shall, for the first time, be played for medals in 8 games at the Asian Games 2022.³ In India, in the Budget of 2022, a new task force named Animation, Visual Effects, Gaming and Comic (AVCG) Task Force has also been established by the Ministry of Information and Broadcasting to give impetus to the gaming industry and to capture the growing market in India.⁴ The National Anti-Doping Agency (NADA) Bill, 2022 has also been passed by the Parliament⁵. The Bill brings us to a very important factor in the growth of this industry i.e. laws and regulations governing it.

Presently, there is no overarching legislation governing sports in India, barring the recently passed NADA Bill and the National Sports Development Code, 2011 (although not technically a statute⁶). Further, the compliance of the latter

¹ Gaurav Laghate, ‘Indian sports sponsorship crosses Rs 9,500 crore mark in 2021: GroupM ESP’ *Economic Times* (25 March 2022) <<https://economictimes.indiatimes.com/news/sports/indian-sports-sponsorship-crosses-rs-9500-crore-mark-in-2021-groupm-esp/articleshow/90447246.cms?from=mdr>> accessed 29 July 2022.

² Varuni Khosla, ‘India’s sports business to hit \$100 billion in 5 years: Report’ *Business Standard* (22 June 2022) <<https://www.livemint.com/companies/news/sports-business-set-to-touch-100-billion-in-5-years-report-11655820426321.html>> accessed 30 July 2022.

³ Rahul Venkat, ‘Asian Games 2022: Esports to make debut; FIFA, PUBG, Dota 2 among eight medal events’ *Olympics* (9 September 2021) <<https://olympics.com/en/news/fifa-pubg-dota-2-esports-medal-events-asian-games-2022>> accessed 30 July 2022.

⁴ ‘Ministry of I&B Constitutes Animation, Visual Effects, Gaming and Comics (AVGC) Promotion Task Force’ <<https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1814698>> accessed 4 August 2022.

⁵ ‘Parliament passes the National Anti-Doping Bill 2022 to provide for the constitution of National Anti-Doping agency as a statutory body for regulating anti-doping activities in sports’ <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1848085>> accessed 4 August 2022.

⁶ AIFF v. Rahul Mehra & Ors., SLP (C) No. 30748-30749 of 2017, Supreme Court of India.

by several National Sports Federations is wanting⁷ and the courts have recently passed orders against All India Football Federation (AIFF)⁸ and Table Tennis Federation of India (TTFI)⁹ for not complying with the same.

There have been several draft proposals and discussion papers¹⁰ that have been released but up till now, hardly any have seen the light of the day. An Inter-Ministerial Panel has been recently set up to work on regulations for the online gaming industry.¹¹ However, much more needs to be done to ensure that the sports in totality, and not just online gaming or e-sports, are governed properly and the players and administrators of the sports have their rightful say in the governance of the sports and none are shortchanged of their basic rights.

In recent times, courts in India have also heard challenges to selections for international events such as the challenge by Manush Shah and Swastika Ghosh over their selection as reserve players for Table Tennis at the Commonwealth Games 2022.¹² An issue of “moment marketing” regarding use of images of sportspersons without their consent congratulating them for accolades, for enhancement of a company’s own brand value also came up at the time of the Tokyo Olympics.¹³

⁷ Rahul Mehra v. Union of India, 2022 LiveLaw (Del) 538.

⁸ AIFF v. Rahul Mehra & Ors, SLP (C) No. 30748-30749 of 2017, Supreme Court of India.

⁹ Manika Batra v. TTFI, 2022 LiveLaw (Del) 111.

¹⁰ “Draft Guiding Principles for the Uniform National Level Regulation of Online Fantasy Sports Platforms in India”, NITI Aayog, <https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf> accessed 4 August 2022; National Sports Ethics Commission Bill, 2017, <<http://164.100.47.4/billtexts/lbilltexts/asintroduced/4408LS.pdf>> accessed 3 August 2022; The Online Gaming Regulation Bill, 2022, <[D:\deepak\Bill\English\march 2022\478 8.3.2022\AILS bill 78 THE ONLINE GAMING \(REGULATION\) BILL, 2022.pmd](D:\deepak\Bill\English\march 2022\478 8.3.2022\AILS bill 78 THE ONLINE GAMING (REGULATION) BILL, 2022.pmd)> accessed 3 August 2022.

¹¹ PTI, ‘Government forms inter-ministerial panel to regulate online gaming’ *The Economic Times* (26 May <https://economictimes.indiatimes.com/news/sports/government-forms-inter-ministerial-panel-to-regulate-online-gaming/articleshow/91819895.cms>).

¹² Manush Shah v. TTFI & Ors., WP (C) 9490/2022, Delhi High Court; Swastika Ghosh v. TTFI & Ors., WP (C) 9488/2022, Delhi High Court.

¹³ Ritwik Sharma, ‘With PV Sindhu mulling legal action, moment marketing faces moment of truth’ *Business Standard* (6 August 2021) <<https://www.business-standard.com/article/sports/with-pv-sindhu-mulling-legal-action-moment-marketing-faces-moment-of-truth-121080501631_1.html> accessed 5 August 2022.

It was in light of such interesting areas of discussion that the Editorial Board decided to publish the journal on the intersection of law and policy with Sports & Gaming- “Unboxing the Legal Potential of the Sports & Gaming Industry: Redesigning India’s Way of Playing?”. We would like to express our gratitude to Dr. Justice Mukundakam Sharma for penning down a Foreword for this edition and sharing his thoughts on this res integra issue, for the benefit of the legal community at large. For this edition, we have had the pleasure of having an esteemed Peer Review Board as well as submissions from acclaimed lawyers and academics such as Ms. Urvasi Naidoo, Dr. Lovely Dasgupta, Mr. Tushar Katheria and Mr. Shashank Atreya writing on issues ranging from match fixing to fantasy sports.

This edition of the RSRR journal is the end result of tireless work by an Editorial Board of 25 members, dedicated to the cause of furthering research on niche and upcoming topics and their intersection with the law, such as Sports and Gaming Laws. For most of the academic year, the Board was working remotely and we hope that the articles do justice to the important issues that have been critically analysed. India’s recent successful performances at the Tokyo Olympics and the 2022 Commonwealth Games indicate the importance of these successes at the international and national level. With the endeavour to improve upon these performances and providing a conducive and infrastructurally sound environment for growth in this field, clear and all-inclusive regulatory frameworks are required. In this light, on behalf of the RSRR Editorial Board 2021-22, we present to you Volume 8 Issue 2 of the RGNUL Student Law Journal.

Stuti Srivastava and Aditya Vyas

Editors-in-Chief

RSRR

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A CRITICAL ANALYSIS OF CURRENT PROVISIONS IN INDIA TO CRIMINALIZE MATCH FIXING

**Urvasi Naidoo and Aayushi Singh*

I. INTRODUCTION

Globally there has been an increase in legislation to criminalize competition manipulation from 5 countries in 2013, to 25 in 2016 and 45 in 2021.¹ However, India is not one of these countries. India currently is reliant on the Indian Penal Code 1860² (“**IPC**”), The Public Gambling Act, 1867³, the Protection of Corruption Act, 1988⁴ and the Maharashtra Control of Organized Crime Act, 1999⁵ (“**MCOCA**”). The National Sports Policy of 1984⁶ re-formulated in 2001⁷ and the National Sports Development Code of 2011⁸ are the only existing regulations which govern national sports federations, but these do nothing to criminalize match fixing.

This article will critically analyze the current provisions in India, previous Bills to introduce criminalisation, and the latest draft legislation titled:

* Urvasi Naidoo is the Compliance and Contracts Manager at Commonwealth Games Federation and Aayushi Singh is a student at Rajiv Gandhi National University of Law, Punjab

¹ United Nations Office on Drugs and Crimes, *Legal Approaches to Tackling the Manipulation of Sports Competitions: A Resource Guide* (International Olympic Committee, 2021)
<https://www.unodc.org/documents/corruption/Publications/2021/Legal_Approaches_to_Tackling_the_Manipulation_of_Sports_Competitions_EN.pdf> accessed 13 March 2022.

² Indian Penal Code 1860 <<https://legislative.gov.in/sites/default/files/A1860-45.pdf>> accessed 13 March 2022.

³ The Public Gambling Act 1867
<https://www.indiacode.nic.in/bitstream/123456789/2269/1/AAA1867_03.pdf> accessed 13 March 2022.

⁴ Protection of Corruption Act, 1988
<<https://legislative.gov.in/sites/default/files/A1988-49.pdf>> accessed 13 March 2022.

⁵ Maharashtra Control of Organized Crime Act, 1999
<https://www.indiacode.nic.in/bitstream/123456789/16362/1/the_maharashtra_control_of_organised_crime_act%2C_1999.pdf> accessed 13 March 2022.

⁶ The National Sports Policy 1984 <<https://yas.nic.in/sports/national-sports-policy-2001>> accessed 13 March 2022

⁷ The National Sports Policy 2001
<<https://yas.nic.in/sites/default/files/National%20Sports%20Policy%202001.pdf>> accessed 13 March 2022

⁸ National Sports Development Code, 2011
<<https://yas.nic.in/sites/default/files/File918.compressed.pdf>> accessed 13 March 2022.

“The Prevention of Match Fixing and Promotion of Fair Play in Sports Bill, 2020”⁹ proposed by The Sports Law and Policy Centre and the Vidhi Centre of Legal Policy.

The authors conclude the position is the same as it was at the turn of the century. In the case of Indian hockey federation, the judgement of Delhi High Court¹⁰ has clearly stated that sport is necessary for the development of the nation, as it promotes political as well as diplomatic relations between the countries. Sport in India is key to cultural, educational, social and economic development and is also a source of national pride and corruption continues to pose a serious threat¹¹.

Existing legislation needs to be strengthened to successfully prosecute organised criminals who seek to manipulate sports competitions. Appropriate investigative and law enforcement tools need to be in place to safeguard sport and mitigate the grave risks that corruption poses and act as an appropriate deterrent to corrupters. With the rapid explosion of online gaming and e-sports competitions this has now become much more urgent. E-sports is vulnerable to not only competition manipulation, but also digital cheating as highlighted in a recent report from United Nations Office on Drugs and Crime (“UNODC”).¹²

II. GLOBAL REPORTS AND RESOURCES

At the end of 2021, the UNODC published the first ever Global Report on Corruption in Sport (“GRCS”).¹³ Previous work has identified that corruption, linked to betting in sport has been around for centuries¹⁴ but the rapid commercialisation and digitalisation of sport has led to more

⁹ The Sports Law & Policy Centre, *Fixing It: Tackling Match Manipulation* (Vidhi Centre for Legal Policy, 2020) <<https://vidhilegalpolicy.in/wp-content/uploads/2020/07/Report-v.3.pdf>> accessed 13 March 2022.

¹⁰ *Indian Hockey Federation v. Union of India*, 2012 SCC OnLine Del 5863.

¹¹ S. Dasgupta, ‘Match Fixing: Threat to Indian Sport’s Integrity’ (2013) <<https://ssrn.com/abstract=2261311>> accessed 13 March 2022.

¹² UNODC, *Global Report on Corruption in Sport* (November 2021) <<http://grcs2021.unodc.org/>> accessed 13 March 2022.

¹³ *ibid.*

¹⁴ *Indian Hockey Federation v. Union of India*, 2012 SCC OnLine Del 5863; See Sports Law & Policy Centre (n 9).

prevalence and in 2017 the UNODC formed a Programme on Safeguarding Sport from Corruption and Crime.¹⁵ Also, in 2017 the International Partnership against Corruption in Sport (“**IPACS**”)¹⁶ was formed and in April 2021 it launched a Task Force aimed at enhancing effective cooperation between law enforcement, criminal justice authorities and sport organisations.¹⁷

In October 2021 the G20 Anti-Corruption Working Group (“**ACWG**”) agreed on High Level Principles on tackling corruption in sport¹⁸ (India is a member of the G20, an intergovernmental forum).

The Report adds to existing UNODC work aimed at supporting parties to the United Nations Convention against Corruption (“**UNCAC**”)¹⁹ in the implementation of paragraph 15 of Resolution 8/4 on safeguarding sport from corruption, adopted by the Conference of the States Parties to the Convention at its eighth session, held in Abu Dhabi from 16 to 20 December 2019.²⁰ In that paragraph 15, the Conference encouraged the signatory States to tackle the problems of competition manipulation, illegal betting and related money-laundering activities by periodically evaluating national policies, effective practices and national law with a view to determining their efficiency and effectiveness in preventing and

¹⁵ See UNODC, ‘Safeguarding Sport from Corruption and Crime’ (2017) <<https://www.unodc.org/unodc/safeguardingsport/index.html>> accessed 13 March 2022.

¹⁶ See *International Partnership against Corruption in Sports* <<https://www.ipacs.sport/>> accessed 13 March 2022.

¹⁷ ‘New IPACS task force to improve cooperation between law enforcement, criminal justice authorities and sport organisations’ (*IPACS*, 27 April 2021) <<https://www.ipacs.sport/news/launch-of-task-force-4>> accessed 13 March 2022.

¹⁸ See G20 Anti-Corruption Working Group, ‘G20 High Level Principles on Tackling Corruption in Sport 2021’ (Italia, 2021) <https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Principles/2021_G20_High-Level_Principles_on_Tackling_Corruption_in_Sport.pdf> accessed 13 March 2022.

¹⁹ United Nations Office on Drugs and Crime, United Nations Convention Against Corruption (G.A. Res. 58/4, 31 October 2003) <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> accessed 13 March 2022.

²⁰ ‘Safeguarding sport from corruption’ (Conference of the States Parties to the United Nations Convention against Corruption Resolution 8/4 on Safeguarding Sport from Corruption, Abu Dhabi, December 2019) <https://www.unodc.org/documents/Safeguardingsport/Documents/UNCAC_-_resolution_8-4.pdf> accessed 13 March 2022.

combating corruption in sport. Resolution 7/8 in 2017²¹ also agreed to a set of commitments aimed at tackling corruption in sport. UNCAC is the only legally binding universal anti-corruption instrument and therefore should be the starting point for all signatories, including India.

India is a signatory to the UNCAC which came into force in December 2005, it should therefore be looking at improving legislation which tackles corruption, not just in the sport sector but across all sectors. It is noted that India has shown some commitment to this topic by taking part in UNODC Conferences in 2018 and 2019.²²

Now with the advent of online gaming, increased and rapidly developing technologies and crypto currencies, the potential for further corruption in sport is amplified. UNODC has provided numerous resources and assistance to signatories to the Convention. In this area of sports corruption, model legislation clauses and examples of best practice are available. India should be making good avail of these resources²³ and using all additional means to safeguard sport as a matter of urgency.

III. CURRENT LEGISLATIONS ARE INADEQUATE FOR CRIMINALIZING MATCH FIXING IN INDIA

Fixing of a match is process in which the players play a game for predetermined results, which are made by breaking rules and laws. There are cases of groups purposefully performing ineffectively to acquire a future benefit or for a superior draft pick or losing for future benefit, these are a few practices which are remembered for the limits of match fixing. Games that are intentionally lost are called tossed or tanked games.

²¹ 'Corruption in sport' (Conference of the States Parties to the United Nations Convention against Corruption Resolution 7/8 on corruption in sport, Vienna, November 2017)
<https://www.unodc.org/documents/Safeguardingsport/Documents/Res.7.8_Corruption_in_Sport.pdf> accessed 13 March 2022.

²²'Safeguarding sport from corruption' (Conference of the States Parties to the United Nations Convention against Corruption Resolution 8/4 on Safeguarding Sport from Corruption, June 2018); Safeguarding Sports from Corruption (n 20).

²³'Resources' (UNODC)
<<https://www.unodc.org/unodc/en/safeguardingsport/resources.html>> accessed 13 March 2022.

The UNODC documentation also provides a definition of Match Fixing.²⁴ Other works have also explored the history, definition and reasons for match fixing²⁵.

This act of Match Fixing is nowhere specifically mentioned in criminal laws; hence it is considered to be a crime of “criminal conspiracy” as stated in IPC.²⁶

It is clearly mentioned under the IPC, Section 120(A)²⁷ that a criminal conspiracy is constituted when two or more people come together and commit any legal act by illegal means or any illegal act which is prohibited under the law, such agreements are said to be in accordance with criminal conspiracy.

For any individual to be prosecuted under this section certain components are required; cheating, committing fraud and misappropriation of an act. For a prosecution to be successful it has to be proved how the party has committed fraud and cheating. It is difficult in sport to make the link and actually show how the player has been involved in the crime. This can be seen in the unsuccessful prosecution of Ashwani Aggarwal,²⁸ which could not succeed as no link between the accused and the organized crime group could be established.²⁹

Under Section 120(B) of IPC, whosoever is a part of the criminal conspiracy could be punished with the death, imprisonment (for life) or rigorous imprisonment for the period of two years or more, depending upon the situation and on a case-to-case basis.³⁰

²⁴ See below ‘NOTE - Definitions taken from UNODC reports’.

²⁵ Kevin Carpenter, ‘Match Fixing - Why Do People Involved in Sport Agree to Match Fix?’ – Part 2’ (*LawInSport*, 12 June 2011) <https://www.lawinsport.com/topics/sports/hockey/item/match-fixing-why-do-people-involved-in-sport-agree-to-match-fix-part-2?category_id=172> accessed 13 March 2022.

²⁶ UNODC Global Report(n 13).

²⁷ Indian Penal Code 1860, s 120(A).

²⁸ *State v. Ashwani Aggarwal* (Delhi District Court, 25 July 2015)

²⁹ See below for further discussion.

³⁰ Indian Penal Code 1860, s 120(B).

1. The Public Gambling Act, 1867³¹

This outdated Act was intended to deal with gambling in a public place or a gaming establishment with an exception for games of skill as opposed to those of chance. Other works and case law have discussed whether an act is classed as skill or chance³². Some states have brought in their own laws, some allowing casinos and lotteries like Daman, Sikkim, and Goa. Given the outdated nature of the law there has been a debate in India as to whether all gambling should be permitted. In 2016, the Supreme Court asked the Law Commission of India to investigate whether betting in India should be legalized. The Law Commission released its report two years later. The report proposed that betting should not be allowed but if the government were considering it then betting should be heavily regulated. It also stated quite clearly that “*match-fixing and sports fraud should be specifically made criminal offences with severe punishments*”³³.

There have also been some enactments to deal with money laundering and online manipulations, the Information Technology Act, 2000,³⁴ and the Payment and Settlement Systems Act, 2007,³⁵ but there is still no definition and clear application to match fixing.

2. The Maharashtra Control of Organized Crime Act, 1999³⁶

In the wake of many instances of coordinated wrongdoing in sports, the State of Maharashtra thought of a demonstration to explicitly target

³¹The Public Gambling Act 1867
<https://www.indiacode.nic.in/bitstream/123456789/2269/1/AAA1867___03.pdf>
accessed 13 March 2022.

³²Law Commission of India, ‘Legal Framework: Gambling and Sports Betting including in cricket in India’ (Report No. 276, July 2018)
<<https://lawcommissionofindia.nic.in/reports/Report276.pdf>> accessed 13 March 2022.

³³ *ibid* at 126.

³⁴Information Technology Act, 2000
<<https://www.indiacode.nic.in/bitstream/123456789/13116/1/it act 2000 updated.pdf>> accessed 13 March 2022.

³⁵ Payment and Settlement Systems Act, 2007.

³⁶ IPACS (n 16);
The Maharashtra Control of Organized Crime Act, 1999.

coordinated wrongdoing and sanctioned an extraordinary law with severe obstruction accessories to control the plague of coordinated wrongdoing. The Act subdued whatever other laws which are overall or made in negation with the arrangements of the demonstration.

The Act was instituted to turn into the most encouraging rule to control and compete against the organization of coordinated wrongdoing in the State, however it had some significant provisos as the Act didn't unequivocally condemn match fixing and to demonstrate an individual for match fixing, proceeded with unlawful demonstration or enrolment in a coordinated criminal organization was required which made it inevitably hard to prove the criminal demonstration in a courtroom.

As organized crime is not restricted to any particular region, in a similar way the application of MCOCA is wider. It not only deals with the cases arising in the State of Maharashtra but also holds validity in other States too.

3. The Prevention of Corruption Act, 1988³⁷

The pertinent aim of this Act was to prevent the corruption in the various sectors by public servants. However, for making anyone liable for corruption it is compulsory for the prosecution to prove that the public servant was offered a bribe. In the case of *Zee Telefilms*,³⁸ it was stated by the court that the Board of Control for Cricket in India (“**BCCI**”) had all the resemblance features of a State; hence, all the Cricketers/Athletes employed under this body would be considered as public servants. However, as with the case of *Azharuddin*,³⁹ the offence must be committed whilst acting in their status as public servants in order for it to be enforceable under the PCA.⁴⁰

³⁷The Prevention of Corruption Act, 1988 <https://www.indiacode.nic.in/bitstream/123456789/15302/1/pc_act_1988.pdf> accessed 30 April 2022.

³⁸*Zee Telefilms Ltd. v. Union of India*, AIR 2005 SC 2677.

³⁹*Board of Control for Cricket in India v. Mohammed Azharuddin*, 2003 (3) ALD 873.

⁴⁰ See Vanita Singh, ‘Understanding the Prevention of Corruption Act, 1988: An Analysis’ (*Legal Services India*) <<https://www.legalserviceindia.com/legal/article-5375->

Even besides BCCI, if there are any other national sports authorities that also have all the features of a State, then the players appointed by them would also be considered as a public servant for the purposes of any prosecutions. However, in a nation like India, the crime of match fixing has still not got any mention in any of the law books or acts, so in accordance with the PCA whenever such situation of fixing arises between two clubs then none of the players can be considered to be a public servant under the mentioned act.

A major investigation, which was conducted by Central Bureau of Investigation (“CBI”) in the year 2000,⁴¹ concluded that the PCA, 1988 was the only Act that could be used for criminalizing the act of match fixing.

The Hon’ble High court of Delhi in pursuance of a Public Interest Litigation (“PIL”) filed against BCCI in 2000⁴², stated that it’s a major drawback that sport, being an important institution of the nation, had no proper set of guidelines for the corruption that happens within the institution itself, the court also expressed the inability of government in not having a proper framework rather than imposing their own guidelines. And asked the government to have a serious concern in this matter and put in place a proper legal framework for sports.

4. The Lokpal and Lokayuktas Act, 2013

In 2010, a very prominent Anti-Corruption movement arose with a bill proposed to introduce an Ombudsman or Lokpal (Sanskrit: *lokapāla*, "defender of people" or "people's friend"). It was finally passed in 2013⁴³ but it is of limited use for the sports sector as the applicability is restricted to inquiring into allegations of corruption against certain important public

[understanding-the-prevention-of-corruption-act-1988-an-analysis.html](#)> accessed 18 March 2022.

⁴¹ Central Bureau of Investigation, ‘Report on cricket match-fixing and related mal-practises’ (October 2000) <<https://www.rediff.com/cricket/2000/nov/01full.htm>> accessed 18 March 2022.

⁴² *Rahul Mehra v. Union of India*, (2005) 4 Comp LJ 268.

⁴³ The Lokpal and Lokayuktas Act, 2013.

functionaries, including the Prime Minister, cabinet ministers, members of parliament, Group A officials of the Central Government and matters connecting such public servants. Clearly, if a public functionary is involved in match fixing and/or sports corruption then the matter can be reported to the Lokpal but to date there have been no such reports.

As stated above, the National Sports Policy, 2001 and the National Sports Development Code, 2011 are the existing regulations which govern national sports federations.

5. National Sports Policy, 2001⁴⁴

In order to get positive development and growth of sports across the country a uniform policy was laid down popularly called the National Sports Policy. The purpose - to attain a proper mechanism and working with dual processes of achieving excellence and “broad-basing” (universalization or mass participation in Sports) in sports at international as well as national level.

The Indian Olympic Association and National Sports Federations, the Union government and state governments all have to work in synchronization to attain better results of the policy. Sports that have a competitive edge and possible growth in the nation need to be encouraged aggressively to put in place structures which are transparent, accountable and professional. The involvement of physical education in the curriculum was one of the motives behind this policy and it is not focussed on stamping out corruption in sports.

6. National Sports Development Code of India, 2011⁴⁵

The National Government is dedicatedly trying to implement a uniform code for good governance practice in organizations and for the

⁴⁴ Central Bureau of Investigation, ‘National Sports Policy’ (*Press Information Bureau*, 3 December 2014) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=112495>> accessed 18 March 2022.

⁴⁵ Department of Sports, ‘National Sports Development Code, 2011’ (Ministry of Youth Affairs and Sports, 31 January 2011) <<https://yas.nic.in/sites/default/files/File918.compressed.pdf>> accessed 18 March 2022.

management of sports at the national level. The Code is mandatory for National Sports Federations and there are multiple judgements passed by Supreme Court and High Courts falling under the ambit of this code mainly, against those bodies who have been found to be non-compliant with the Code.⁴⁶ The Code, similar to other governance Codes relates to the functioning and management of the sports bodies and more recent focus on the appointment, tenure, age and disciplining of board members.⁴⁷ Whilst it can be a useful tool in developing regulations for the sports to tackle corruption it does little to assist with the criminalization of match fixing. Further it has come under criticism for being inadequate to tackle recent evolutions in the sports sector.⁴⁸

Although Indian criminal laws have certain sets of punishments for corruption, the lack of a proper definition of match fixing as a crime means that any instance of match fixing is treated as general corruption under the criminal justice system and the nature of punishment is thus unprescribed and often inadequate. This is why it is an alarming time for demanding proper national legislation that would govern the sports sector and determine the proper range of punishments.

The Prevention of Match Fixing and Promotion of Fair Play in Sports Bill⁴⁹ focuses on strengthening provisions for the sports sector. As well as creating an offence of Match Fixing, it proposes that all Sports Federations shall have an ethics commission and a disciplinary committee

⁴⁶Mahipal Singh v. Union of India (Delhi HC, 3 August 2018); Maharashtra Archery Association v. Rahul Mehra, 2017 SCC OnLine SC 1849; V. Ranjit & A. Rastogi, 'Complying With The National Sports Development Code Of India, 2011' (Mondaq, 30 June 2020) <<https://www.mondaq.com/india/sport/959720/complying-with-the-national-sports-development-code-of-india-2011>> accessed 18 March 2022.

⁴⁷ Manali Kulkarni, 'India's New National Sports Code: Problems with Implementation and the Effect on the Autonomy of Sport' (*LawInSports*, 15 May 2014) https://www.lawinsport.com/topics/item/india-s-new-national-sports-code-problems-with-implementation-and-the-effect-on-the-autonomy-sport?category_id=152 accessed 18 March 2022.

⁴⁸ 'Senior Advocate Aruneshwar Gupta on Sports law, BCCI & more' (*Bar and Bench*, 7 June 2021) <<https://www.barandbench.com/apprentice-lawyer/senior-advocate-aruneshwar-gupta-on-sports-law-the-bcci-more>> accessed 18 March 2022; Dasgupta (n 11).

⁴⁹ Sports Law and Policy Centre (n 9)

and that a National Fair Play Appellate Board and an investigative body entitled the National Fair Play Authority are established. This is welcome as the formation of a central sports regulatory authority is necessary to ensure uniform development and implementation of match fixing policies across all sports and all states.

IV. EXAMPLES WHERE LACK OF CRIMINAL DEFINITION OF MATCH FIXING HAS IMPACTED PROSECUTIONS

In the case of *S. Sreesanth v. The Board of Control for Cricket in India*,⁵⁰ Sreesanth was arrested for spot fixing during an Indian Premier League match in 2013. A lifetime ban was imposed by BCCI in September 2013. Sreesanth had a criminal prosecution under Section 406 of the Indian Penal Code i.e., whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both, charges under the MCOCA and the Public Gambling Act, 1867 were also considered. On the 25th of July 2015, the criminal court discharged Sreesanth, and he then sought to have his lifetime ban by the BCCI rescinded. In 2017, the Honorable court set aside the life ban imposed on the cricketer and directed the board to decide a fresh quantum of punishment stating that previously imposed life ban was too harsh for the crime. The BCCI appealed and the lifetime ban was re-imposed. However, in the most recent judgement, *Board of Control for Cricket in India*,⁵¹ followed through on March 15, 2019, composed by Justice Ashok Bhushan and Justice K.M. Joseph, the Supreme Court has asked the BCCI Disciplinary Committee to accept a new approach to the quantum of his discipline under the Anti-Corruption Code. The Apex Court requested that the BCCI choose 36-year-old Sreesanth's discipline ideally inside 90 days. It requested that Sreesanth would get just one opportunity to express his opinion on the quantum of punishment. It was finally decided that his

⁵⁰ *S. Sreesanth v. BCCI*, (2019) 4 SCC 660.

⁵¹ *ibid.*

lifetime ban would end at end of August 2020. Sreesanth served a total of 8 years banned from cricket.

The criminal prosecution could not continue as it was said there was prima facie “no sufficient material” against the accused to establish their “nexus” with organised crime syndicate⁵².

In the case of *Ajay Sharma v. The Board of Control for Cricket in India*⁵³, Additional District Judge, Sunil Chaudhary, passed the directions while allowing a suit by Sharma challenging the appointment and report of advocate K. Madhavan and Sharma’s subsequent debarment from playing by the Disciplinary Committee constituted by the BCCI.

The Board had appointed Mr. Madhavan a Commissioner in 2000, following the submission of an inquiry report on the match fixing allegations by the CBI to the Union Ministry of Culture and Youth Affairs.⁵⁴ The Disciplinary Committee had barred the player from participating in the sport, holding him guilty of match fixing on the basis of the Commissioner’s report. The CBI had in its probe report stated that the facts did not disclose any offence under provisions of Indian Penal Code, and neither was it possible to prosecute anyone under the Public Gambling Act.⁵⁵

In the case of *Ashwani Aggarwal v. The State*,⁵⁶ the Delhi Police sought the custody of the main bookie arrested by Mumbai police, Ramesh Vyas. Delhi police had also sought the custody of key bookmaker Ashwini Aggarwal, known as ‘Tinku Mandi’. This man was earlier brought to Mumbai from Delhi in connection with the IPL spot-fixing case and on

⁵² Press Trust of India, ‘Sreesanth, Chandila, Chavan discharged in IPL spot-fixing case’ (*The Hindu*, 16 November 2021) <<https://www.thehindu.com/sport/cricket/ipl-spot-fixing-sreesanth-chandila-chavan-acquitted/article7464447.ece>> accessed 18 March 2022.

⁵³ *Ajay Sharma v. The Board of Control for Cricket in India* (Delhi District Court, 24 May 2014).

⁵⁴ Madhavan, ‘Madhavan report on cricket match-fixing’ (*Hindustan Times*, 1 July 2001) <<https://www.hindustantimes.com/india/madhavan-report-on-cricket-match-fixing/story-NoAvAUDNMSaav2disOYKcO.html>> accessed 15 March 2022.

⁵⁵ The Public Gambling Act, 1867.

⁵⁶ *State v. Ashwani Aggarwal*, AIR 1956 All 158.

June 1 remanded to Police custody by a Mumbai court till June 6. Delhi police has charged the bookie under the MCOCA, and meanwhile in custody, Tinku Mandi spilled out the details regarding his involvement with IPL for spot-fixing. However, the bookie Ramesh Vyas was granted bail by the Mumbai police but as per Delhi police he was charged under the MCOCA for spot-fixing. The case was dismissed:

No nexus or link between various accused with part of an organized group has been established. Also, the offence in relation to which MCOCA is sought to be invoked, pertains to betting and match fixing, which as discussed above does not fit in any Penal statute. All the necessary ingredients to establish a prima facie case under the provisions of MCOCA is not made out. The best case could have been under Public Gambling Act, but that also is not prima facie established from the evidence placed on record by the prosecution. The offence of cheating is also not made out prima facie, even if the entire evidence of prosecution is admitted without formal proof.⁵⁷

In the case of *Azharuddin v. Board of Control for Cricket in India* 2003,⁵⁸ the cricketer Azharuddin along with several other cricketers like Ajay Sharma was booked for the crime of cheating and match fixing in international cricket matches. Azharuddin reportedly confessed that he had fixed three one-day matches; the first against South Africa at Rajkot in 1996, then Pepsi Cup matches in Sri Lanka in 1997 and Pakistan in 1999. But he was subsequently quoted in an interview denying that he was involved in any such activity. However as per the BCCI rules, the accused along with the other co-cricketers was banned from playing any further matches. As in every case Judgment at last is what matters, so in this particular case, Delhi court, basing its verdict on Azharuddin's Andhra Pradesh High Court judgement, rescinded his ban in May 2014.⁵⁹

The case of Azharuddin was civil and centred around the BCCI's disciplinary processes. The CBI 2000 report upon which the basis for the case is made identified that there could be no successful prosecution

⁵⁷ *ibid.*

⁵⁸ *Azharuddin v. Board of Control for Cricket in India*, 2003 (3) ALD 873.

⁵⁹ See Pradeep Magazine, *Not Quite Cricket – The explosive Story of How Bookmakers Influence the Game Today* (Penguin 2007) 6.

under section 120-A IPC dealing with criminal conspiracy and/or section 415 IPC dealing with cheating. As stated above the prosecution under PCA was also not possible as the cricketers could be classed as public servants, but they were not acting as public servants when they committed the match fixing offences.

V. RECENT BILLS INTRODUCED TO TACKLE MATCH FIXING IN INDIA

1. The Prevention of Sporting Fraud Bill, 2013⁶⁰

The main motive of the bill was to criminalize the frauds happening in sports industry including fixing as well, this bill was brought by the congress led UPA government in response to the scandal of spot fixing in 2013. However, this bill got the full stop by the BJP-led NDA government. The then Sports Minister, Vijay Goel, also made a statement that “*We are not considering this Bill. We have no plans for it as of now.*”⁶¹ The task of drafting the bill was handed over to Justice Mukul Mudgal, later in 2015 it moved to the Law Ministry for further changes but in a short time span the bill was amended and returned to the Sports Ministry and since then it’s been lying pending, and no further steps have been taken.

2. National Sports Ethics Commission Bill, 2016⁶²

President Ram Nath Kovind cleared BJP MP Anurag Thakur’s private member Bill – the National Sports Ethics Commission Bill 2016 – to be considered by the Parliament. Thakur, the former president of BCCI and three-time MP from Hamirpur in Himachal Pradesh, had moved this Bill

⁶⁰ The Prevention of Sporting Fraud Bill, 2013.

⁶¹ Sabi Hussain, ‘Government shelves Sports Fraud Bill’ (*The Tribune*, 2 June 2017) <<https://www.tribuneindia.com/news/archive/sports/government-shelves-sports-fraud-bill-416408>> accessed 15 March 2022.

See also D.G. Sekhri, ‘A Critique Of India’s ‘Prevention Of Sporting Fraud Bill, 2013’ (*LawInSports*, 22 January 2014) <<https://www.lawinsport.com/topics/anti-corruption/item/a-critique-of-india-s-prevention-of-sporting-fraud-bill-2013>> accessed 15 March 2022.

⁶² National Sports Ethics Commission, 2016.

in 2016 to counter the growing menace of match-fixing, doping, age fraud, and sexual harassment in Indian sports.

While Thakur was unceremoniously evicted from the BCCI by the Supreme Court in January 2017, it did not end his pursuit of changing the root cause of trouble in sports. Thus, this Bill is also still lying pending.⁶³

3. The Sports (Online Gaming and Prevention of Fraud) Bill, 2018⁶⁴

This bill was introduced by Parliamentarian Shashi Tharoor in the Lok Sabha (lower house), stating that such a strong sector needs a strict mechanism to regulate itself. The bill was aimed “*to establish an effective regime to maintain the integrity of Sports in India by preventing and penalizing sports fraud, regulation of online sports gaming; and for matters connected therewith or incidental thereto.*”

Further the reason for bringing the bill was explained by him, “*the need of the hour is a comprehensive regulatory framework, overseen by a competent regulatory body, to check the flow of black money in online sports gaming, and to curb any illegal activities in connection with it.*”⁶⁵

This was the first act specifically aimed at regulating online gaming. It has not been passed and has since lapsed.

4. Prevention of Match Fixing and Promotion of Fair Play in Sports Bill, 2020⁶⁶

The Bill takes forward the findings of the report “Fixing It: Tackling Match Manipulation”⁶⁷ and recognizes three key stakeholders who have the potential to make an adverse impact on a sport. *First*, members of the

⁶³ N. Kamath, ‘Fighting Sports Corruption In India: A Review Of The National Sports Ethics Commission Bill 2016’ (*LawInSports*, 1 July 2016) <<https://www.lawinsport.com/topics/item/fighting-sports-corruption-in-india-a-review-of-the-national-sports-ethics-commission-bill-2016>> accessed 15 March 2022.

⁶⁴ The Sports (Online Gaming and Prevention of Fraud) Bill, 2018.

⁶⁵ Gaurav Laghate, ‘Shashi Tharoor Moves Bill to Regulate Online Gaming’ (*The Economic Times*, 15 January 2019).

⁶⁶ Sports Law and Policy Centre (n 9).

⁶⁷ *ibid.*

concerned sport which include the players, officials and staff. *Second*, interested persons, which include broadcasters, advertisers, sponsors. *Lastly*, any other person who aids and abets the offence of match fixing.

To oversee implementation of the proposed Bill and also undertake sensitisation measures to reduce corruption in sports, an authority known as the National Fair Play Authority is sought to be established.

The Bill provides that responsibilities are placed on Sports Associations (defined as federations or bodies governing a sport in India) to form an Ethics Commission, enact a Code of Ethics and have in place adequate disciplinary measures to take action if there is a breach of the Code of Ethics. There is also proposed a National Fair Play Appellate Board to deal centrally with appeals from Sports Associations decisions.

The proposed National Fair Play Authority would have powers to direct the Sports Associations in relation to their compliance with the Act and would also have investigative powers through a newly created Director of Investigation.

The Bill includes an offence of “Spot Fixing” which is very welcome as this has been absent in all previous Bills. Spot Fixing being “*to deliberately alter the outcome of an event during the course of the match*”. With the prevalence of spread betting, it is now possible to bet on a wide range of events within a sports match, not just the outcome of the match. For example, in soccer, who scores first? How many corners there are in the first half? In cricket, how many no balls in the third over? etc.

The definition of match fixing does not include the provision of “inside information” to those who would use such information for corrupt purposes, but it does allow for those who work in and around sport to be prosecuted. For instance, a ground keeper who has changed the condition of a pitch so as to facilitate a fix.

The proposals to increase education and improve the overall culture of sports is a helpful approach to safeguarding sports but not all Sports Associations in India have the resource and capability to put in place the

proposed structures of an Ethics Commission and a Disciplinary Commission as they are predominately voluntary. It is an ambitious Bill which requires significant financial backing to put in place the proposed national structures (National Fair Play Authority, National Fair Play Appellate Board and Director of Investigations) and then fund their operation. Significant resource is also needed to not only monitor but also assist the Sports Associations.

The report also includes an in-depth analysis of previous Bills and in particular, examines the definition of match fixing which is key. There have been subtle differences and it is clear that if any legislation is to succeed in its aim of criminalizing match fixing across the whole country the definition must be appropriate and fit for purpose.

VI. UNODC RESOURCES

The UNODC resources provide model criminal law provisions for the prosecution of competition manipulation⁶⁸. Using the analysis of legislation in other jurisdictions the model provisions are not exhaustive but could assist in relation to providing a specific definition for match fixing. The model provisions offer passive and active options:

Any person, who solicits or accepts, directly or indirectly, an undue advantage or its offer or promise for himself or herself or another person or entity in order to alter the course or the result of a sporting competition or any of its particular events in breach of legislation or sports regulations, or accepts a reward for doing so, shall be punished by _____ Passive (bribe taker)

Any person, who promises, offers or gives, directly or indirectly, an undue advantage to another person for himself or herself or for another person or entity, in order that the person alters the course or the result of a sporting competition or any of its particular events in breach of legislation or sports regulations, or gives him or her a

⁶⁸ United Nations Office on Drugs and Crimes, *Legal Approaches to Tackling the Manipulation of Sports Competitions: A Resource Guide* (International Olympic Committee, 2021)

<https://www.unodc.org/documents/corruption/Publications/2021/Legal_Approaches_to_Tackling_the_Manipulation_of_Sports_Competitions_EN.pdf> accessed 13 March 2022.

reward after doing so, shall be punished by _____
Active (the briber)

1) Any person, who alters the course or the result of a sporting competition or any of its particular events in breach of legislation or sports regulations in order to use the altered course or result in a betting scheme, shall be punished by _____.

2) Any person who participates in betting with a knowledge that it has been influenced by the course or result of a sporting competition altered in breach of legislation or sports regulations, shall be punished by _____.

NOTE: This criminal offence sanctions two different types of perpetrators:

1. An individual match-fixer, who fixes the match with the intention to get to illicit proceeds through (legal or illegal) betting schemes. It is not even important if s/he really gains anything from the betting planned. In the case of organised criminality, other members of the group might be sanctioned through provisions on participatory acts or organised crime.
2. An individual, who knows that s/he is betting in a betting scheme influenced by match fixing. Since the person betting can at the same time also be the person fixing the match, the gravity of his offence can effectively be dealt with through a proper range of sanctions - either for the first or for the second paragraph.⁶⁹

More recent analysis of legal measures around the world was produced by the UNODC and the International Olympic Committee (“**IOC**”) in 2021. The ‘Legal Approaches to Tackling the Manipulation of Sports Competitions’⁷⁰ offers other good guidance for States. Using these resources as a basis, India should be looking to bring about robust criminal legislation and enforcement measures. There is also a need to include sport in a concurrent list so that it gets easy and convenient for both the state and the union government to make laws regarding match fixing and the application and operation of the match fixing provisions are thus uniform.

VII. RECENT CALLS FOR CRIMINALIZATION

⁶⁹ *ibid.*

⁷⁰ *ibid.*

There have been lots of debates revolving around criminalizing corruption in sports. In a recent interview of ICC Anti-Corruption Unit,⁷¹ one of the senior officials, Steve Richardson, made a statement that criminalizing the sports corruption in India was one of the most effective things one could do for the country, where police were acting while having one of their hands tied at their backs due to lack of stringent laws.

Richardson also added that making proper legislations was the only way in which sports in India could be protected. He pointed to the enactment in 2019 of the 'Prevention of Offences Relating to Sports Act' in Sri Lanka⁷² as the first initiative in the Asian Sub-Continent to criminalize match fixing. The panel was formed for the discussion that 'Does India need a match-fixing legislation?'⁷³ as part of the Sports Law and Policy Symposium held in June 2020.⁷⁴ BCCI Anti-Corruption Unit head Ajit Singh was also the part of the panel and he highlighted that all the case law confirmed that existing legislation was ineffective in tackling corruption and especially in dissuading the actions of corruptors who are outside the sport.⁷⁵ The full panel discussion is available to view and provides further valuable insight and persuasions.⁷⁶

VIII. CONCLUSIONS

⁷¹ 'Match-Fixing Law Would be a Game-Changer in India: ICC Official' (*Times of Sports*) <<https://www.timesofsports.com/cricket/news/match-fixing-law-would-be-a-game-changer-in-india-icc-official/>> accessed 14 March 2022.

⁷² Prevention of offences relating to sports Act 2019 <<https://www.srilankalaw.lk/Volume-VI/prevention-of-offences-relating-to-sports-act.html>> accessed 18 March 2022.

⁷³ Press Trust of India, 'Criminalising match-fixing in India will be single-most-effective move for cricket: ICC ACU official' (*The Indian Express*, 25 June 2020) <<https://indianexpress.com/article/sports/cricket/criminalising-match-fixing-in-india-will-be-single-most-effective-move-for-cricket-icc-acu-official-6475432/>> accessed 14 March 2022.

⁷⁴ The Sports Law & Policy Centre, 'Symposium 2020' (Bangalore) <<https://sportslaw.in/symposium>> accessed 14 March 2022.

⁷⁵ Nihal Koshie, 'Need a law against fixing: BCCI Anti-Corruption Unit Chief Ajit Singh' (*The Indian Express*, 30 June 2020) <<https://indianexpress.com/article/sports/cricket/bcci-acu-chief-ajit-singh-ravinder-dandiwal-fixing-corruption-6482223/>> accessed 14 March 2022.

⁷⁶ Symposium 2020 (n 74).

Brodkin⁷⁷ in his presentation highlights that in a post-Covid world, e-sports are even more at risk. There is a rapid growth in the gaming and fantasy market in India and the risk are high due to fact that the governing bodies are new, there is no players union, players are younger and more susceptible to corruptors and there are many different ways to manipulate and spot fix the e-sports competitions. The Global e-sports and gaming market is set to generate \$175.8 Billion in 2021 with the market being on track to surpass \$200 Billion in 2023⁷⁸ so it is clear this rapidly developing and expanding industry shows no signs of decline and requires urgent protection now.

Corruption and match fixing continue to be a threat to sport in India as long as there are large amounts of money involved would be corruptors will be drawn to the sector. No sports are immune as illustrated by the recent report in table tennis.⁷⁹ The average betting turnover per Indian Premier League (IPL) match in 2019 was \$88.9 million with an estimated total annual betting turnover for the IPL being \$4.98 billion.⁸⁰ As illustrated by the case law discussed above, existing mechanisms do not criminalize the act of match fixing and are therefore inadequate for tackling corruption in sports. National and International sports federations will continue to carry out their duties⁸¹ and put in place anti-

⁷⁷ 'The Sports Law & Policy Centre, 'Match Fixing in a Post Covid-19 World' (*YouTube*, 25 March 2021) <<https://www.youtube.com/watch?v=LdVDsN6KWPg>> accessed 18 March 2022.

⁷⁸ Tom Wijman, 'Global Games Market to Generate \$175.8 Billion in 2021; Despite a Slight Decline, the Market Is on Track to Surpass \$200 Billion in 2023' (*NewZoo*, 6 May 2021) <<https://newzoo.com/insights/articles/global-games-market-to-generate-175-8-billion-in-2021-despite-a-slight-decline-the-market-is-on-track-to-surpass-200-billion-in-2023/>> accessed 18 March 2022.

⁷⁹ 'TTFI forms inquiry panel to probe Manika's 'match-fixing' allegations against Soumyadeep Roy' (*The Tribune*, 11 September 2021) <<https://www.tribuneindia.com/news/sports/ttfi-forms-inquiry-panel-to-probe-manikas-match-fixing-allegations-against-soumyadeep-roy-309811>> accessed 14 March 2022.

⁸⁰ 'Match fixing on the rise as global sports betting turnover surpasses €1.45 trillion for the first time' (*SportsRadar*, 3 March 2022).

⁸¹ See U. Naidoo & S. Gardiner S, 'On the front foot against corruption' [2007] *The International Sports Law Journal* <<https://go.gale.com/ps/i.do?p=AONE&u=googlescholar&id=GALE|A213032906&v=2.1&it=r&sid=AONE&asid=2d631c19>> accessed 30 April 2022.

corruption measures but without the backing of criminal legislation attempts to tackle organised crime linked to match fixing will be futile.

The Prevention of Match Fixing and Promotion of Fair Play in Sports Bill, 2020 is appropriate for the domestic sports sector but it is not far reaching enough. It does not specifically address the area of e-sports and digital cheating. It does not address the ills of those betting on matches which they know to be fixed and organised crime and a definition of such organised manipulations. In conjunction with provisions for sports sector general criminal law provisions need to be added so as to specifically define match fixing and thus make prosecutions more likely against corruptors outside of sports bodies. As noted above, other Bills introduced on the subject of integrity and sports have not come to pass. It remains to be seen if this Bill will succeed in becoming law.

Legislation is only one part of the solution as the framework provided by UNODC outlines, education, training and awareness is also required, including inter-state and international co-operation. For the benefit of public interest some information sharing is required – ‘IPACS Task Force 4: Enhancing Effective Cooperation between Law Enforcement, Criminal Justice Authorities and Sport Organisations’ could provide good collaborations in this regard.

A multi-stakeholder approach must also be adopted in the fight against organized crime in sport and co-operation not just with national sports bodies but also with international sports bodies and partners such as the IOC. In 2018, the IOC formed the Olympic Movement Unit on the Prevention of the Manipulation of Competitions⁸² and whilst initially for the benefit of international sports and international sports competitions, it has some exceptional resources⁸³ which can assist in the education,

See also International Cricket Council (ICC) – Anti Corruption Unit, The International Tennis Integrity Agency (ITIA) and FIFA Global Integrity Programme.

⁸² ‘Prevention of Competition Manipulation’ (*International Olympics Committee*) <<https://olympics.com/ioc/integrity/prevention-competition-manipulation>> accessed 13 March 2022.

⁸³ ‘Olympic Movement Unit on the Manipulation of Competitions Strategy, 2019’ (*International Olympics Committee*) <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What->

training and awareness and is freely available to all National Olympic Committees including the Indian Olympic Committee. Given the murky nature of this corruption, protections must be afforded for whistle blowers and investigative journalists.

The INTERPOL Match-Fixing Task Force (“**IMFTF**”) was formed in 2011 to support member countries with investigations and law enforcement. INTERPOL has 195 member countries and India is one of those countries.⁸⁴ Recently, working with the IOC and UNODC, it produced a resource aimed at assisting in post-Covid times. Whilst the world is still coping with the devastation of the global pandemic, attention, focus and funds may be diverted from corruption in sports, but this could lead to greater potential for corrupters to take over sport. “*It is therefore recommended to all relevant stakeholders to ensure that the fight against corruption in sport and specifically preventing the manipulation of competitions is part of any responses to the pandemic and remains a priority in their post pandemic era.*”⁸⁵

Numerous works have been written on match fixing in India⁸⁶ and more widely on corruption in sport⁸⁷ and it is impossible to give weight to all of them in this article. It is a complex rapidly evolving threat to the integrity of sports. For the purposes of this article, it is sufficient to say that there is a body of thinking which points to criminalisation and an accurate

[We-Do/Protecting-Clean-Athletes/Competition-manipulation/Protecting-clean-athletes-competition-manipulation.pdf](#)> accessed 13 March 2022.

See also ‘How I was Asked to Cheat’ (*YouTube*, 7 December 2017)

<https://www.youtube.com/watch?v=RicHEIFiGj0&list=PLX9eJ_kgiRLYr_k5Krp4nLh8qC9nmtozK&index=6> accessed 13 March 2022.

⁸⁴Corruption in Sports’ (INTERPOL)<www.interpol.int/Crimes/Corruption/Corruption-in-sport> accessed 13 March 2022.

⁸⁵ ibid at 2.

⁸⁶ Ashutosh Misra and Abhishek Vikram, ‘Corruption in Sports in India’ (Briefing Paper, Alberta Gambling Research Institute, November 2011) <<https://prism.ucalgary.ca/handle/1880/49799>> accessed 13 March 2022; The Sports Law and Policy Centre (n 9); Dasgupta (n 11); See Ed Hawkins, *Bookie Gambler Fixer Spy: A Journey to the Heart of Cricket's Underworld* (Bloomsbury 2012).

⁸⁷ See C. Ordway (ed.), *Restoring Trust in Sport: Corruption Cases and Solutions* (1st ed., Routledge 2018); L.A. Kihl, *Corruption in Sport: Causes, Consequences, and Reform* (1st ed., Routledge 2018).

definition of match fixing as an appropriate start to changing the culture in sports.

The publication of the Report, the G20 Principles, the work of the IOC and INTERPOL, and the creation of the IPACS Taskforce all indicate there is a great deal of momentum and support for tackling corruption in sport at this moment in time. All academics, politicians and interested parties should therefore be lobbying for urgent change and for an appropriate legislative framework and better systems to be implemented across India to tackle corruption in sport. The risks posed from corruptions will only increase with every advance in technology and e-sports, is especially vulnerable. If India is to be at the forefront of harnessing the huge social and economic benefits of sport and e-sports it must be proactive and take action now.

IX. NOTE- DEFINITIONS TAKEN FROM UNODC REPORTS⁸⁸:

“Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit

“Match-fixing” shall mean the arrangement on an irregular alteration of the course or the result of a sporting competition or any of its particular events (e.g., matches, races etc.) in order to remove all or part of the uncertainty normally associated with a competition.

“Legal betting” shall mean all types of betting that are allowed on a specific territory or jurisdiction (e.g., by licence given by a regulator or recognition of licences given by the regulator of a third country). “Illegal betting” shall mean all types of betting that are not allowed on a specific territory or jurisdiction. –

⁸⁸ UNODC, ‘Criminalization Approaches to Combat Match-Fixing and Illegal/Irregular Betting: A Global Perspective’ (International Olympics Committee) <https://www.unodc.org/documents/corruption/Publications/2013/Criminalization_approaches_to_combat_match-fixing.pdf> accessed 13 March 2022; See Kamath (n 63).

“Irregular betting” shall mean all types of betting based on match-fixing.

DOPING IN SPORTS-GOING THE DIGITAL WAY

*Lovely Dasgupta

Abstract

Doping in sports is an accepted fact. The effect of doping is that it tarnishes the image of sports and makes it commercially unviable. Hence, there is a concerted effort by the sports governing bodies to eliminate the menace of doping. Unfortunately, like cheating, doping is here to stay. Thus, the only way sports governing bodies can regulate and prohibit doping is through the imposition of stringent penalties/sanctions. The World Anti-Doping Agency (WADA) is leading the fight against doping in sports. It is supported by the International Olympic Committee (IOC). IOC has made it mandatory for all sports to be WADA compliant. WADA compliance is one of the pre-conditions for getting recognition as a legitimate sporting activity. E-sports, as it is called, is no exception to the rule and hence has to be WADA compliant. This article explores the issue of digital doping in E-sports. The first part of the article maps out the existing anti-doping structures that oversee enforcement of anti-doping measures amongst different sports. The next part details out the compliance requirements laid down by IOC for granting recognition to an activity as a legitimate sport. The third part explains the concept of E-sports and the doping issues concerning it. This part also looks into the anti-doping measures laid down by independent bodies like ESIC and IESF. The final part of the article concludes with the argument that digital doping throws up challenges similar to that in other sports. Hence, the WADA Code needs to be expanded to include E-sports and the Code should be strictly complied with thereafter. This inclusion would secure legitimacy of E-sports.

I. ANTI-DOPING REGULATION OF SPORTS-THE WADA CODE

The anti-doping regulation within the field of sports is being led by the World Anti-Doping Agency (“WADA”).¹ The primary text which lays down the rules and sanctions for doping offences is the World Anti-

* Lovely Dasgupta is an Associate Professor of Law and Director of Centre for Sports Law and Policy at The West Bengal National University of Juridical Sciences, Kolkata.

¹ ‘World Anti-Doping Agency’ (WADA) <<https://www.wada-ama.org/en>> accessed 19 December 2021

Doping Code (“**WADA Code**”).²The WADA Code has undergone several revisions and the 2021 version is the one currently in force.³ The WADA Code is a complete manual as to what all things are not allowed within sports. The structures that implement the WADA Code are the different International Sports Federations, the IOC and the National Anti-Doping Agencies.⁴ WADA and its Code is also recognised by the National Governments across the world. Consequently, there is a consensus as to the fact that WADA is the supreme authority in regulating enforcement of anti-doping measures within sports. The WADA Code, as in force, spells out the rationale for prohibiting doping within sports. Thus as per the WADA Code

“Anti-doping programs are founded on the intrinsic value of sport. This intrinsic value is often referred to as “the spirit of sport”: the ethical pursuit of human excellence through the dedicated perfection of each Athlete’s natural talents. Anti-doping programs seek to protect the health of Athletes and to provide the opportunity for Athletes to pursue human excellence without the Use of Prohibited Substances and Prohibited Methods. Anti-doping programs seek to maintain the integrity of sport in terms of respect for rules, other competitors, fair competition, a level playing field, and the value of clean sport to the world...”⁵

There is hardly any scope of compromise on doping in sport. This is evident from the definition of doping within the WADA Code. Articles 2.1 to 2.11 list out the various instances that will be treated as doping within sports. As per Article 1:

² ‘WADA Code’, (*WADA*, 1January 2004)

<https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf> accessed 19 December 2021

³ *ibid*

⁴ ‘The World Anti-Doping Code’ (*WADA*, 24 January 2005)

<<https://www.wada-ama.org/en/what-we-do/world-anti-doping-code>> accessed 19 December 2021

⁵ ‘WADA Code’, (*WADA*, 1January 2004)

<https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf> accessed 19 December 2021

“Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.11 of the Code.”⁶

The WADA Code adopts the principle of strict liability and imposes the burden on the athletes to avoid doping infractions. As per Article 2.1.1:

“It is the Athletes’ personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.”⁷

Accordingly, the presence of any prohibited substance in the sample of an athlete is enough to prove doping. In addition, the WADA Code also includes other evidence that establish doping by an athlete. The following instances have been laid down as anti-doping rules violations by the WADA Code:

- “1. Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method” amounts to proof of doping;
2. “Evading, Refusing or Failing to Submit to Sample Collection by an Athlete” amounts to doping;
3. Evading, Refusing or Failing to Submit to Sample Collection by an Athlete;
4. Whereabouts Failures by an Athlete;
5. Tampering or Attempted Tampering with any Part of Doping Control by an Athlete or Other Person;
6. Possession of a Prohibited Substance or a Prohibited Method by an Athlete or Athlete Support Person;
7. Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method by an Athlete or Other Person;
8. Administration or Attempted Administration by an Athlete or Other Person to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is Prohibited Out-of-Competition;
9. Complicity or Attempted Complicity by an Athlete or Other Person;

⁶ WADA Code, Art. 1

⁷ WADA Code, Art. 2.1.1

10. Prohibited Association by an Athlete or Other Person;
11. Acts by an Athlete or Other Person to Discourage or Retaliate Against Reporting to Authorities.⁸

The WADA Code thus provides widest possible net to cover all kinds of infraction that will be treated as anti-doping violations. This means that the anti-doping organizations are free to use both analytical as well as non-analytical methods to establish an anti-doping rule violation. The WADA Code places the burden on the anti-doping organizations to establish such a violation. The burden of proof that they have to discharge is to the comfortable satisfaction of the hearing panel.⁹ Once the organization has established an anti-doping rule violation, the burden shifts on the athlete to counter this. The burden of proof that the WADA Code has placed on the athletes is balance of probability. Further once the anti-doping rule violation is established, the athletes are given a chance to reduce the period of ineligibility.¹⁰ Hence the WADA Code has provided for reduction or elimination of the period of ineligibility. As per Article 10.5:

“Elimination of the Period of Ineligibility where there is No Fault or Negligence: If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.”¹¹

And as per Article 10.6:

“Reduction of the Period of Ineligibility based on No Significant Fault or Negligence”¹²

Further as per Article 10.6.2:

“Application of No Significant Fault or Negligence beyond the Application of Article 10.6.1: If an Athlete or other Person establishes in an individual case where Article 10.6.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.7, the otherwise applicable period of

⁸ WADA Code, Art. 2.2 – 2.11

⁹ WADA Code, Art. 3.1

¹⁰ Lovely Dasgupta, *The World Anti-Doping Code- Fit for Purpose?* (Routledge 2019)

¹¹ WADA Code, Art. 10.5

¹² WADA Code, Art. 10.6

Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years."¹³

In addition, the WADA Code provides other grounds which give further choices to athletes to get their sanction reduced. Thus Article 10.7

*"Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault."*¹⁴

Further Article 10.8.1 provides for

*"One-Year Reduction for Certain Anti-Doping Rule Violations Based on Early Admission and Acceptance of Sanction."*¹⁵

To further dissuade the athletes from indulging in doping the WADA Code provides for sanction for multiple violations of anti-doping rules. For instance, as per Article 10.9

"Multiple Violations

10.9.1 Second or Third Anti-Doping Rule Violation

10.9.1.1 For an Athlete or other Person's second anti-doping rule violation, the period of Ineligibility shall be the greater of: (a) A six-month period of Ineligibility; or (b) A period of Ineligibility in the range between: (i) the sum of the period of Ineligibility imposed for the first anti-doping rule violation plus the period of Ineligibility otherwise applicable to the second anti doping rule violation treated as if it were a first violation, and (ii) twice the period of Ineligibility otherwise applicable to the second antidoping rule violation treated as if it were a first violation. The period of Ineligibility within this range shall be determined based on the entirety of the circumstances and the Athlete or other Person's degree of Fault with respect to the second violation.

10.9.1.2 A third anti-doping rule violation will always result in a lifetime period of Ineligibility, except if the third violation fulfills the condition for elimination or reduction of the period of Ineligibility under Article 10.5 or 10.6, or involves a violation of Article 2.4. In these particular cases, the period of Ineligibility shall be from eight (8) years to lifetime Ineligibility.

¹³ WADA Code, Art. 10.6.2

¹⁴ WADA Code, Art. 10.7

¹⁵ WADA Code, Art. 10.8.1

10.9.1.3 The period of Ineligibility established in Articles 10.9.1.1 and 10.9.1.2 may then be further reduced by the application of Article 10.7.”¹⁶

The other consequences that the athlete has to face for anti-doping rule violation are:

“1) *Article 10.10 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*

2) *Article 10.11 Forfeited Prize Money*

3) *Article 10.12 Financial Consequences*”¹⁷

Thus, the consequences of anti-doping rule violations are stringent.

II. IOC AND WADA CODE- PRE-REQUISITE FOR RECOGNITION

The principles that a sport needs to follow in order to get legitimacy are laid down in the International Olympic Committee Charter (“**IOC Charter**”). The IOC Charter forms the core of the governance structure of sports and is by default binding on all sports. To begin with the principles that a sport needs to aspire for are formulated in the credo of Olympism.¹⁸ The Charter lays down the principles of Olympism which states, amongst others, that

*“Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.”*¹⁹

To be part of Olympics is the ultimate goal of sports and sports persons. Hence without the recognition of IOC an activity cannot gain legitimacy. Further recognition by IOC *per se* does not ensure that the sports can participate in the Olympic Games. However, recognition by the IOC

¹⁶ WADA Code, Art. 10.9

¹⁷ WADA Code, Art. 10.10 – 10.12

¹⁸ Lovely Dasgupta, *Doping in Non-Olympic Sports- Challenging the Legitimacy of WADA?* (Routledge 2022)

¹⁹ ‘International Olympic Charter’ (*International Olympic Committee*, 23 June 1894) <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.66794605.2115662959.1643801350-amp-INq-Lj6JMtMWULsPw4wF7Q> accessed 19 December 2021

gives them the chance to vie for participation in the Olympic Games.²⁰ As per Rule 40 of the IOC Charter:

“Participation in the Olympic Games: To participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter, the World Anti-Doping Code and the Olympic Movement Code on the Prevention of the Manipulation of Competitions, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, team official or other team personnel must be entered by his NOC.”²¹

Thus, WADA Code is integral to any process of recognition and eventual participation in the Olympic Games. This is further reiterated in Rule 43:

*“World Anti-Doping Code and the Olympic Movement Code on the Prevention of Manipulation of Competitions Compliance with the World Anti-Doping Code and the Olympic Movement Code on the Prevention of Manipulation of Competitions is mandatory for the whole Olympic Movement.”*²²

Similarly Rule 45 states that:

“Programme of the Olympic Games...

*....Only sports which comply with the Olympic Charter, the World Anti-Doping Code and the Olympic Movement Code on the Prevention of the Manipulation of Competition are eligible to be in the programme.”*²³

Thus, in each and every aspect of recognition it is the compliance with WADA Code that plays a key role. As will be seen hereunder the governance of E-Sports and its rules and regulation will determine the scope of it being recognized. Importantly the anti-doping rule compliances are to be monitored for E-sports to be regarded as legitimate sports. Hence, for E-sports to be regarded as legitimate sports, compliance with WADA Code is a *sine qua non*.

III. E-SPORTS AND DOPING-IDENTIFYING THE ISSUES

²⁰ *ibid*

²¹ IOC Charter, Rule 40

²² IOC Charter, Rule 43

²³ IOC Charter, Rule 45

E-sports has gained tremendous recognition and fan following across the globe. As per the International E-sports Federation (“**IESF**”), E-sports is the fastest growing sports in the world.²⁴ IESF claims that revenue generation capacity of E-sports has jumped by leaps and bounds.²⁵ Against this back ground the issue of doping becomes a real concern within the virtual world.²⁶ The reasons for doping within E-sports are no different from the other sports. Essentially doping is indulged in to gain an unfair advantage. With increasing competition, it is not a surprise that E-sports is affected by doping. However, there is a greater challenge when it comes to regulating doping in E-sports. The nature of E-sports enables the participants to indulge in the most innovative form of doping.²⁷ As per the definition given by IESF:

*“While E-sports is not an “obvious” physical activity like many traditional sports, it fits into all of the sporting criteria set by international standards. Anyone can participate in Esports, but those truly gifted with incredible talent and commitment to hard work are the ones who excel.”*²⁸

On the other hand, Global E-sports Federation (“**GEF**”), does not provide any definition.²⁹ Hence there exists a lack of clarity as to what can and cannot be regarded as E-sports. In all this the IOC has not yet made its stand clear as to the recognition of E-sports as distinct sports.³⁰ The most it has done is that it had launched the Olympic Virtual Series, as a precursor to the Tokyo Olympics 2021.³¹ The IOC enabled the

²⁴ ‘International Esports Federation’ (*IESF*) <<https://iesf.org/>>accessed 19 December 2021

²⁵ *ibid*

²⁶ Michal Jasny, ‘Doping in e-sports. An empirical exploration and search for sociological interpretations’ (2020) *Acta Universitatis Lodzianis, Folia Sociologica* 75 <https://www.researchgate.net/publication/350335928_Doping_in_e-sports_An_empirical_exploration_and_search_for_sociological_interpretations>accessed 19 December 2021

²⁷ Surbhit Shrivastava, ‘Doping in E-Sports’ (*The IP Press*, 29 August 2021) <<https://www.theippress.com/2021/08/29/doping-in-e-sports/>>accessed 19 December 2021

²⁸ ‘Esports - True Sports?’ (*IESF*) <<https://iesf.org/esports>>accessed 19 December 2021

²⁹ ‘Global Esports Federation’ (*Global Esports*) <<https://www.globalesports.org/>>accessed 19 December 2021

³⁰ Kevin Hitt, ‘IOC Delivers Blow to Esports’ Quest for International Legitimacy’ (*The Esports Observer*, 4 November 2020) <<https://archive.esportsobserver.com/ioc-no-to-esports-governing-body/>>accessed 19 December 2021

³¹ ‘IOC makes landmark move into virtual sports by announcing first-ever Olympic Virtual Series’ (*International Olympic Committee*, 22 April 2021)

enthusiasts to participate in the virtual version of five sports viz. baseball; cycling; rowing; sailing and motor sport. In this process IOC partnered with the respective International Federations (“IFs”) of these sports. These five IFs in turn tied up with the creators of virtual game content to create the virtual version of their sports.³² This however has not translated in to the recognition of E-sports.³³ One of the biggest hurdles that exists to grant recognition to E-sports, is the lack of an International Federation. This means that for the IOC it will not be possible to identify one single organization that will regulate the sports. Further the content of E-sports itself is fluid. Currently genres like tactical shooters; MOBA; Sports SIM and fighting are popular, with each of these genres having their own popular games. medium, with developments in technology there is a huge likeliness of new games and genres replacing the old ones. In contrast are physical sports like football or cycling, where the essential rules remain the same. Rules for these sports may be modified at certain times, however, the essence of the game continues to remain the same.³⁴

Another hurdle in recognizing E-sports, is the prospect of negotiating through the several license agreements and IPR issues vis-a-vis the game developers. In contrast to the physical sports, E-sports definitely do not present an easy narrative. There are n-number of game developers and their IPRs that have to be protected. Further the challenge is to decide which genre and which game of the particular genre ought to be included. As noted above there is no specific definition of E-sports, and the only common attribute is the use of a virtual medium to compete. Further the IOC might also have to take a call on the content of the game that will be

<<https://olympics.com/ioc/news/international-olympic-committee-makeslandmark-move-into-virtual-sports-by-announcing-first-ever-olympic-virtual-series>>accessed 19 December 2021

³² Sanjeev Palar, ‘The Olympic Virtual Series’ (*International Olympic Committee*, 22 June 2021)<<https://olympics.com/en/featured-news/olympic-virtual-series-everything-you-need-to-know>>accessed 19 December 2021

³³ Ellen M. Zavian, ‘Who Is Snubbing Who? Esports, The IOC And International Federations Need To Listen To One Another Closely’ (*Forbes*, 11 May 2021)<<https://www.forbes.com/sites/ellenzavian/2021/05/11/whos-is-snubbing-who-esports-the-ioc-and-international-federations-need-to-listen-to-each-other-closely/?sh=17dbf29788b4>>accessed 19 December 2021

³⁴ Anand Krishnaswamy, ‘IOC's refusal to recognise Gobar Esports Federation may actually be in industry's best interests’ (*Firstpost*, 4 November 2020) <<https://www.firstpost.com/sports/iocs-refusal-to-recognise-gobar-esports-federation-may-actually-be-in-industrys-best-interests-8981411.html>>accessed 19 December 2021

showcased as part of the E-sports. For if the content is too violent or too sexual it might offend sentiments as well as violate the IOC Charter. That E-sport is a technology driven activity is accepted but to recognize a technology driven activity as a sport is challenging. Importantly the varied use of technologies like Artificial Intelligence, Virtual Reality, Augmented Reality Mixed Reality, Internet of Things & 5G means that there cannot be one single understanding of E-sports. Against such a background it will be difficult to regulate doping within E-sports.³⁵

For the range of doping is likely to vary from the traditional to the non-traditional sports. E-sports represents a counter-culture where as sports represent culture of a society. Hence it needs to be reflected upon whether doping in E-sports can be made amenable to the WADA Code. To begin with, the participants, being humans, are as susceptible to the use of performance enhancing drugs as in any other sports. Consequently, the doping issues within the fluid field of E-sports, have been largely the same.³⁶ Hence the solutions that have been thought of to deal with doping are thus structured around the familiar lines. To be specific the E-sports Integrity Commission (“**ESIC**”) has framed the anti-doping code on lines similar to the WADA Code.³⁷ Accordingly the acts amounting to anti-doping rule violations are:

- “1. The presence of a Prohibited Substance or its Metabolites or Markers in a Player’s sample.
2. It is each Player’s personal duty to ensure that no Prohibited Substance enters his body.
3. [T]he presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a player’s sample shall constitute an Anti-Doping Rule Violation.
4. Use or Attempted Use by a Player of a Prohibited Substance.

³⁵ Reuters Staff, ‘Talk of esports in Olympic Games is premature: IOC’ (*Reuters*, 8 December 2018) <<https://www.reuters.com/article/us-olympics-esports-idUSKBN1O70NK>>accessed 19 December 2021

³⁶ Justin W. Bogle, ‘Trying to Think Faster: Doping in Esports’ (*The Jeffrey S. Moorad Center for the Study of Sports Law*, 6 October 2020) <https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2020/TryingtoThinkFasterDopinginEsports.html>accessed 19 December 2021

³⁷ ‘Anti-Doping Code’ (*ESIC*) <<https://esic.gg/codes/anti-doping-code/>>accessed 19 December 2021

5. Refusing or failing without compelling justification to submit to sample collection after notification or otherwise evading sample collection or to cooperate with any investigation...
6. Tampering, or Attempting to Tamper with any part of Doping Control or investigation.
7. Possession by a Participant of any Prohibited Substance
8. Trafficking in any Prohibited Substance
9. Administration or Attempted administration to any Player of any Prohibited Substance or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an Anti-Doping rule violation or any Attempted Anti-Doping Rule Violation.
10. Prohibited Association³⁸

The above list, thus, is a reflection of the same concerns that are incorporated in the WADA Code. Though the ESIC anti-doping code is an independent document, there is no doubt that it is inspired by WADA Code. ESIC is the autonomous body constituted by the stakeholders practicing E-sports, to ensure observation of best practice within E-sports. This body depends on the cooperation of its members for its success. The absence of data on anti-doping rule violations does not mean that there are no incidences of doping. In 2015, a counter strike player admitted to be under the influence of Adderall during the finals of the 2015 Intel Extreme Masters, which is an international E-Sports series. Similarly in 2018, the Esports Integrity Commission published reports indicating the use of the same drug by one player during the Electronic Sports League (“**ESL**”) 2018 Tournament.³⁹ The biggest problem is the lack of a single federation regulating the sports. Hence while other incidences of corruption might be reported, doping within E-sports continues to be an open secret, which no one seems to acknowledge. The adoption/formulation of anti-doping code however is a reflection of the problem being there.⁴⁰ The IESF has gone ahead and adopted the

³⁸ WADA Code, Art. 2

³⁹ Michal Jasný, ‘Doping in e-sports. An empirical exploration and search for sociological interpretations’ (2020) *Acta Universitatis Lodzianae, Folia Sociologica* 75 <https://www.researchgate.net/publication/350335928_Doping_in_e-sports_An_empirical_exploration_and_search_for_sociological_interpretations> accessed 19 December 2021

⁴⁰ Zachary Kandell, ‘ESports Has Its Own Doping Problem’ (*CBR*, 28 February 2020) <<https://www.cbr.com/esports-doping-problem/>> accessed 19 December 2021

WADA Code verbatim.⁴¹ This is understandable for the IESF is trying to be recognised as the legitimate IF for E-sport. In contrast the GESF has no specific document dealing with anti-doping rules.⁴² Overall the essence of doping remains the same within E-sports, which is to use substances that help the competitors to act fast and think faster.⁴³ As and when issues are decided by a legitimate E-sports adjudicating body, the direction of anti-doping regulation will become clearer.

IV. CONCLUSION

Doping in E-sports is an established fact, though there is yet to be full fledged adjudication on the issue. There is an absence of legal opinions on this issue. One is left with a clear sense of *déjà vu* for though it's sports in virtual world, the participants are human. Hence the anti-doping rule violations are similar to that in other sports. Given the dearth of reported cases and proper adjudication, the seriousness of anti-doping measures in E-sports is not clear. However, for E-sports to have a shot at IOC recognition, WADA Code compliance is a must. There cannot be an argument that E-sports need separate doping intervention as argued above, the doping methods are similar to ones used in physical sports, the WADA Code will suffice. Further the IFs of E-sports, can build upon the WADA Code and widen the net to take into account all innovative methods of doping. However, compliance with WADA Code shall act as the first step in regulating doping issues in E-sports. Without WADA Code compliance all discussions on doping in the digital world will be futile and E-sports will be treated, not as a legitimate sport, but as a mere spectacle without any value for merits or skill.

⁴¹ 'Anti-Doping Regulations' (IESF) <<https://iesf.org/governance/anti-doping>>accessed 19 December 2021

⁴² 'The Global Esports Federation' (GlobalEsports) <<https://www.globalesports.org/about>>accessed 19 December 2021

⁴³ Coleman Hamstead, 'Nobody talks about it because everyone is on it': Adderall presents esports with an enigma' (*Washington Post*, 13 February 2020) <<https://www.washingtonpost.com/video-games/esports/2020/02/13/esports-adderall-drugs/>>accessed 19 December 2021

VALUATION SYSTEM OF PLAYERS AND ATHLETES IN SPORTS: A NEW MODEL OF ASSESSMENT

**Tushar Katheria*

ABSTRACT

This research paper aims to discuss and understand how the valuation system of players work on players in the sports industry. The author will examine the fixed and variable factors which play an essential role in evaluation and further impact athletes. The author has adopted secondary research method which will be used as evidence for concluding this topic. The research paper involves different realms of law which include Contract Law, Anti-Doping or WADA Code, Intellectual Property Law, and other essential guidelines and rules which are issued by the government and sports organizations. The author will do the analysis & further co-relate with the different topics of sports management. The present paper consists of various case studies and comparative analyses with the US, UK, Europe, and India to get a better understanding of this topic. Finally, the author will give his suggestions from his research data which can be used in further research studies.

I. INTRODUCTION

A child who wants to pursue sports at the professional level has a dream to develop his/her skills to play for a certain club, further represent their nation, and later on, perform exceptionally at global events.¹ Such players should perform from the Amateur level to the Professional Level. Such level can be at:

- a) Academy Level;
- b) School-level and College/University Level;
- c) Club Level;

* Tushar Katheria is an LL.M Candidate at the University of London (UK), and Founder of Sports Law Sage.

¹K. Tremblay and others, 'Feasibility Study Report: Volume 1' (OECD 2012) <<https://www.oecd.org/education/skills-beyond-school/AHELOFSReportVolume1.pdf>> accessed 20 February 2022.

- d) National Level; and
- e) International Level.

The prominent players get sponsorships or endorsements deals in millions. These players can further negotiate with the sponsors, and owners of the club to further come into an arrangement where both parties can generate revenue. But how can we determine how the players or athletes get valued for which they got paid in millions. There are a lot of things that are on the stakes for the club owners, for players and fans.²

Therefore, the valuation of players becomes an essential part of coming into the arrangement with the player or athlete, owners of the organization, and with the agent of the players.

1. Objective of this Research Paper

The main objective of this research paper is to find the answers and relevant solutions to the questions, which are: -

1. How valuation of players needs to be done in Sports?
2. Whether there is any specific model to evaluate such valuation?
3. What are the factors which are involved in the valuation?

2. Research Methodology

The researcher in the present paper chooses the secondary research method to get a better understanding of the available data and further refers to well-researched articles, journals, books and also online databases.

II. IMPORTANCE OF SCOUTING SYSTEM

When a scouting network of any sports organization starts to find talented players at a young age for their team, they do see a few things which need to take into consideration: -

² A. Elberse, 'Ferguson's Formula' (*Harvard Business Review*, October 2013) <<https://hbr.org/2013/10/fergusons-formula>> accessed 20 February 2022.

- I. whether a young player can become a potential player for their main team;
- II. whether a player can perform better for their team; and
- III. what position of a player could be selected for?

But when such players were graduated from their U-19 or their Sports Academy a real litmus test needs to be done by analysing the performance of such players at the elite league against the bigger clubs at the consistent level.³

The player should become an asset for their organization for generating revenues through various modes, such as selling such players to a bigger club at a higher price, attracting bigger sponsors, selling merchandise, which the researcher will talk about in this paper. It is kind of an investment that clubs make in these young players so that in the future, if a club or player wishes to sell a player to another club, they also make a profit from such transfer.

Apart from this, clubs do consider whether a player can become a good ambassador of a sport. There is a certain programme for which players does comply with the international organization such as WHO, UNICEF, etc., where they should promote the societal programmes in underdeveloped or developing countries.⁴

III. IMAGE RIGHTS OF PLAYERS

Image rights are such rights that are under the owner's right, which he/she can control, further can license or exploit for all kinds of personality attributes that are related to the owner's image.⁵

Such image rights can be exploited in two ways: -

³ J. Collins and others, 'UEFA Expert Group Statement on Nutrition in Elite Football. Current Evidence to Inform Practical Recommendations and Guide Future Research' (2020) 55 BJSM 416 <<https://bjsm.bmj.com/content/bjsports/55/8/416.full.pdf>> accessed 20 February 2022.

⁴ O. Abdi, 'Strengthening UNICEF's Humanitarian Action' (*The Humanitarian Review*, UNICEF 2020) <<https://www.unicef.org/media/108046/file/Humanitarian%20Review.pdf>> accessed 20 February 2020.

⁵ The Copyright Act 1957, s 2(c).

1. Personal Capacity

Personal Capacity deals with the individual basis. A sportsperson or athlete can sign an individual endorsement deal with any company. He/She will have a bigger portion of income as the players can exploit their image right attributes through their advertisements or public events with the brands.

Illustration: Player 'X' signed an endorsement deal with 'KL' Company. Player X shall appear in the advertisement with

2. Association or Club Capacity

Association or Club Capacity means when a sportsperson or player was employed with the club or with the association. They do have to comply with the terms and conditions which were written in their contract.

Illustration: Player 'Y' signed an employment agreement with 'XYZ Football Club'. As per the Terms and Conditions in the contract, Player 'Y' shall click the picture with the squad, signed the club merchandise, and appear in the advertisement which is associated with the club.

Both, the players as well as the clubs, wants to keep a big portion of themselves in these image rights. Hence, the negotiations between the player and clubs become a struggle for both of the parties.

IV. FACTORS FOR VALUATION OF PLAYERS

There are numerous factors which involve, which can be called as "*TAP-R-PPV Model*" or simple words let us call it the "*Katheria Model of Valuation*".

Let us break down this TAP-R-PPV Model or Katheria Model of Valuation, which are: -

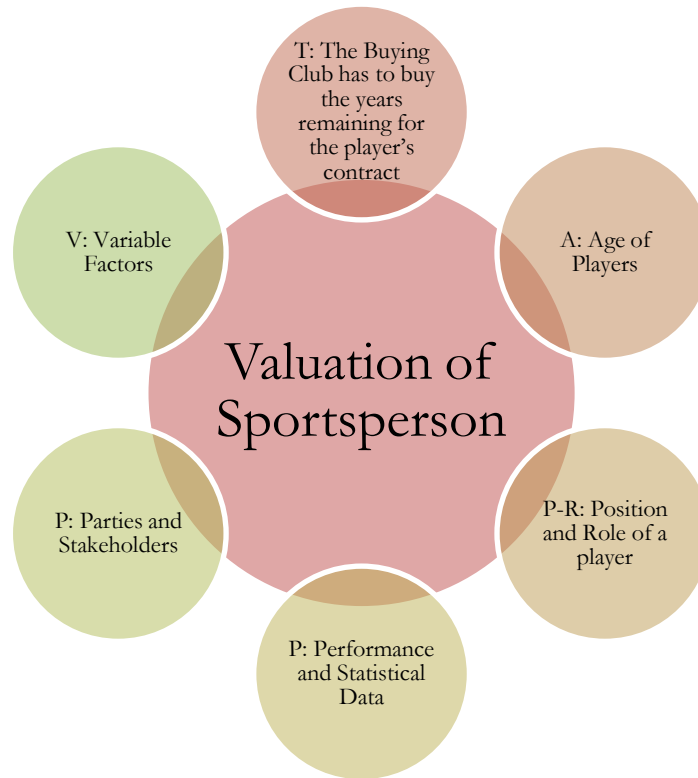


Fig. of TAP-R-PPV Model introduced by the researcher.

- ✓ T: The Buying Club has to buy the years remaining for the player's contract;
- ✓ A: Age of Players;
- ✓ P-R: Position and Role of a player;
- ✓ P: Performance and Statistical Data;
- ✓ P: Parties and Stakeholders involved; and
- ✓ V: Variable Factors.

Let us discuss all the above said terms in brief:

1. The buying club has to buy the years remaining for the player's contract

When a player was with the contract with a club or with any franchise team, sometimes a player still left a few years which he has complied with the club. Therefore, the buying club obliged to buy the remaining year of the player's contract to compensate the seller's investment.

2. Age of Players

The age of a player is one of the most important factors to evaluate for such valuation. The more the young player is the bigger the money involved to incur the cost for the huge potential.

3. Position and Role of a player

A player's position and his role in the squad is also important. Such kinds of factors are applicable in team-based sports. It should be made clear to the player whether he or she will play regularly with the first team, whether the owners and administration are willing to pay them bonus whenever they perform for their team, and whether he or she will get the opportunity to use his gear as tools of the trade.

4. Performance and Statistical Data

A regular performance by a player consistently can further rise his/ her value in the market. A player wants to chase his dream by playing at elite clubs and playing in the top league against the top players. Moreover, the statistical data of an individual player give more clarity in terms of getting offer sponsorship from different companies which can be related to the sports industry or any other industries except betting, liquor & alcoholic beverages, and any other industry which were restricted by the sport's governing federations or associations or organizations.

5. Parties and Stakeholders involved

Numerous parties are involved in the sports contracts. A player, a buyer, a seller, agent of the player, and lawyers of both the parties. There are times when fans also have the power and become an essential part of the organization.

Such kind of concept was already been implemented by FC Barcelona, which has its members known as *Socis* or *Socios*.⁶ These members have a part-ownership in the FC Barcelona. These members have an influence in

⁶ A. Bialkowski, 'Who are Barça socios and how to become one' (*9Camp Nou*, 14 April 2022) <<https://9campnou.com/how-to-become-fc-barcelona-socio/>> accessed 20 February 2022.

the organization during the elections, referendums. Currently, in FC Barcelona, there are 146,000 *socios*. The *socios* have to pay an annual fee of EUR 185.⁷

6. Variable Factors

Injuries of players, bad behaviour of player with team-mates and with the manager of the clubs, public image, and social responsibilities or public service.

However, these variable factors do act as a *double-edged sword*. In case any player appearances are less in a season, the constant fight with the team-mates or with the coach, manager or support-staff, sportspersons involved in gambling or betting incident or any serious criminal activity, such incidents can devalue the player's valuation.

In the next heading, the researcher further explains such variable factors which hamper the player's overall valuation and further included in the TAP-R-PPV Model or Katheria Model of Valuation.

V. FACTORS THAT CAN HAMPER THE VALUATION OF A PLAYER

The valuation of a sportsperson can get hampered by various variable factors. Such factors can be:

1. Accused in any serious criminal activity

If a player is accused of any serious crime, most of the time sportspersons or players do lose their sponsors. The companies do not want to associate with such sportsperson which can damage the goodwill of their brand.

2. Involved in betting or dangerous sports activity

Sports associations or club owners do make a prevention clause in their agreement to make sure that players are not involved in any kind of betting games or any such sporting activity which does impose a life

⁷ *ibid* at 7.

threat. Many sportspersons got banned while involved in the betting activities in their respective matches.

3. Doping

If any player is deliberately involved in consuming performance enhancement drugs which are restricted by the authorities. There have been instances of players who were involved in doping or consumed performance enhancement drugs which led them to lose their sponsorship and endorsement deals with well-known brands.

VI. CASE STUDIES ON PLAYERS WHOSE VALUATION INCREASED

1. David Beckham

The former England football player and legend, David Beckham has made a huge empire not through the endorsement deals, but also from the investment he made during his career. Beckham makes \$42 million from the endorsement deal from brands like Adidas, Coty, H&M, Sainsbury's, Samsung, and Breitling.⁸ Currently, his net worth is \$450 million.⁹ His company, Beckham Holdings invested in the various subsidiaries company¹⁰, such: -

- a) *Victoria Beckham Holdings Limited*- A holding company, consisting of fashion and retail business;
- b) *Victoria Beckham Incorporation*- A fashion e-commerce company.;
- c) *Beckham Retail Limited*- The principal activity of this company is dormant;
- d) *DB Ventures Limited*- Image rights and licensing;

⁸ '#19 David Beckham'(Forbes, 26 June 2013) <<https://www.forbes.com/profile/david-beckham/?sh=71ddc92a56d5>> accessed 20 February 2022.

⁹ E. Wallin, 'David Beckham Net Worth' (*Wealthy Gorilla Blog*, 2021) <<https://wealthygorilla.com/david-beckham-net-worth/>> accessed 20 February 2022.

¹⁰ *ibid* at 9.

- e) *Beckham Brand Limited*- It is also an image right and licensing company;
- f) *Dbrazil TV Limited*- This is a TV production company;
- g) *Miami Beckham United LLC*- A Major League Soccer franchise;
- h) *Miami Properties LLC*- A property holding company;
- i) *Miami LLC*- A non-trading company.

2. Virat Kohli

Former Captain of the Indian Cricket Team, Virat Kohli is India's most valuable celebrity. He has an endorsement deal with Vicks, Audi, Too Yumm, Manyavar, and Hero which was worth around \$20 million.¹¹ Apart from this, he has also co-owned FC Goa in the Indian Super League. Mr Kohli is valued at around \$237.6 million.¹²

3. Michael Jordan

The Greatest of All Time in NBA history, Michael Jordan net worth is up to \$1.6 billion.¹³ During his NBA career, he earned \$90 million, including the \$63 million with the final two seasons with the Chicago Bulls.¹⁴ Brands like Nike, Hanes, Upper deck and Gatorade signed the endorsement deals with him, which is valued at around \$130 million. In 2020, Jordan also co-owned a NASCAR team name, 23XI Racing.

Nike already signed a lifetime endorsement brand deal with Michael Jordan for the famous "*Nike Air Jordans*" shoes. In 1984, the US-based Nike Inc. signed a sneaker deal with him of \$250,000 for the upfront

¹¹ '#66 Virat Kohli'(Forbes, 22 May 2020) <<https://www.forbes.com/profile/virat-kohli/?sh=5e239efb4cc9>> accessed 20 February 2022.

¹² 'Virat Kohli is India's most valuable celebrity' (*Royal Challenger Bangalore*, 9 February 2021) <<https://www.royalchallengers.com/rcb-cricket-news/lifestyle/virat-kohli-is-indias-most-valuable-celebrity>> accessed 20 February 2022.

¹³#1931 Michael Jordan',(*Forbes*, 12 June 2022) <<https://www.forbes.com/profile/michael-jordan/?sh=2fc7845b2d83>> accessed 20 February 2022.

¹⁴ M. Cruz, 'Michael Jordan's Net Worth In 2022' (*ClutchPoints*, 3 January 2022) <<https://clutchpoints.com/michael-jordans-net-worth-in-2022/>> accessed 20 February 2022.

commitment.¹⁵ This resulted that a brand worth \$3 billion, earning about \$1.3 billion. In the current sneaker market, Nike's "Air Jordan" already made a monopoly due to the value which brings from associated with the G.O.A.T, Michael Jordan.¹⁶ Jordan also holds majority shares in an NBA team, Charlotte Hornets, which is worth around \$1.5 billion.¹⁷

4. LeBron James

LeBron James is one of the biggest sportspersons in the sports industry. He won four NBA Championship, four NBA MVP Awards, four NBA Final MVP Awards, and two Summer Olympic gold medals.¹⁸ LeBron made almost \$125 million from his salary.¹⁹ Further, he made \$326 million worth of endorsement deals with the 2K Sports, AT&T, Beat Electronics, Calm, Epic Games, GMC, Nike, PepsiCo, RIMOWA, Tonal, and Walmart.²⁰

He is on contract and playing for the Los Angeles Lakers, which he signed in 2018, and expires in 2023, his base salary is \$41.1 million and the whole deal is about \$153 million.²¹ LeBron James founded the LRMR Venture, with Maverick Carter, Rich Paul and Randy Mims.²² The LRMR is a sports marketing agency. He already invested in the Fenway Sports

¹⁵ 'Michael Jordan Net Worth 2021: What is Jordan's deal with Nike?' (Marca, 17 October 2021) <<https://www.marca.com/en/basketball/nba/2021/10/17/616c0df146163f846f8b45b5.html>> accessed 20 February 2022.

¹⁶ *ibid* at 16.

¹⁷ '#27 Charlotte Hornets' (*Forbes*, October 2021) <<https://www.forbes.com/teams/charlotte-hornets/?sh=67dda329364f>> accessed 20 February 2022.

¹⁸ 'LeBron James net worth 2021: What is LeBron's salary per week?' (*MARCA*, 10 October 2021) <<https://www.marca.com/en/basketball/nba/2021/10/10/6162d4d846163f8c968b4633.html>> accessed 20 February 2022.

¹⁹ D. Chmielewski and C.H. Withron, 'LeBron James' Net Worth Revealed – And, Spoiler, He's Not A Billionaire' (*Forbes*, 21 August 2021) <<https://www.forbes.com/sites/dawnchmielewski/2021/08/21/why-lebron-james-is-not-a-billionaire--yet/?sh=3fc51a043e3e>> accessed 20 February 2022.

²⁰ 'LeBron James' (*Forbes*, 12 June 2022) <<https://www.forbes.com/profile/lebron-james/?sh=5a25280f2398>> accessed 20 February 2022.

²¹ *Ibid* at 19.

²² P.B. Torre, 'LeBron: The Sequel' (*ABC News*, 25 July 2016) <<https://abcnews.go.com/Sports/lebron-sequel/story?id=48828248>> accessed 20 February 2022.

Group and owns Boston Red Sox, Liverpool Football Club, Roush Fenway Racing and the New England Sports Network.²³

Further, LeBron James and Maverick Carter founded The Spring Hill Company, an entertainment company that recently co-produced the movie “Space Jam: A New Legacy”, with the Warner Animation Group, and Proximity Media. The Spring Hill Company is worth around \$300 million.²⁴

VII. CASE STUDIES ON PLAYERS WHO LOST THEIR SPONSORSHIPS AND DIP IN THEIR VALUATION

1. Oscar Pistorius

The South African “*Blade Runner*”, Oscar Pistorius lost his sponsorship from Oakley, Nike, BT, Thierry Mugler, and Ossur due to the charges of “*premeditated murder*” for shooting death of his girlfriend Reeva Steenkamp.²⁵ The Nike endorsement deal was worth \$2 million.²⁶ The charges were framed against him was serious criminal charges.

2. Lance Armstrong

Former American professional road racing cyclist, Lance Armstrong admitted that he used the performance enhancement drugs at the age of 21. He was a seven-time Tour de France winner, which was strapped and further punished with the lifetime ban in 2012 from the United States Anti-Doping Agency (USADA).²⁷ Due to this incident, Nike, Honey Stinger, Trek, Easter-Bell Sports, 24 Hour Fitness, Anheuser-Busch, RadioShack, Oakley, all of them terminate their endorsement and sponsorship deal with him.²⁸

3. Tiger Woods

²³ *ibid.* 21

²⁴ *ibid.* 20

²⁵ M. Wall, ‘Pistorius fall-out: The perils of sports sponsorship’ (*BBC News*, 21 February 2021) <<https://www.bbc.com/news/business-21472843>> accessed 20 February 2022.

²⁶ *ibid.* at 26.

²⁷ Samuel Abt, ‘Lance Armstrong’ (*Britannica*, 11 January 2022) <<https://www.britannica.com/biography/Lance-Armstrong>> accessed 20 February 2022.

²⁸ T. Rotunno, ‘Armstrong Loses Eight Sponsors in a Day’ (*CNBC*, 18 October 2012) <<https://www.cnbc.com/id/49462583>> accessed 20 February 2022.

Tiger Woods, former No.1 golfer, was found in extra-marital affairs which was later comes to the public, leading to nightmares not only in his personality but also in his professional life.²⁹ Big corporate giants like Accenture, AT&T Inc., and Gatorade terminated their endorsement deal which was worth \$23 million;³⁰

4. Ben Johnson

The Canadian athlete, who won the gold medal 1998 Summer Olympics, was found to be using the banned substance stanozolol, which is an anabolic steroid. It was found in his blood and urine sample by the Olympic Doping Control Center.³¹ Within three days, not only did the Olympic Committee strip his gold medal and his world record which he set in the 100-meter Men's sprint event, but he also lost his sponsorship deal from the Diadora, which is an Italian sportswear brand worth \$2.8 million, at that time.³²

5. Wayne Rooney

In 2010, a tabloid was released in the UK that Wayne Rooney was allegedly cheating on his wife who was pregnant at that time. Such an incident led him to pull him back from the ad from Coca-Cola. Further, Tiger Beer also pulled him from their ad campaign.³³

VIII. E-SPORTS

E-Sports is an unregulated market. There is no fixed transfer window, which means any player can apply for a permanent or loan transfer to any other E-Sports organization. Therefore, the valuation of players depend on the current forms of the E-Sports player. But the question is how the valuation of such players can be done as it is dynamic in nature.

²⁹ 'Athletes who've lost endorsements after scandals' (CBS News, 23 October 2012) <<https://www.cbsnews.com/media/athletes-whove-lost-endorsements-after-scandals/>> accessed 20 February 2022.

³⁰ *ibid* at30.

³¹ *ibid* at 30.

³² *ibid* at 30.

³³ *ibid* at30.

Certain things shall consider before any player make a permanent or loan transfer to any E-Sports organization. These factors in E-Sports are:

1. Age of the Player

The E-Sports organization does consider this as one of the important factors to sign an E-Sports player. It is important to note that there is legislation that governs whether a person is competent to sign a contract.

Under Section 11 of the Indian Contract Act, 1872, only a competent person can sign a contract when he/ she has attained the age of majority and a sound mind. In India, the '*age of majority*' is defined under Sec. 3(1) of the Indian Majority Act, 1872. It says: "*Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.*"

2. Skills of Players

When any E-Sports players were scouted by any E-Sports organization, they look out for various skills which shall consist in a player. These skills can be: -

- a) Game Sense and Awareness;
- b) Reflexes of player;
- c) Teamwork & Assisting Ability;
- d) Hand-eye coordination;
- e) Aiming of Player.

3. Performance

The performance of an E-Sports player becomes important for negotiating with the E-Sports organization for a permanent or a loan transfer deal. The scouts of the E-Sports organization look at the last three-four months performance, which helps them to submit and further negotiate with the E-Sports players.

Let us understand such valuation of E-Sports players through the various case studies, which are: -

1. Zimo

The Chinese E-Sports player, Zimo who play Honor of Kings [the Chinese version of Arena of Valor] has been acquired by the Team Weibo in the auction for the King Pro League. The transfer fee amounted to \$1.89 million.³⁴ He has become the most expensive mobile E-Sports player across any mobile e-Sports industry.

2. John “N0tail” Sundstein

The Dota 2 E-Sports player, John Sundstein who is known as “N0tail”, play for OG, won Dota 2 The International Tournament for consequently two years.³⁵ He earned around \$7 million which makes him the highest-earning E-Sports player in the world.

3. Kyle “Bugha” Giersdorf

The famous Fortnite player, Kyle Giersdorf, also known as “Bugha”. In the Fortnite World Cup 2019, he showed his dominant performance and won \$3.2 million.³⁶ This made him one of the highest esports players in the world in terms of winning the prize pool.

4. Zhu “paraboy” Bocheng

The Chinese e-sports player, Zhu Bocheng, also known as “paraboy”, is the most respected mobile E-Sports player for playing in the Game For Peace (a Chinese rebranded version of PUBG Mobile). In terms of winning the pool prize, he is one of the most-highest earning in the PUBG Mobile or Game For Peace, including the domestic, as well as

³⁴ D. Moghe, ‘Zimo signed by Team Weibo for \$1.9M’ (*Talkesport*, 24 January 2022) <<https://www.talkesport.com/news/zimo-signed-by-team-weibo-for-1-9m/#:~:text=Honor%20of%20Kings%20professional%20player,esports%20player%20across%20any%20title>> accessed 20 February 2022.

³⁵ A. Boggs, ‘Top 10 highest earning esports players in the world’ (*Esportsbets*, 27 January 2021) <<https://www.esportsbets.com/news/highest-earning-esports-players/>> accessed 20 February 2022.

³⁶ *ibid* at 36.

international tournaments. He earned around \$1.05 million.³⁷ He is in contract with the NOVA E-Sports (earlier, it was XQF, which was later acquired by the NOVA E-Sports).

IX. VALUATION PROCESS OF A PLAYER OR ATHLETE

The valuation process of a player or athlete consists of three things: -

- a. Letter of Intent or Enquiry Report;
- b. Representation of Players or Athletes;
- c. Valuation Report.

Now let us discuss this briefly:

1. Letter of Intent or Enquiry Report

Whenever any club or organization needed the estimated value of a player or athlete, a letter of intent or enquiry report needs to be prepared it. This usually happens in football, when any club wants to know the estimated value of a football player before making an offer to the club.

The same process can be applied in the E-Sports when any e-sports athlete or any E-Sports organization wants to include a new player in their line-up;

2. Representation of Players or Athletes

Once the club or the organization did find a potential player who can be a good addition to their team will engage the lawyers and agents/intermediaries who are representing the potential player as well as key managerial personnel who are handling the player transfer division such as Sporting Director, Coach, Manager, etc.

3. Valuation Report

The valuation report consists of the statistical data of the potential player. These data consist the various information on the performance of a

³⁷Zhu "paraboy" Bojun' (*EsportsEarnings*, 2022) <<https://www.esportsearnings.com/players/69516-paraboy-zhu-bojun>> accessed 20 February 2022.

player, social media engagement of a player, and existing sponsorship or endorsement deals with the brands. Once the valuation report has been completed, the club then make an offer to another club to acquire the service of the potential player that they are looking to add to their team.

Let us understand with the illustration:

- a) *Illustration 1* -“ABC Football Club” wants to add a potential player name “Mr. X”, who is playing for the “XYZ City Football Club”. The ABC Football Club has already done the scouting of Mr. X. Therefore, ABC Football Club will send a Letter of Intent or the Enquiry Report to XYZ City Football Club to get the estimated value to buy the services of the player. Once the XYZ City Football Club get such a Letter of Intent or Enquiry Report. Two things will happen, either the XYZ City Football Club reject such a report or they will send an estimated value. Here let us assume Mr. X's estimated value is GBP 40,00,000.

Then, the valuation report needs to make which consists of the player's performance for their club, existing endorsement and sponsorship deals with the brands, and the social media presence. Once they acquired all such data, they will analyse, how the potential player (here it is Mr. X), accordingly they discuss the tenure of the player's contract, appearances, appearances in the matches, as well as for the event, and many more.

Once the Valuation Report has been submitted to the ABC Football Club, they will engage the key managerial personnel of the Club, as well as the player's lawyer and agent or intermediaries. After taking into consideration all factors, ABC Football will make an offer to the player, and further discuss the add-ons such as the bonuses for the players once they won any tournament for the club or won any individual award.

- a) *Illustration 2* -DEF E-Sports team wants to add Mr. S who is a professional E-Sports athlete and plays Battleground Mobile India (BGMI). Right now he is playing for the Team PQE E-Sports as an

All-Round Supportive player. DEF E-Sports team wants a player who can perform a supportive role with their team.

Once the trial has been ended, the DEF E-Sports team will send a Letter of Intent or the Enquiry Report for his availability to play with their team for 5 matches in an invitational event to check whether the player is compatible and have good synchronization with the other team members. Further, the DEF E-Sports will also ask Mr. S to send his device POV camera, his gameplay recording, and his mobile device to check whether he is not using any unethical means to gain unfair advantages during the events.

Once the trial has been completed, the valuation report will be drafted in which the all the data will be gathered from these 5 trial matches, his performance in the major tournaments, his last 5 months' performance in the E-Sports tournaments, number of views on his live streaming, and existing sponsorship and endorsement deals with the brands.

If the team owners and coach of the team found the player is compatible, the next step will be to involve his agents or intermediaries who are representing him to make an offer to the E-Sports athlete, and further terms and conditions will be negotiated by both of the parties.

X. ANALYSIS

The problem with the current valuation system is that it can be the dynamic and volatile, depending on nature of the organization. There can never be an absolutely correct way to calculate the correct valuation of the sportsperson which can be resulted in 100%. However, by considering the TAP-R-PPV Model, we can get a close to perfect valuation.

Every sport has different standards to measure. Accordingly, brands also approach the sportsperson and athletes for endorsement deals. Also, E-Sports brings different kinds of aspects for evaluating the E-Sports players. If we see the traditional sports, such as Football, Basketball, Cricket, where the players were got tested with both, physical and mental

strength, the TAP-R-PPV Model of Valuation can be applied to make a good valuation of a Sportsperson or Athlete.

However, we still have to see the E-Sports sector, as there are not enough data available to get the correct valuation of E-Sports players. The majority of the E-Sports tournaments are broadcasted through YouTube or other streaming platforms such as LOCO, Twitch, Disney+, Hotstar, etc. There are not enough broadcasting deals that happen with the organizers and the broadcaster which help more cash flow in the E-Sports sectors, which can help to setup the E-Sports Academy and develop a more professional ecosystem.

1. Why There Was No Basic Formula?

There can never be a fixed formula to calculate the valuation of a player. This is dynamic and volatile in nature. The above-said factors which the researcher mentioned in the TAP-R-PPV Model of Valuation can be considered for doing the valuation. Every team, club, organization have their own set of factors while also taking the variable factors to calculate the almost correct valuation of such players.

XI. CONCLUSION AND SUGGESTION

The researcher can conclude that the *TAP-R-PPV Model or the Katheria Model of Valuation* can be a better way to get the result of the valuation of the sportsperson who play the traditional sports. Also, the above-said case studies which the researcher mentioned for the variable factors showed us that brands can pull their endorsement deal in case you are involved in Doping, Serious or Serious Criminal Activity, and Involved in Betting or in Dangerous activities.

However, in E-Sports there shall be more investment which can help not only the younger generation but also the boomer generation for getting a better understanding of E-Sports. This will help to get the broadcasting deal from the various broadcaster which will inflow cash into the system, as the tournaments of E-Sports players are only restricted in the online streaming platform or OTT platforms. The more appearance of the E-Sports player will be on the T.V., the more recognition of E-Sports will

get, the more data will available, and the better evaluation will get for the players for the endorsement deals.

The following suggestions which researcher wants to propose in this paper are: -

- A regulated transfer market shall be implemented in the next five-year planning for the E-Sports industry which should have power like FIFA. This will help the esports organization to maintain their squads. A regulated transfer market can reduce labour turnover. The employment agreement for the E-Sports players can be drafted like BCCI does for their men's national cricket team players.
- A separate data of E-Sports shall be maintained by Big 4 Accounting firms as these firms do for the Football. This will further help to negotiate with the E-Sports organization in respect to salary;
- The Statistical Data of sportsperson plays an important role. Through current data analysis, it can bring a better valuation for sportspersons. And further, it'll help them to negotiate their contract with the brands or with the clubs.

GAME OF SKILL OR CHANCE OR BOTH? DESIGNING A REGULATORY ARCHTECTURE FOR FANTASY SPORTS IN INDIA

** Shashank Atreya*

ABSTRACT

The fantasy sports market in India has proved to be a significant contributor to the growth of the gaming industry. A KMPG report has indicated that fantasy sports players grew from 2 million in 2016 to 90 million in 2019, causing the industry's revenue to triple. However, the fast pace of growth of fantasy sports in India has taken place despite an archaic public gaming legislation. Multiple State Governments have banned fantasy sports with overarching penal legislations. These legislations display limited grasp of gaming technology and subject the gaming industry to the overused principle of chance vs. skill. This paper traces the current regulatory framework for public gaming and proposes the replacement of chance vs. skill metric to test online gaming platforms. Based on Lessig's theory of internet regulation this paper proposes a combination of self-regulation and Government intervention to govern fantasy sports in India. The paper maintains the position that fantasy sports in India must be regulated not banned.

I. INTRODUCTION

The fan engagement around Indian sports is evolving in India. The advent of fantasy sports has elevated the average sports fan from being a spectator to engaging in virtual participation and management of teams and leagues. Fans, unlike ever before, are able to form teams, select or remove players and utilize all their street expertise to build a successful team, albeit on a virtual platform. The increasing participation on fantasy platforms and the generation of unique datasets have opened a new market with boundless potential and high risk. A 2021 Deloitte report pegs this potential at a growth rate of 40% year on year and an overall market value of \$2.8 Billion in 2022.¹ To draw perspectives of this

* Shashank Atreya is a Senior Resident Fellow at Vidhi Centre for Legal Policy.

He was assisted by Ms. S. Lavanya, II Year Student, Rajiv Gandhi National University of Law, Punjab.

¹ PN Sudarshan, 'Deloitte, Technology, Media, and Telecommunications Predictions' (Deloitte, 10 January 2021)

number, the predicted market capitalization is more than 1/3rd of IPL's market value of \$6.3 Billion.² While this growth and public engagement is lucrative, fantasy platforms are fraught with regulatory concerns.

As the fantasy sports industry grows in popularity and usage, it is important to develop a regulatory framework that recognizes the uniqueness of the fantasy sports industry and its associated challenges. This paper critically analyzes India's existing efforts to regulate fantasy sports based on the principle of chance vs. skill, and proposes a new regulatory format. The paper will first provide an overview of the working of fantasy sports and its various components that pose a regulatory concern. The second section of the paper analyzes the treatment of fantasy sports by multiple State Governments as a form of gambling and the judicial rulings on India's archaic gambling legislation. The third section examines the treatment of fantasy sports by the United States, a mature market for fantasy sports, and the challenges faced by regulators in the United States. The paper ends by proposing a principle-based framework to regulate fantasy sports and advocates against the outright banning of fantasy sports.

II. FANTASY SPORTS IN INDIA

This paper has chosen the popular cricket fantasy sports platform, *Dream 11*, as its muse to help understand the working of fantasy sports platforms and the intricacies of its operations. However, it is important to note that India currently has over 32 fantasy sports platforms that operate similarly.³ Due to its popularity in the Indian market, *Dream 11* reached 100 million users on its platform in FY 2019-20, generating the highest income of Rs. 2,130 crore among industry participants.⁴ *Dream 11* is not

<<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-predictions-2021-noexp.pdf>> accessed 19 Feb 2022.

²IPL brand value grows 19 per cent to USD 6.3 billion in 2018, Deccan Chronicle, (*Deccan Chronicle*, 10 August 2018) <<https://www.deccanchronicle.com/business/in-other-news/100818/ipl-brand-value-grows-19-per-cent-to-usd-63-billion-in-2018.html>> accessed 19 February 2022.

³Adarsh Adi, 'The Curious Case of Indian Fantasy League(s)' (*Financial Express*, 9 May 2021) <<https://www.financialexpress.com/industry/technology/indian-fantasy-league-fantasy-apps-fantasy-league-indian-mobile-fantasy-game-apps-dream11-mycircle11-dream11-fantasy-cricket-game/2248669/>> accessed 22 February 2022

⁴Peerzada Abrar, 'Sports tech firm Dream Sports posts Rs 181 crore profit in FY20' (*BusinessStandard*, 30 September 2021)

ordinarily available on the Google Play Store. Potential users are required to enter their mobile details on its website to receive the link for downloading its app. Google continues to treat *Dream 11*'s operation as a violation of Indian laws and, therefore, restricts its availability on the Play store. On downloading the app, the users provide a basic set of details such as age, gender, and email ID, which *Dream 11*, strangely, commits to protect to the best of its ability. The lack of a data protection law continues to allow firms such as *Dream 11* freewheel on users' data with limited oversight.⁵

Each user is given 100 credits which they use to build a team of 11 or more players depending on the sport. In Cricket, the most popular sport on *Dream 11*, a user can build a team of 11 players out of which not more than 7 can be from one team [Royal Challengers Bangalore/South Africa]. On building the team the user has two options, to participate in the season-long tournament or the daily challenges. For a user to actually participate in either of the formats they are required to pay an entry fee which is added to the overall pool, that is administered by *Dream 11*. Based on the performance of the chosen players, the user is awarded points based on an extensive mechanism evolved by *Dream 11*. For instance, each run is awarded with 1 point and a century with 16 points, while a duck out is penalized by 2 points.⁶ Based on the performance of the participants in the pool, the users with the highest points are awarded cash. The entry fee for various pools is often as low as Rupees 10 and can be as high as Rupees 500 and the payouts are based on the points earned. Most fantasy sports platforms, including *Dream 11*, deliberately keep the entry requirements to a minimum in order to increase engagement and provide users a feeling of a potential instant

<https://www.business-standard.com/article/companies/fantasy-sports-platform-dream11-posts-rs-181-crore-profit-in-fy20-121092101343_1.html>accessed 19 February 2022.

⁵ 'DREAM 11' <<https://www.dream11.com/about-us/privacypolicy#:~:text=All%20information%20gathered%20on%20Dream11,need%20to%20know%20basis>>accessed 19 February 2022.

⁶ 'How to Play' (*Dream 11*, 16 February 2022) <<https://www.dream11.com/games/fantasy-cricket/how-to-play>> accessed 21 February 2022

gratification.⁷ The entry requirements to participate on *Dream 11* is similar to traditional sports gambling and other online games.

The working of *Dream 11* and its allied apps have two operational similarities, a) there is an entry requirement akin to traditional gambling, and b) the points earned by a user are dependent on the individual choice and knowledge i.e. - 'Skill' and the actual performance of the players chosen on the team i.e. - 'Chance'. As commented by *Zachary Shapiro*, the interplay between skill and chance places fantasy sports in a regulatory gray area. Opponents of fantasy sports argue that the performance of athletes is never consistent, and therefore, wagering on their performance is a game of chance and not skill.⁸ While a case may be made for users playing season long competitions, where data analysis/statistical study may elevate the skill component of fantasy sports, a user's success being contingent on the performance of another individual/player places fantasy sports in murky water. Based on the reasoning offered by those who oppose fantasy sports, day-to-day wagering will certainly qualify as gambling.⁹

In response, fantasy sports operators and users have submitted that the creation of day-to-day fantasy teams requires extensive knowledge of the sport, such as the knowledge on current and past performance of various players as well as the skill to utilize such knowledge to construct a team of top-performing players within the in-built salary or credit cap. Similarly, for long term fantasy sports, operators have argued that the component of sports and player knowledge outplays the chance component in the overall operation. In the United States, a study by *McKinsey* shows that 91% of the winnings on fantasy sports platforms were only by 1.3% of the players.¹⁰ This strongly suggests that fantasy sports is a game of skill.

⁷Soumitra Bose, 'IPL 2021: Fantasy Cricket Transactions Soar - Why NPCI Is Wary' (*Outlook*, 15 April 2021) <<https://www.outlookindia.com/website/story/sports-news-npci-may-set-minimum-limit-as-fantasy-cricket-transactions-soar-during-ipl-2021/380253>>accessed 21 February 2022

⁸ Zachary Shapiro, 'Regulation, Prohibition, and Fantasy: the Case of Fan Duel, Draft Kings, and Daily Fantasy Sports in New York and Massachusetts', (2016) 7 *JSEL* 277, 285 <<https://harvardjssel.com/wp-content/uploads/sites/9/2016/06/Shapiro.pdf>>accessed 21 February 2022

⁹ Ibid.

¹⁰ Ed Miller & Daniel Singer, 'For daily fantasy-sports operators, the curse of too much skill' (*McKinsey & Company*) <<https://www.mckinsey.com/industries/technology-media->

However, if this study is alternatively analyzed it may suggest the abysmal low possibility of the majority of users having such statistical skill to improve their chances of winning. Therefore, making potentially making fantasy sports a game of chance rather than skill.

In India, *Dream 11* and allied apps place the possibility of operational continuity on an inconsistent jurisprudence of chance vs. skill. In an interesting court observation made by Judge *Manuel J Mendez* of the New York Supreme Court, he stated that lack of adequate control or influence on the overall outcome may result in fantasy sport being akin to gambling.¹¹ However, this observation may be an exaggeration of the overall control on the outcome held by an individual player whiling and participating in a team sport on the field. The next part of this paper analyzes the legislative and judicial position on this subject and highlights the difficulty in placing fantasy sports within the framework of India's archaic gaming laws.

III. FANTASY SPORTS AND INDIA'S PUBLIC GAMING LAWS

Two legislations primarily govern gaming in India, the pre-independence Public Gambling Act, 1867 (PGA) and the Prize Competition Act, 1955 (PCA). The PGA outlaws any game of chance and permits game of skills. It, however, carves an exception for the elite sport of horse racing. While the intention behind the PGA may have been to prevent gambling from becoming a societal disorder, the carving out of horse racing and targeting games often indulged by the middle class, makes PGA a discriminatory legislation to begin with.¹²

While the scope of the PGA, as conceived by the British, was limited subsequent to independence, the State Governments under Entry 34 and 62 of List II of the Seventh Schedule were empowered to legislate on the subject of public gaming. Most states have chosen to retain the pre-independence position and endorsed the chance vs. skill legislative

[and-telecommunications/our-insights/for-daily-fantasy-sports-operators-the-curse-of-too-much-skill](#)>accessed 21 February 2022.;

¹¹*People v. Fanduel, Inc.*, [2015] N.Y. Slip Op. 32332

¹² Naman Lohiya and Sakshi Pawar, 'A Gamble of Laws: Reconciling The Conflicting Jurisprudence on Gambling Laws in India'(2019) 13 NSLR 27, 28 <<https://nslr.in/wp-content/uploads/2019/05/NSLR-Vol-13-Issue-1-No-2.pdf>>accessed 21 February 2022

structure. The lack of legislative guidance on what constitutes skill makes a majority of State legislation on public gaming vague and inadequate.¹³ Such legislative inadequacies frustrate fantasy sports operators and impinge on their freedom to carry on trade. As is rightly recognized by the World Bank, clear and definite laws are a first step towards easing the doing of business in any country.¹⁴ States with public gaming laws criminalize the act of gambling in public forums and keeping of a 'common gaming house'; in any enclosed space. In the States of Orissa and Assam, prohibition¹⁵ is extended to games of both chance and skill. Over the past years, owing to the growth of online gaming in India, few State Governments have passed legislations either as an amendment to their Police Acts or new Acts to specifically ban online gaming. These legislations have made no attempt to depart from the pre-independence legislation on gaming and ban all kinds of online games. Such legislations indicate the blatant refusal of these states to understand/consider the operations of fantasy sports operators or other growing online gaming operations. They fail to consider the various judicial decisions on public gaming and importantly echoes an archaic thought and an underdeveloped policy opinion on public gaming.

For instance, the Telangana State Gaming (Amendment) Ordinance, 2017 under Section 2(2), places an overarching ban on online gaming. This legislation certainly violates Article 14 for equating all types of online gaming irrespective of the existence of an element of gambling in their operations. Section 2 (b)(i) of the Karnataka Police Act, 1976, as amended in 2021, extends the ban on online games containing an element of chance, unlike Telangana.¹⁶ The Legislation makes no attempt in defining online wagering or gambling or if games that are predominately skill-based face the sanction of such a law. Such legislative measures are

¹³ Ibid.

¹⁴ 'Doing Business' (2019) World Bank Group
<https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf> accessed 20 February 2022

¹⁵ The Odisha Prevention of Gambling Act 1955, s 2(b), s 3; Assam Game and Betting Act 1970, s. 2 (a)

¹⁶ The Karnataka Police (Amendment) Act 2021, s 2(b)(i)

concerning for the future of fantasy sports in India which relies on a legal interpretation that fantasy sports are predominantly a skill-based game.¹⁷

In 2021, Tamil Nadu passed an amendment banning online gaming.¹⁸ The text of the amendment shows limited understanding of the technology and the lack of basic consideration on the impact of such an amendment on the people of the State. The text of the Tamil Nadu amendment is a brazen copy of the 2017 amendment in Telangana, and its overarching legal language bans all forms of online gaming including, games of skill. A departure from the established jurisprudence on public gaming.

On the other hand, Nagaland Prohibition of Gambling and Promotion and Regularization of Online Games of Skill Act, 2016 permits all or any type of online gaming that is predominantly of skill.¹⁹ As is evident from the title of the legislation, it seeks to regularize online games which otherwise may be unlawful. It endorses a fee and license model for online games/fantasy sports operators. Such regularization is contrary to public gaming jurisprudence laid down by High Courts and the Supreme Court. While the Nagaland legislation may provide a glimmer of hope for *Dream 11* and similar apps, it also reflects a continued sense of uncertainty. For instance, if fantasy sports operators now register in Nagaland and offer services across India, the Nagaland law may come under constitutional attack for being extra-territorial.²⁰

The lack of consistency and clarity in the State legislation has resulted in the courts bridging the gap in interpretation and paving the way for multiple fantasy sports platforms to operate. The next part of this paper analyzes the various judicial decision on public gaming and its impact on fantasy sports.

IV. INDIAN COURTS AND PUBLIC GAMING

¹⁷ Karnataka Police (Amendment) Act 2021

¹⁸ The Tamil Nadu Gaming and Police Laws (Amendment) Act 2021, s 8.

¹⁹ The Nagaland Prohibition of Gambling and Promotion and Regulation Of Online Games Of Skill Act 2015

²⁰ Sports Law & Policy Centre, *Games of Skill in India: A Proposal for Reform* (White Paper, 2017) <<https://bit.ly/3gOmi5u>>accessed 20 February 2022

Dream 11, which is now outlawed in majority of the States continues to operate based on a decision of the Punjab and Haryana High Court.²¹ The court in its judgement traces all the judicial decisions on the interplay between Chance and Skill, and endorses the predominantly skill or the dominant factor test. The court recognized that *Dream 11* is mostly a game of skill and hence its operation would be exempt from the sanctions under the PGA.

The first feature of the dominant factor tests may be traced to the pre-independence version of the Prize Competition Act. Section 2(2)(c) of the 1939 version of the PCA²² which stated that ‘Prize Competition’ is inclusive of “*any other competition success in which does not depend to a substantial degree upon the exercise of skill.*” Based on the usage of the word ‘substantial’ under this legislation the Supreme Court in *State of Bombay v. R.M.D. Chamarbaugwala* founded the dominant factor test.²³ Subsequently, the Supreme Court in *Andhra Pradesh v. K. Satyanarayana & Ors.* (“*Satyanarayana*”) analysed the game of Rummy.²⁴ The court held that Rummy was not a game of pure chance and that there were considerable elements of the game that required skill, such as memorizing the cards and the knowledge of the game while deciding which card to lay down. The court in *Satyanarayana* permitted operators of game of skill to levy an administrative charge to meet the costs of the operation. While the effect of *Satyanarayana* might permit game of skill operators to function but, any indulgence in profit making might be construed as gambling. The dominant factor test was also endorsed in *K.R Lakshmanan v. State of Tamil Nadu* where the Supreme Court upheld the exemption granted to horse betting on the basis that it involved a substantial amount of skill.²⁵ The court in this case also recognizes that no sport or game can be fully dependent on one’s skill and the element of chance always exists. Therefore, it endorsed the dominant factor test as laid down in *Satyanarayana*.

²¹ *Varun Gumber v. Union Territory of Chandigarh & Ors*, 2017 Cri LJ 3827

²² Bombay Prize Competition Tax Act 1939, s 2(2)(c)

²³ *State of Bombay v. RMD Chamarbaugwala*, (1957) AIR SC 699

²⁴ *State of Andhra Pradesh v. K. Satyanarayana*, (1968) 2 SCR 387

²⁵ *Dr. KR Lakshmanan v. State of Tamil Nadu*, (1996) 2 SCC 226

In 2021, the Madras High Court in the case of *Junglee Games of India Pvt. Ltd. v. State of Tamil Nadu* discussed the constitutionality of the Tamil Nadu Public Gaming Amendment Act, 2021. The court analysed the various decisions of the Supreme Court on the chance vs. skill debate. The court spared no words in recognizing these amendments to be paternalistic and an invasion of personal liberty. It even went on to hold that the words used in the Tamil Nadu Amendment Act were “*crass and overbearing*”. The court recognized that laws dealing with technology are often passed void of research and struck down this law to be excessive and disproportionate.²⁶ In February’22 the Karnataka High Court also followed its sister High Courts and struck down the Karnataka Police Amendment Act, 2021. The Karnataka Amendment Act banned all forms of ‘online gaming’ including those qualifying as fantasy sports. The High Court, held such a ban to be bad in law especially due to the lack of data or logic guiding such decisions to ban.²⁷ The Karnataka and Tamil Nadu examples also highlight a growing systemic concern of the lack of reason, basic diligence and consultation by State legislatures while passing laws that impact the survival of an industry and millions who depend on its operation for their livelihood.

The judgement of the Madras High Court must serve as a guide for states seeking to regulate the internet. The court identifies how over regulating legislation such as the one in Tamil Nadu and Telangana is an attack on personal liberty and does not reflect the ideal ways to regulate emerging technology products. For fantasy sports operators, especially *Dream 11* and allied apps, they must celebrate the verdict of the Madras High Court as it provides sufficient legal headway to push States to regulate fantasy sports better and nudges states to establish a platform for fantasy sports operators to function in an ethical manner.

V. CONSTRUCTING A REGULATORY FRAMEWORK FOR GOVERNING FANTASY SPORTS IN INDIA

²⁶*Junglee Games of India Pvt. Ltd. v. State of Tamil Nadu*, AIR 2021 Mad 252.

²⁷*All India Gaming Federation v. State of Karnataka*, WP 18703/2021

The lack of legislative guidance by the State Government on the future of online gaming shows a poor grasp of technology by Indian regulators.²⁸ Banning access to technology or its creative usage is an act of digital paternalism and often fails to achieve the sought objective. The evolution of fantasy sports and its struggle to constantly justify to regulators of its interpretation of chance vs. skill firstly, shows that regulating the future of gaming cannot be on an objectively definable test whether a game is chance or skill based. The tests evolved by courts have come up as reactive rather than proactive.²⁹ Therefore, for states to comprehensively regulate fantasy sports, they must begin by accepting that they cannot ban it and, any attempt to ban will only increase its usage. By acknowledging this reality, states must evolve a regulatory framework that taps the economic potential of fantasy sports and ensures minimal adverse impact on the public.

This paper recommends the adoption of Lessig's Pathetic Dot Theory to regulate fantasy sports in India.³⁰ Lessig's socio-economic theory on the regulation of the internet, provides a perspective on ways to look at the regulation of fantasy sports. The theory states that the internet or a product of the internet (fantasy sports) are regulated by four forces, 1) Network Architecture; 2) Societal Regulations; 3) Market Costs; 4) The Law. This paper proposes that for the State to pass a law to regulate the internet it must have considered the first three forces (Network Architecture, Societal Regulations, and Market Costs), and only subsequently should it introduce a law to regulate the internet. Such a proposal must naturally be extended to the regulation of Fantasy Sports as well. Based on this theory, the first step towards regulating fantasy must be for the State to consult with operators of Fantasy Sports and encourage the creation of self-regulating guidelines and a network architecture that prevents excessive usage and reduces any societal risk.

²⁸ Priyesh Mishra, 'Karnataka's online gaming ban won't work. It shows poor grasp of tech' (*ThePrint*, 5 October 2021) <<https://theprint.in/opinion/karnatakas-online-gaming-ban-wont-work-it-shows-poor-grasp-of-tech/745224/>> accessed 20 February 2022.

²⁹ 'Games of Skill in India: A Proposal for Reform'(2017) Sports Law & Policy Centre <<https://bit.ly/3gOmi5u>> accessed 21 February 2022

³⁰ Lawrence Lessig, *Code: And Other Laws of Cyberspace* (Basic Books 1999)

The NITI Aayog in its concept paper on fantasy sports agrees with this suggestion and suggests the establishment of a “Fantasy Sports Industry Council.”³¹ The council can prescribe an industry-wide standards and ethics code which can be the first layer of regulations all the fantasy sports operators must adhere to. In the United States, fantasy sports operators have an ethics code through which they have established hotlines for assistance on gambling addiction. An Industry Council in India will also serve as a platform for Governments to better understand gaming technology. The Industry Council must evolve an ethics code through an independent, bipartisan committee and ensure that all fantasy sports operators are subjects to the code. The ethics code must deal with the positions the operators must take on the design of the technological code and ensure there is no deliberate coding to increase a user’s time on the platform at the risk of it translating to unhealthy wagering. Upon building a consensus on the design of the technology and the operation of an ethics code amongst Fantasy Sports platforms, the Government must identify the layers of regulation that truly require State interference.

Any form of regulation of fantasy sports must be principle-based rather than context-based. Regulations must endorse principles that are technology-proof and applicable to any kind of fantasy sports that exist and may evolve in the future. The State Governments in the United States of America have evolved contrasting State Models to regulate fantasy sports, but these are specific to fantasy sports. Proposing a legislation specific to fantasy sports may not be appropriate for India, considering the limited ability of the Indian State Government to carve out sector specific legislation and delays in legislative activity. Therefore, this paper proposes the restructuring of PGA to make it current, dynamic, and fair.

The PGA must be amended to reflect the following principles based on Malta’s Regulation of Online Sports,³²

³¹ Niti Aayog, *Government of India, Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India* (Draft for Discussion, 2020) <https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf> accessed 25 February 2022

³² Malta Skill Games Regulations 2017; Lotteries and Other Games Act 2001

- A. The regulation of games must shift from skill or chance to a combination of amusement/entertainment and chance. This departure from the commonly held position on online gaming will allow newer forms of media engagement to emerge and increase commerce on the internet.
- B. If the game is played for competition, the regulations must test if the user's ability to win is higher if there is an increased participation on the gaming platform. This mechanism would allow the regulator to identify the extent of gambling/wagering risk associated with the platform.
- C. The regulations must mandate gaming operators to establish robust rules to ensure that all participants have a competitive chance of winning. The formation of internal rules would further nullify the element of chance associated with the game.
- D. Fantasy sports operators must establish a fraud prevention and redressal mechanism to address the concerns of users.
- E. The winning percentage for any competition must be publicly disclosed to ensure that users carefully consider their participation on such platforms.

The above principles must be enforced through a 'Gambling Commission' common for all Indian states. The Government of India must become the custodian of public gaming as the subject is now largely an inter-state matter.

While a constitutional amendment maybe difficult to process, the Government of India may find it appropriate to legislate it as an inter-State subject under Inter-State Trade and Commerce reserved for the Union under Item 42 of List I of the Seventh Schedule.³³

VI. CONCLUSION

Fantasy sports will dominate fan engagement in the future and outlawing it would only make enforcement harder for the State Governments. It is in India's interest to regulate fantasy sports through a principle-led

³³The Constitution of India 1950, art 246, Seventh Schedule, List 1, Item 42.

framework and allow for similar gaming platforms to emerge. India's online gaming industry is pegged to have a market value of USD 7 Billion by 2025.³⁴ For a market to witness such growth while still being in the regulatory gray area shows that banning is not the appropriate form of regulation.

³⁴ 'India's mobile gaming industry set to treble in value by 2025: Report' (*The Economic Times*, 16 February 2022) <<https://economictimes.indiatimes.com/tech/technology/indias-mobile-gaming-industry-set-to-treble-in-value-by-2025-report/articleshow/86783569.cms?from=mdr>> accessed 25 Feb 2022.

NEED FOR A STANDARDIZED REGULATORY FRAMEWORK IN FANTASY SPORTS

**Aakash Arun Roa and Ritik Kumar Rath*

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

**Aakash Arun Roa and Ritik Kumar Rath are students at National Law Institute University, Bhopal.*

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](https://www.punjabpradesh.gov.in/press-releases/2022/01/02/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.

DYNAMIC NATURE OF PAY-TO-PLAY CONTESTS: A CHECKERBOARD OF VARYING REGULATIONS AND ITS INADEQUACY

**IndiradeviKollipara*

ABSTRACT:

Risking money on online fantasy sports is a hotly contested issue among its supporters and detractors. This article presents a qualitative study on the legal regime of online fantasy sports in India. In the first part of the article, authors examine the issue of wagering money on fantasy sports being a game of chance or of skill. In the second part of the article, the legislative competence for enacting legislations regulating online fantasy sports is scrutinised. In the third part of the article, the authors explore the need for regulation of online fantasy sports; it being a game of chance. Lastly, varying laws among State Governments on online fantasy sports in India is examined. The authors have shed light on The Karnataka Police (Amendment) Act, 2021, to support the view why expanded criminalization of gambling activities is preferred over legalisation.

I. INTRODUCTION

The existence of games in India can be traced back to ancient times such as the ‘game of dice’ played between Pandavas and Kauravas.¹ Since then, the traditional games have metamorphised into virtual games. Online gaming has also undergone transition by leaps and bounds because of technological advancement and global outreach. New gaming formats have emerged, one of them being ‘online fantasy sports.’ Online fantasy sports are held on website platforms where contestants pay an entry fee and create their ‘fantasy’ team of real athletes for a game or series of games with a predetermined budget. The outcome of real-life sports games determines each contestant’s line-up performance. The sole objective of a contestant in such competitions is to perform better than its competitors to win cash prizes. Online fantasy sports have appealed to the masses because of the well-known sporting events such as Indian

* Indira devi Kollipara is a student at School of Law, Christ (Deemed to be University), Bengaluru.

¹ Anuradha Kapur, *Actors, Pilgrims, Kings and Gods: The Ramlila of Ramnagar* (vol. 19, 1985) 57-73.

Premier League and Indian Super League. However, the dark underbelly of these fantasy sports remains to be recognized. These fantasy sports have done more harm than good to the society at large. Risking money on such sports have raised social, economic, and psychological concerns. This raises the dilemma whether this is just a new form of online gaming in its true sense or has it replaced the traditional form of betting/gambling.

II. GAME OF CHANCE OR GAME OF SKILL: THE LEGAL CONUNDRUM

Broadly, games are categorised into games of chance or games of skill. While the former is based on the element of luck, the latter is based on physical or mental skill. The distinction of games of chance and games of skill is of utmost significance as gaming legislations generally exclude gambling on all gaming activities that are not classified as 'games of skill'. To determine the legality of any game, specifically those games which are played with real money, it is imperative to ascertain whether such games will fall within the ambit of gambling legislation. Thus, a distinction between the games of chance and games of skill is of utmost significance.

With the advent of technology, the online fantasy sports have emerged as one of the biggest players in gambling industry. The position of law on whether the online fantasy sports are games of chance or games of skill remains unsettled. The judgment rendered by the High Court of Punjab and Haryana in *Varun Gumber v. Union Territory of Chandigarh and Ors.* was one of the earliest decisions where questions of whether fantasy sports can be categorised as 'betting or gambling' were raised.² The court held that fantasy sports being a 'game of skill' do not fall within the ambit of betting or gambling. This judgement was propounded primarily on the understanding that emerged from earlier findings of the Apex Court in *K.R. Lakshmanan's Case*, *K. Satyanarayana's Case* and *RMDC Cases*.³ The High Court of Punjab and Haryana while analysing these Supreme Court decisions laid down two important principles. First, the

²*Varun Gumber v. Union Territory of Chandigarh and Ors* 2017 Cri LJ 3827

³*Dr. K. R. Lakshmanan v. State of T.N. & Anr.* (1996) 2 SCC 226; *State of Andhra Pradesh v. K. Satyanarayana* AIR 1968 SC 825; *R.M.D. Chamarbaugwala v. Union of India* AIR 1957 SC 628; *State of Bombay v. R.M.D. Chamarbaugwala* AIR 1957 SC 699

competitions where success depends upon a substantial degree of skill are not gambling; and second, despite there being an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of 'mere skill'. Following this judgement, different High Courts in the country have merely endorsed the findings of the Punjab and Haryana High Court or of the courts which dealt with similar issues prior to them.⁴ Some of these decisions of the High Court which held fantasy sports to be games of skill and thus outside the purview of betting or gambling were appealed before the Supreme Court of India.⁵ The appeal was summarily dismissed by a non-speaking order and therefore the decision of the Courts cannot be considered as a law declared or upheld by virtue of Article 141 of the Constitution.⁶ Furthermore, the aforementioned decisions of Apex Court in K.R. Lakshmanan's Case, K. Satyanarayana's Case and RMDC Cases were specific to the legislations in question therein and did not provide a blanket ruling on the conundrum of game being game of chance or skill. For instance, in the RMDC-1 case, the constitutional validity of the Prize Competition Act, 1955 was called into question as the impugned Act not only regulated prize competition of gambling nature but also those in which substantial degree of skill was involved.⁷ The court applied the doctrine of severability and held that the said Act only applied to "games of chance", and not to "games of skill". In RMDC-2 case, the constitutional validity of Bombay Lotteries Prize Competition Control and Tax (Amendment) Act, 1952.⁸ The court held that the impugned Act does not have the effect of roping in innocent price competitions which are not of gambling nature. Therefore, a competition wherein success does not depend to a substantial degree of

⁴*Gurdeep Singh Sachar v. Union of India Through Ministry of Finance and Ors* 2019 SCC OnLine Bom 13059; *Chandresh Sankhla v. State of Rajasthan & Ors.* 2020 SCC OnLine Raj 264; *Ravindra Singh Chaudhary v. Union of India*, 2020 SCC OnLine Raj 2688

⁵*Varun Gumber v. UT, Chandigarh & Ors.* 2017 SCC OnLine P&H 5372; *Varun Gumber v. Union of India & Ors.*, SLP (Crl) Diary No. 35191 of 2019; *Gurdeep Singh Sachar v. Union of India & Ors.*, SLP (Crl) Diary No. 43346 of 2019; *Union of India v. Dream 11 Fantasy Private Limited* M A 11445/ 2019 in SLP (Crl.) 11445 of 2019; *Avinash Mehrotra v. State of Rajasthan & Ors.* SLP (Civil) Diary No. 18478 of 2020

⁶*Kunhayammed & Ors. v. State of Kerala & Anr.* (2000) 6 SCC 359

⁷*R.M.D. Chamarbaugwalla v. Union of India* AIR 1957 SC 628

⁸*State of Bombay v. R.M.D. Chamarbaugwalla* AIR 1957 SC 699

skill is recognised to be of gambling nature. In K. Satyanarayana's case, the conviction of Respondents under Section 4 and 5 of the Gambling Act for playing "rummy" for stakes, was set aside by holding that Rummy was a game of skill and Section 14 of the said act excluded "game of skill" from its ambit. Similarly, in Lakshmanan's case, the court decided that horse racing is a "game of skill" and not "game of chance" and thus it falls under exemption from criminal liability provided under the Tamil Nadu Gaming Act and the Tamil Nadu Police Act. In these judgements, the courts laid emphasis on the evolution of the 'Preponderance of chance or skill test', which state that if the game involves a substantial element of skill, it is a game of skill and vice-versa. The material role played by chance/skill is immaterial.

Unlike these games called into question in the above decisions, online fantasy sports are modern games of distinctive nature, and no comparison can be drawn between these games that operated in physical time and space with the one which is open to third party human (service providers) as well as technological intervention by means of computer programming, codes, etc. Apart from this, the intertwining of skills involved in online fantasy sports of different parties i.e., the athletes and the participant creating a dream team, creates a room for new understanding and classification of games. More importantly, whether a game is skillbased or chance based is largely a question of fact and not law.⁹ Each case must be decided independently, taking unique facts and circumstance into consideration. The aforementioned judgments cannot be treated as an authority on the proposition of validity of online fantasy sports and the principles laid down cannot be applied uniformly in the context of online fantasy sports. This leaves scope for adoption of the understanding and classification proposed by the authors with regards to Online Fantasy Sports.

1. 'Material Element Test' Triumphs over 'Preponderance of Chance or Skill Test'

In view of the authors, the 'Preponderance of chance or skill test' as

⁹*People v. Mason* 68 Cal. Rptr. 17, 21 (Dist. Ct. App. 1968)

relied on by the Courts in India does not facilitate classification of fantasy sports as a game of chance or skill in the most suitable manner. In the United States of America, several states including Alabama, Alaska, Hawaii, Washington, Missouri, New Jersey, New York, among others, employ the ‘material element test’ to determine whether element of chance is material to the final outcome irrespective of skill being dominant. The authors have selected USA for comparison owing to its technological advancement and developed jurisprudence on online gambling. In New York, the definition of gambling was amended in the Penal Code to include contest of chance which is defined as ‘any contest, game, gaming scheme or gaming device in which the outcome depends on a material degree of element of chance, notwithstanding that skill of the contestants may also be a factor therein’.¹⁰ The New York Supreme Court, Appellate Division embraced the “Material element test” in a February 2020 decision and held that skill factor cannot eliminate or outweigh the material role of chance and thus material element test is ideal test for the classification process.¹¹ The criteria employed in this test is that even if the game involves 51% or more elements of skill, it can still be classified as a game of chance.¹² In *People v. Turner*, the court held that games of chance include both games that require no skill such as lottery and games such as poker or blackjack where the result is dependent upon random distribution of cards, irrespective of skill employed.¹³ Even in India, the courts while establishing the preponderance of chance or skill test, have implicitly concurred with the opinion that games involve both elements of chance and skill. In K.R. Lakshmanan’s Case, K. Satyanarayana’s Case and RMDC Cases, the courts acceded to the fact that all games involve skill and chance, and the deciding factor is the element which is existent substantially in the game. These judgements highlight the fact that categorising a game into watertight compartments either solely based on chance or solely based on skill is not possible as

¹⁰ The New York Penal Law, Art. 225

¹¹ *White v. Cuomo* 181 A.D.3d 76 (N.Y. App. Div. 2020)

¹² *United States v. Di Cristina* 726 F. 3d 92, 98 (2d Cir. 2013); *Thole v. Westfall* 682 S.W.2d. 33 n.8, (Mo. Ct. App. 1984)

¹³ *People v. Turner* 629 NYS 2d 661, 662 (NY Crim Ct 1995)

they co-exist at the same time.

Just like any other game, chance and skill co-exist in fantasy sports. In other words, they are not mutually exclusive of one another. Undisputedly, a participant in an online fantasy sports competition employs its skills in deciding the line-up for their virtual team, for instance, while analysing past performance of an athlete. Moreover, if the trends of prize distribution are observed in such fantasy sports competitions, it is evident that a small percentage of users who employ their skills in formulating their team receive a large percentage of the prize money as compared to participants who choose their team at random. Regardless of employing skills in the selection of a virtual team, a participant of an online fantasy sport cannot control the performance of an athlete in the real sporting event. Here the skill of another is involved, success or failure is dependent on third party's performance and other allied determinative factors having bearing on the outcome of the sporting event, like injury or illness, poor officiating, a selected player having a bad day or an unselected player having a surprisingly good day.¹⁴ This reinforces the premise of fantasy sport being a game of chance and therefore falling under the category of betting or gambling.

Therefore, the element of skill involved in a fantasy sport cannot outweigh material role of chance. Applying the material element test, *prima facie*, fantasy sports are more akin to game of chance and thus fall within the domain of betting or gambling.

III. LEGISLATIVE COMPETENCE FOR REGULATION

In India, the Legislative powers are conferred upon the State and Centre under the Constitution of India. The power to regulate betting and gambling activities can be traced to multiple entries in the Constitution.¹⁵

The Constitution has empowered the State to legislate on matters relating to 'Betting and Gambling'. Entry 34, List II of Schedule VII to the

¹⁴*Superintendent and Remembrancer of Legal Affairs, Bengal v. L E Renny* 1935 SCC Online Calcutta 153

¹⁵*M/s Ujagar Prints and Others (II) v. Union of India and Others* (1989) 3 SCC 488

Constitution of India explicitly provides for 'Betting and Gambling'.¹⁶ It is settled law of interpretation that legislative entries should be liberally interpreted.¹⁷ Thus, in light of this well-settled principle, the meaning of the term 'gambling' and 'betting' in Entry 34, List 2 of Schedule VII to the Constitution of India should be interpreted broadly.

The term 'gambling' has been defined in the Black Law's Dictionary as

“Gambling. The dealing, operating, carrying on, conducting, maintaining or exposing for pay any gam. Making a bet. To plan, or game, for money or other stake; hence to stake money or other thing of value on an uncertain event. It involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of a consideration, an element of chance, and a reward. In re Gaming Devices Seized at American Legion Post No. 109, 197 Pa. Super. 10, 176, A.2d 115, 122. The element of gambling are payment of a price for a chance to win a prize. *Boies v. Bartell*, 82....”.¹⁸

Thus, *prima facie*, the outcome of the uncertain event may be predictable owing to the skill of the person is wholly irrelevant for the purpose of understanding the word 'gambling' in common parlance. On similar lines, the term 'bet' has been defined in the Black Law's Dictionary as “*A contract by which two or more persons agree that a sum of money, or other thing shall be paid or delivered to one of them on the happening or non-happening of an uncertain event*”. Consequently, the term 'betting' has been defined as the “*act of placing a bet or wager*”. Thus, in colloquial terms, the term 'betting' is understood to mean the act of contributing money or valuable thing on the happening or non-happening of a future uncertain event with the understanding that the money or other valuable thing will become the property of one or some of them on the happening or non-happening of the event. Therefore, assuming the word 'gambling' was limited to events

¹⁶ The Constitution of India 1950, Entry 34, List II, Schedule VII

¹⁷ *Godfrey Philips Limited and Another v. State of UP* (2005) 2 SCC 515; *Jilubhai Nanbhai Khachar and Others v. State of Gujarat* 1995 Supp (1) SCC 596

¹⁸ Bryan A. Garner, *Black's Law Dictionary*, (8th edn, West Publishing Co. 2004) 701

involving ‘game of chance’, the word “betting” is wide enough to cover wagering money on “games of skill”. The framers of the Constitution are presumed to have intended that every word in the Constitution must be given effect to.¹⁹ If ‘betting’ is assumed to exclude risking money or other valuable thing on the happening of a ‘game of skill’, the word ‘betting’ in Entry 34, List 2 of Schedule VII to the Constitution of India would be reduced to a nullity because then, ‘betting’ and ‘gambling’ would only cover ‘game of chance’. If the word ‘gambling’ covers ‘game of chance’, there was no need for the constitutional makers to use the word ‘betting’ in Entry 34, List 2 of Schedule VII to the Constitution of India to cover only “game of chance” (and not “game of skill”).

Further, Entry 1, List II of Schedule VII to the Constitution provides for ‘Public Order’.²⁰ In *Romesh Thappar v. State of Madras*, ‘public order’ has been defined as “*an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of the internal regulations enforced by the Government which they have established.*”²¹ Delhi High Court has affirmed the view that laws relating to gambling, lotteries, etc. can be traced to the laws necessary for maintenance of public order.²² In *Kanu Biswas v. State of West Bengal*,²³ the court laid down that to ascertain whether an act affects ‘public order’, the test is to observe if it causes disturbance to the current life of the community.²³ Betting and gambling has gravely impacted the commission of crimes in the society and has caused deleterious effects on the even tempo of life of the community. There are several instances wherein debt-ridden gamblers have committed suicide under pressure.²⁴ Hence, regulatory legislations fall within the ambit of public order. Additionally, considering betting and gambling has been categorised as a behavioural disease by the World

¹⁹*High Court of Gujarat and Another v. Gujarat Kishan Mazdoor Panchayat and Others* (2003) 4 SCC 712

²⁰ The Constitution of India 1950, Entry 1, List II, Schedule VII

²¹*Romesh Thappar v. State of Madras* AIR 1950 SC 125

²² *Akhil Bharatiya Sarkari Lottery Vyapari Mahasangh v. Commissioner of Police New Delhi* (1999) 50 DRJ (DB) 495

²³*Kanu Biswas v. State of West Bengal* (1972) 3 SCC 831

²⁴ Pramod Madhav, ‘Tamil Nadu: 31-year-old man hangs self, family blames online gambling addiction’ (*India Today*, 12 October 2021) <<https://www.indiatoday.in/india/story/tamil-nadu-31-year-old-suicide-family-online-gambling-addiction-1863716-2021-10-12>> accessed 28 February 2022

Health Organization, a law seeking to curb the practice can also be a law relating to 'public health' under Entry 6, List II of Schedule VII to the Constitution of India.²⁵

Lastly, Entry 26, List II of Schedule VII to the Constitution provides for 'Trade and Commerce within the State subject to the provisions of Entry 33, List III'.²⁶ Assuming not admitting, betting, and gambling is a game of skill and not a game of chance, then betting or risking money on a game of skill is trade. Hence the State has the competence to frame legislations vide the powers conferred under Entry 26, List II of Schedule VII to the Constitution.

From the above discussion, the ragbag of Legislative entries in Schedule VII to the Constitution of India demonstrate that the State has comprehensive power of regulating betting and gambling.

IV. NEED FOR REGULATION OF ONLINE GAMBLING OF FANTASY SPORTS

In recent years, India has witnessed a digital revolution that has led to online platforms pandering to the vice of betting. Betting has become easily accessible to all age groups and sections of the society.²⁷ This may raise greater concerns than the traditional structure of betting which was limited in time and space. With the proliferation of online platforms owing to the digital revolution, the entire landscape of gaming has undergone a cataclysmic change. Many youngsters have fallen prey to the depravity of online gambling. These incentives cloaked under the promise of lucrative returns are often elusive.

The sinful, pernicious, and morally depraved nature of betting and wagering can be traced back to ancient India. In *State of Bombay v. R.M.D. Chamarbaugwala*, the court noted gambling as a sinful and pernicious vice

²⁵ The Constitution of India 1950, Entry 6, List II, Schedule VII

²⁶ The Constitution of India 1950, Entry 26, List II, Schedule VII

²⁷ NITI Aayog, 'Guiding Principles for the Uniform national-level regulation of online fantasy sports platforms in India' (*Draft for Discussion*, December 2020) <https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf> accessed 27 February 2022

and deprecated its practice.²⁸ The judgement referred to the Rig Veda wherein it is mentioned that

“Dice verily are armed with gods and driving hooks, deceiving, and tormenting, causing grievance woe. They give frail gifts and then destroy the man who wins, thickly anointed with the player’s fairest good.... The gambler’s wife is left forlorn and wretched; the mother mourns the son who wanders homeless. In constant fear, in debt, and seeking riches, he goes by night unto the home of others.”

The Mahabharata deplores the doleful conditions of gambling by Pandavas who gambled away their kingdom. Verse 221 also advises the king to exclude from his realm gambling and betting, for those two vices cause the destruction of the Kingdom of Princes.

In the past few years, the menace of online gambling has reached epic proportions. The enforcement agencies have observed that several delinquents who have used such online platforms were later involved in illegal activities.²⁹ There is a direct nexus between online gaming activities and commission of offences. For instance, a person may commit theft to pay off his gambling debts. Indebtedness often causes people to commit suicides, leaving behind families with huge debts. Recognizing the deleterious effect of online gambling, the World Health Organization has characterised online gaming as a ‘behavioural addiction’ in the International Classification of Diseases.³⁰

Gambling and betting activities have also stunted the growth of art in our country as it may consequently lead to match fixing activities organised at the instance of people participating in fantasy sports competitions. As a result of which athletes may be motivated to underperform in lieu of receiving financial gains. It hampers the morale of players which in turn

²⁸ *State of Bombay v. R.M.D. Chamarbaugwala* AIR 1957 SC 699

²⁹ Sanju George, Richard Velleman, Benedict Weobong, ‘Should Gambling Be Legalized in India?’ (*PubMed Central*, 20 July 2020) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8313460/>> accessed 1 March 2022

³⁰ ‘Inclusion of gaming disorder in ICD-11’ (*World Health Organization*, 14 September 2018) <<https://www.who.int/news/item/14-09-2018-inclusion-of-gaming-disorder-in-icd-11>> accessed 15 January 2022

affects the growth of the gaming industry. Betting or gambling activities taints the essence and purity of a game. Due to this, the nature of games has delineated from being art to a commercial activity. In Karnataka, some players were suspended from the Karnataka Premier League due to rampant match fixing because of which several promising cricketers were denied the opportunity of showcasing their talent.³¹ Hence, regulation of fantasy sports has become the need of the hour to curb the menace it is causing to society. In fact, the sole purpose of the introduction of 'Betting and Gambling' Entry in the Constitution was to give the State complete power to prohibit or regulate betting or gambling activities.³²

V. CHANGING NATURE OF REGULATORY REGIME OF GAMBLING IN INDIA

Prior to Independence, the Public Gambling Act, 1867, a central legislation was enacted which prohibited any games of chance and probability except lotteries.³³ However, the Act excluded 'games of skill' from its ambit.³⁴ Several States have adopted this colonial-era statute with certain modifications. Certain States have devised their own laws to regulate gambling. Being a pre-internet statute, this statute fails to cater to the needs of today's gambling activities that have evolved with the dawn of the internet. Some states such as Sikkim, Nagaland and Meghalaya have laid down a licensing regime for online games. Sikkim allows online games that are offered only through intranet terminals and to the exclusion of its state residents.³⁵ Nagaland has restricted the licences only for skill-based games.³⁶ The State of Meghalaya has recently introduced the 'Meghalaya Regulation of Gaming Act, 2021' wherein it permits the

³¹ 'KSCA Suspends Belagavi Panthers Over KPL Match-fixing Scandal' (*News18*, 7 November 2019) <<https://www.news18.com/cricketnext/news/kscs-suspends-belagavi-panthers-over-kpl-match-fixing-scandal-2377969.html>> accessed 18 January 2022

³² Entry 45, Constituent Assembly Debate, <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-02> accessed 15th January 2022

³³ Public Gambling Act 1867

³⁴ Public Gambling Act 1867, s 12

³⁵ Sikkim Online Gaming (Regulation) Act 2008, s 3

³⁶ Nagaland Prohibition of Gambling and promotion and Regulation of Online Games of Skill Act 2015, s 2(1)

operators to offer online and land-based games of chance.³⁷

The State of Tamil Nadu introduced the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 prohibiting wagering or betting in cyberspace or on games of skill in lieu of exemption.³⁸ The Court upheld the challenge and struck down the Act as ultra vires the Constitution in its entirety.³⁹ The Court struck down the Amendment on the ground that the wording of the clauses was so crass and overbearing that they smacked of unreasonableness. Further, strangely, turning the presumption of constitutionality of a statute on its head, the Madras High Court held that the State had failed to discharge its burden of proof of demonstrating that lesser restrictive measures would have aided the State in attaining the desired object. The court has overstepped its jurisdiction and acted as a super-legislature by striking down the Amendment Act. The Special Leave Petition challenging the High Court decision is currently pending before the Supreme Court.⁴⁰ Post this enactment of this Act, several people such as Virat Kohli, Sourav Ganguly were issued notice for their alleged involvement in the promotion of online fantasy sports league applications.⁴¹ The Amendment brought to light several gambling activities.

Similarly, the State of Telangana had imposed a blanket ban on all forms of online gaming by passing the Telangana Gaming (Amendment) Bill back in 2017.⁴² The ban made no distinction between online games of chance or skill and prevented all forms of gaming. However, the recently the State is reconsidering its position on the subject by addressing the lacunae existing in the earlier law. As per reports, the new law will attempt to strike a balance between developing a regulatory system and controlling the menace of gambling.

³⁷ Meghalaya Regulation of Gaming Act 2021, s 3

³⁸ Tamil Nadu Gaming and Police Laws (Amendment) Act 2021

³⁹ *Junglee Games India Private Limited v. State of Tamil Nadu* (2021) SCC Online 2762

⁴⁰ *The State of Tamil Nadu & Ors v. Junglee Games India Pvt. Ltd. & Anr.* 2021 SCC OnLine Mad 2762

⁴¹ Meera Emmanuel, 'PIL in Madras HC seeks arrest of Virat Kohli, Tamannah, other celebs for promoting online gambling websites' (*Bar and Bench*, 1 August 2021) <<https://www.barandbench.com/news/litigation/pil-madras-hc-seeks-arrest-of-virat-kohli-tamannah-promoting-online-gambling-websites>> accessed 19 May 2022

⁴² Telangana Gaming (Amendment) Act 2017

While on one hand, most States continue to grapple with a blanket ban of such games, on the other hand, various fantasy sports platforms operate as games of skill. The States which impose a blanket ban have enacted restrictive and ambiguous legislations without being in conformity with the object of the Amendments. Whereas, the other States have categorised online fantasy sports as games of skill without any prohibition on gambling activities. Such regimes are not effective. Regulating such platforms is utopia as there are more than thousand gaming portals online offering users the opportunity of wagering or betting money existing today.⁴³ The numbers are rapidly growing everyday by virtue of it being in virtual space. Hence, it is difficult and cumbersome to identify the legal personality of these online portal i.e., whether they are run by individuals, companies, partnerships, etc. Most importantly, it is difficult to track them as they may operate from one part of the country and offer services in another. The enforcement agencies cannot lay their hands on most of these portals since their place of business may be in another State. Hence, mere regulation may not be sufficient to counter the iniquities of online gambling. Further, varying legislations in different States is not suitable in case of online fantasy sports which do not operate in a physical time and space. A coherent set of uniform legal and regulatory guidelines to bridge the gap in the underlying grey areas is necessary.

Recognizing the vices of online gambling and betting on fantasy sports, State of Karnataka recently amended the Karnataka Police Act, 1963. The Karnataka Police (Amendment) Act, 2021 imposes a ban on electronic means and virtual currency, electronic transfer of funds in connection with any game of chance.⁴⁴ It has also amended the safe harbour provision provided under Section 176 of the Karnataka Police Act, 1963.

⁴³ Technology, Media, and Telecommunications Predictions 2021, India edition, (Deloitte) <<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-predictions-2021-noexp.pdf>> accessed 28 February 2022

⁴⁴ The Karnataka Police (Amendment) Act 2021

⁴⁵ Prior to the Amendment, wagering or betting by persons on their own skills was permissible. However, post the Amendment, the said exemption has been done away with. The Amendment provides safe harbour only to 'pure' games of skill when played without any element of betting and gambling. Therefore, the earlier safe harbour provision that restricted the applicability of the Act for wagering by persons taking part in such games of skill has been done away with. Proponents of legalisation of betting or gambling activities have often raised the contention that despite a game being chance-based, one can risk money on their own skill.⁴⁶ However, post this Amendment, this argument does not hold any ground and irrespective of skill being employed, betting or gambling on such fantasy sports is prohibited. The objective of the Amendment is abundantly clear. It is applicable to 'betting and gambling activity' on a game, regardless of the game being a game of chance or game of skill. Hence, the users of such platforms are not prevented from playing fantasy sports but are merely refrained from risking money on such games.

The Amendment Act has not imposed a ban on online 'game of chance' or 'game of skill'. It merely restrains people from risking money in the hope of achieving unattainable prizes. Section 78(1) of the Karnataka Police Act, 1963 *inter alia* makes it punishable offence to be the owner of an online platform that is open, kept or used for the purpose of gaming in which the receipt or distribution of prizes in money or otherwise is made (a) to depend on chance; or (b) the skill of another.⁴⁷ Section 78(2) of the Karnataka Police Act, 1963 *inter alia* makes it a punishable offence to bet on the outcome of a (a) game of chance; (b) skill of another; (c) their own skill.⁴⁸ The restrictions imposed through the Amendment Act are in proportion to the legitimate aim of curbing the evils of betting. This Legislation is an economic legislation. It is in consonance with the Directive Principles of State Policy. Article 39(f) of the Constitution enjoins a duty on the State to ensure that youth are protected against

⁴⁵The Karnataka Police (Amendment) Act 2021, s 9

⁴⁶ The Karnataka Police (Amendment) Act 2021, s 176

⁴⁷ The Karnataka Police (Amendment) Act 2021, s 3

⁴⁸*Id.* at 41

exploitation and against moral and material abandonment.⁴⁹ This legislation intends to achieve high standards enshrined in the Constitution and to counter a pressing social evil.

It is well-established that there cannot be business in a crime.⁵⁰ Games of chance or wagering money on skill of another are *res extra commercium* in nature and hence do not violate a person's right to trade. Gambling and betting activities from their very nature and in essence are extra-commercium. Though the external formalities and instruments of trade may be employed yet they are not protected by Article 19(1)(g) or Article 301 of the Constitution.⁵¹ The sky-rocketing suicide rates and financial decadence of the youth in recent times owing to betting on online platforms are overwhelming reasons to impose complete ban on risking money on an uncertain event, online or offline, in a game of chance or skill.⁵² The constitutional validity of this legislation was challenged in Karnataka High Court and the High Court declared the Amendment Act as ultra-vires the Constitution. However, the Court ruled that the State may bring legislation for the regulation of online gaming within the bounds of the Constitution.⁵³ This judgement came as a relief for the gaming industry as it allows the entities to continue offering their services uninterrupted. However, it leaves room for further regulatory intervention by the government. This appears to be promising in countering the threats of gambling or betting in the society. It leaves ample scope setting up a strong regulation that leads to a win-win for players, industry, and the government. The judgement failed to distinguish between skill-based games and chance-based games, hence leaving the primary question unanswered. We can only hope that this will set the tone to establish a robust and uniform regulatory framework for the online gaming industry.

⁴⁹ The Constitution of India 1950, art. 39, Cl. (f)

⁵⁰ *Khoday Distilleries Limited v. State of Karnataka* (1995) 1 SCC 574

⁵¹ *State of Bombay v. R.M.D. Chamarbaugvala* AIR 1957 SC 699

⁵² Kavita Mandhare, 'World Suicide Prevention Day: Gaming and suicide, an emerging connection' (*The Bridge Chronicle*, 9 September 2020) <<https://www.thebridgechronicle.com/lifestyle/world-suicide-prevention-day-gaming-and-suicide-emerging-connection-55492>> accessed 28 February 2022

⁵³ *All India Gaming Federation and Another v. State of Karnataka* 2022 SCC OnLine Kar 435

VI. CONCLUSION

The question whether gambling or betting on fantasy sports is a game of chance or game of skill has continued to elude the State Governments and they have been unable to arrive at a unified answer. The test devised by judiciary in India to create legal distinction between skill and chance has not adapted well to fantasy sports. Evolving out of the traditional contests, the format of fantasy sports has changed today. The factor of chances has increased and the level of skill necessary to play has decreased. Thus, the authors have arrived at the conclusion that the 'preponderance test' employed by the courts over the years can no longer be applied in the context of fantasy sports.

In a country like India, where population and poverty both are rampant, regulation is the ideal way forward. On one hand fantasy sports industry is alleged to give a boost to a country's FDI, but on the other hand a greater proportion of the section of society loses money.⁵⁴ There is no doubt that the development of a country's industry is significant. This development cannot be at the cost of the welfare of its citizens. However, imposing mere restrictions is not sufficient. It is a settled law that restrictions can be prohibitory in nature. In other words, regulations involve prohibition. Imposing a ban on gambling of fantasy sports does not mean fantasy sports are banned *in toto*. Restrictions should be placed on risking money on such contests. The Fantasy Sports Competition can operate and provide services in a manner similar to innocent prize competitions by rewarding winners with non-cash incentives such as goodies, coupons. NITI Aayog recognized the legislative gap in relation to online fantasy sports and provided certain recommendations.⁵⁵ In consonance with NITI Aayog's recommendations to an extent, it is recommended that the ambiguity of varying regulations in different states must be addressed through a uniform national-level safe harbour for fantasy sports game. A self-regulatory body for regulation of online

⁵⁴ PricewaterhouseCoopers India's report: Federation of Sports Gaming 'Report on Taxation of Online Fantasy Sports Gaming Market in India' (May 2019) accessed 28 February, 2022

⁵⁵ibid 14.

fantasy sports must be created consisting of persons in experience in governance, law, and administration. Furthermore, adherence to advertising standards as laid down by the Advertising Standards Council of India must be complied with, for instance, the advertisements should be honest and not make absurd claims like fantasy sports being a source of sustenance or earning livelihood.

Thus, until an appropriate legislation is enacted in relation to online fantasy sports, such interim measures must be employed.

OWNERSHIP OF IPR AND THE RELEVANCE OF INSURANCE IN E-SPORT CONTRACTS: AN OVERVIEW

**Coral Shah and Suryanshu Priyadarshi*

ABSTRACT

The Indian e-Sports industry is expected to be exponential in the years to come. Viewership ratings and engagement of people in the e-Sport leagues will attract more sponsors. The inclusion of Indian servers would eventually lead to an increase in the influx of professional players in the Indian regiment. Foreign ventures are reaching out to Indian companies to hire professional trainers and players for international tournaments. The developments mentioned above show that Indian players would be subject to contracts. Most of them could be potentially young players who would not be recognised as competent parties within the Indian Contract Act, 1872. In addition to this, training contracts are on the rise, and the implications on the players would be different from the agreements entered with designated streamers and professional players. In this paper, essential clauses pertaining to the Intellectual Property Rights of the players and other stakeholders such as event organisers, owners, and sponsors are recognised. The dynamics of the Intellectual Property and Insurance Laws will also be dealt with. Additionally, the significance of identifying the stakeholders in the e-Sports industry is analysed in the paper, along with a comparative analysis of e-Sports laws of some top leaders in e-Sports, namely South Korea and the US. The author intends to focus on the relevant stakeholders' IPR and Insurance contractual obligations since there is a gap in the existing pool of literature that discusses the influx of IP and Insurance obligations.

I. INTRODUCTION

The e-Sports Industry in India has been increasing in great manifold.¹ India is currently a member of the International e-Sports Federation

*Coral Shah and Suryanshu Priyadarshi are advocates.

¹Sreehari Menon, 'e-Sports And Gaming Industry In India Grows By 21 Per Cent Amidst Lockdown: Report' (Republic World, 29 November 2020) <<https://www.republicworld.com/sports-news/other-sports/e-Sports-and-gaming-industry-in-india-grows-by-21-amidst-lockdown.html>> accessed 27 February 2022

along with 87 other member states,² wherein statutes and governance policies are adhered to. The popularity of e-Sports started with the inclusion of the e-Sports regiment for the 2018 Tokyo Games as a demonstration and India won the bronze medal for the same.³ Leading game sponsors are investing in gaming cafés, and third-party tournaments are witnessing an increase. Recently, Riot Games hosted the 10th edition of the ‘Worlds’ in China and over 1 million people pre-registered (for tickets) in 4 hours.⁴ The developments mentioned above also mean that many endemic and non-endemic sponsors are levelling up their support since engagement towards these games have exponentially increased.

In India, there have been many partnership agreements signed by leading game sponsors with venture capitalists to build teams. Recently Fnatic, one of the major e-Sports organisation partnered with Loco, an Indian Online Streaming platform to create and broadcast content online based on the PUBG Mobile game.⁵ In addition to this, Fnatic has engaged itself in scouting Indian players and has built its presence in the Indian gaming sector after building a team for PUBG Mobile.⁶ Furthermore, the legal context in India, especially in terms of the dynamics of age and coaching strategies, must be considered whilst deriving an analysis of the e-Sports regime. India does not have a law on e-Sports in general, but in terms of enforcing intellectual property rights, the *status quo* of enforceability is established through the Copyright Act, 1957;⁷ Trademark Act, 1999,⁸ The Patents Act, 1970⁹ and the Designs Act, 2000.¹⁰ This article will mainly focus on the dynamics of the contracts entered between the

² International e-Sports Federation <<https://ie-sf.org/about/members>> accessed 30 November 2020

³ Roland Landers, ‘e-Sports: The big medal opportunity for India’ (*Forbes India*, 21 September 2020) <<https://www.forbesindia.com/blog/business-strategy/esports-the-big-medal-opportunity-for-india/>> accessed 27/02/2022

⁴ Sujay Chakraborty, ‘League of Legends Worlds 2020 Finals Ticket Sale Records Over 2 million Registrants’ (*Republic World*, 15 October 2020) <<https://www.republicworld.com/sports-news/esports/league-of-legends-worlds-2020-finals-ticket-sale-esports-news.html>> accessed 27/02/2022

⁵ Jonno Nicholson, ‘Fnatic enters India-focused content partnership with Loco’ (*e-sports Insider*, 17 June 2020) <<https://esportsinsider.com/2020/06/fnatic-loco/>> accessed 27/02/2022

⁶ Fnatic, <<https://fnatic.com/esports>> accessed 27/11/2020

⁷ Copyright Act 1957

⁸ Trade Marks Act 1999

⁹ Patents Act 1970

¹⁰ Designs Act 2000

players (professional and trainees) and the e-Sports organisation. The terms of the training contract agreements will be pondered upon in comparison with professional gaming contracts that are entered between the owners and the potential team players representing the teams in major world leagues. Further, the article shall delve into the sponsorship agreements and the influence of sponsors in a player's IP rights. The article provides a comparative analysis of laws in South Korea and the US with India to provide suggestions and concludes with concluding remarks of the author.

II. CONTRACTUAL TERMS CONCERNING INTELLECTUAL PROPERTY RIGHTS

In general parlance, professional player contracts have an interplay of labour rights and intellectual property. Although it may seem obvious, the principles of contract law play a defining factor in ensuring that trade secrets, sponsors' interests and team's interests are not compromised. This includes proprietary information that has a commercial value and is protected through the ambit of breach of confidence and principles of equity. However, it is interesting to note that most of the players who end up signing these contracts are minors.¹¹ Training contracts have become common, and they regulate coaching hours, work hours, dynamics with coaches and broadcasting rights. This goes on to show that these training contracts and professional gaming contracts are similar. In addition to this, some of the players are loaned to other teams on a limited tenure basis, further adding scope for more revenue to the e-Sports gaming houses.¹² Another important question that arises with this regard is when a player is loaned off to another team on a limited basis, will the property of the player like the 'gamer tag' lie with the player or the owner; furthermore, the issue of whether the other team (i.e, the team that has the loaned player) have some control over the player's rights is something

¹¹Angad Makkar, 'Minors' Contracts in Sports: Need For Reform In India (*Iprment Law*, 7 December 2019) <<https://iprmentlaw.com/2019/12/07/minors-contracts-in-sports-need-for-reform-in-india/>> accessed 27 November 2020

¹²Vishakh Ranjit, et.al, 'e-Sports Player Contracts: Common Clauses and Potential Legal Issues in India' (*Mondaq*, 18 June 2020) <<https://www.mondaq.com/india/gaming/955392/e-sports-player-contracts-common-clauses-and-potential-legal-issues-in-india>> accessed 27 November 2020

that must be discussed. These dynamics showcase the various clauses that a player loan off clause must/can include. Generally, in a player's contracts the duration of contract, fee, daily working hours, intellectual property right ownership, use of gaming equipment are included. The specific intellectual property rights and the implications are dealt in the subsequent sections.

1. Image Rights

In terms of the image rights, players are usually asked to enter into the agreement enabling the company or the organisation to use the player's gamer tags, regulate their social media accounts and enter endorsement deals with potential sponsors and leagues.¹³ Players' engagement with fans and viewers are regulated by the e-Sports companies. Merchandise and souvenirs made by the company involve signs, slogans and pictures of the players themselves. These permissions are mainly dealt in contract agreements. However, if the product is made through a manufacturer (in a licensing agreement for instance), then there must be an express agreement between the owner of the e-Sports team and the manufacturer allowing such a product to be released in the market. There are some issues and challenges that must be addressed to completely understand the players' future. First, most player contracts are subject to a limited time period. In games such as League of Legends, every player can be subject to a contractual tenure of maximum three years.¹⁴ This means that the players can change teams in the foreseeable future thus creating an effect on products that are attached to the image of the players. If the player happens to change the team and the products attached to his/her previous team are out there in the market, it would affect the rights of the new team (depends on whether the agreement recognises the implications of having the player on the team), and sponsors involved. Second, if the

¹³ Hayley Morgan, 'Know your image rights in esports' (*Brabners*, 8 February 2021) <<https://www.brabners.com/blogs/know-your-image-rights-esports>> accessed 27 February 2022

¹⁴Ryan Hawkins, 'e-Sports in the off-season – A guide to the League of Legends free agency period from the perspective of team Fnatic' (*Lawinsport*, 22 November 2018) <<https://www.lawinsport.com/topics/features/item/esports-in-the-off-season-a-guide-to-the-league-of-legends-free-agency-period-from-the-perspective-of-team-fnatic>> accessed 27 November 2020

player does not wish to endorse his image in the products despite the contract, then the issue of violation of right to privacy may arise. In addition to this, the player also has a 'right to publicity' which protects the commercial interests of the players from being compromised for unauthorised purposes. These include use of the player's image/publicity without prior permission and a licensed agreement to do the same.¹⁵

2. Broadcasting Rights

Contracts pertaining to the broadcasting rights differ on the nature of work that the players are expected to undertake. Some players are designated the role of solely streaming their gameplays through the regulation and backing the gaming organisation. Additionally, professional e-sport players are also subject to some restrictive broadcasting gigs. In the case of individual player streams, sponsors are brought into endorsement agreements through their association with the e-Sport organisation. The e-Sport organisations regulate the individual player's sponsor endorsements through the individual player's contract. This establishes the dynamics between the sponsors and players. In most case scenarios, these streamers are given equipment by the company and are expected to stream content on a regular basis. They are limited to only stream gameplays of specific games mentioned by the company. Professional Indian players are also involved in streaming contracts. Recently, the Fnatic Indian team for PUBG Mobile has become the official streamer for the Loco platform.¹⁶

3. Trade secrets

Players in the contract can be subject to a non-disclosure clause that refrains the player from sharing information related to the diet, technical know-how, company software and strategies employed in the practice

¹⁵Laura Gastaldi, 'e-Sports: a new frontier for the advertising law and image rights?' (*Dla Piper*, 14 February 2019) <<https://blogs.dlapiper.com/iptitaly/2019/02/esports-a-new-frontier-for-the-advertising-law-and-image-rights/#page=1>> accessed 30 November 2020

¹⁶Jonno Nicholson, 'Fnatic enters India-focused content partnership with Loco' (*e-sports Insider*, 17 June 2020) <<https://esportsinsider.com/2020/06/fnatic-loco/>> accessed 27 February 2022

sessions. Moreover, misappropriation of trade secret by wrongful means would eventually amount to the enforcement of action against the wrongdoer.¹⁷

4. Protection from infringement of IP rights

The team owners are bound by the agreement to not misappropriate the players brand value in unauthorised ways and shall seek consent from players in case of using the IP rights and gaining commercial benefit that is deemed to be fit. The concept of 'right to publicity' recognises the protection of these players from infringement of their rights from third party violations. If the image rights of the players are infringed, then the team owner shall take all measures to institute actions against the violators.

The aforementioned terms of contractual obligation determine the extent to which players can assign intellectual property rights to the owners of the gaming organisations. But most players are treated as independent contractors and not as employees. If the players are treated as employees, only then the company is expected to pay benefits and assume liability for any violations done by the players.

III. ACADEMY CONTRACTS AND IPR IMPLICATIONS

Indian players are being brought into training contracts with major gaming organisations to learn and gain skills that would potentially bring India to the major world stages. The e-Sports Federation of India (ESFI) happens to be the regulatory authority of harnessing and recognising talent.¹⁸ In addition to this, the federation aims to train and provide support to young players who could potentially represent India in the world leagues. As of now, the Olympic Council of Asia has recognised e-Sports tournaments as one of the main events to be conducted in major

¹⁷ Charles Throckmorton, Carlton Fields, 'Keep it secret, keep it safe: Trade Secrets in Video Games and Esports' (*Id Supra*, 17 April 2020) <<https://www.jdsupra.com/legalnews/keep-it-secret-keep-it-safe-trade-secr-19177/>> accessed 30 November 2020

¹⁸ e-Sports Federation of India, <https://esportsfederation.in/#main_objects> accessed 30 November 2020

Asian tournaments.¹⁹ However, though ESFI trains players for representing the country in major games, it does not elaborately make contracts pertaining to IP rights of players such as gamer tags, broadcasting rights and commercial agreements. According to the contract prepared by the ESFI for the Asian Games 2018, the players were responsible to bear the expenses of participation in the games.²⁰

IV. INDIAN LEGISLATIONS THAT PROTECT PLAYERS' IP RIGHTS

The Indian laws pertaining to the protection of IP Rights of players can be recognised in various angles. Firstly, every player's contract is governed by the Indian Contract Act, 1872.²¹ Secondly, the Indian Copyrights Act recognises video games under the definition of a cinematograph and protects the performers' rights. Personality rights are protected within the ambit of the common law principle of 'passing off'. This section will primarily be dissected into explaining the facets of contracts, performers rights and personality rights.

1. Indian Contract Law

The Indian Contract Law promotes and provides protection to players in various ways. First is the protection of minors through the exceptions established. If the contract is with a minor, then the minor has the option to either honour or not oblige for the same. In the e-Sports context, if a minor has fulfilled his/her obligations in the promise and the e-Sports organisation does not fulfil the promise, then the contract can be enforced. In addition to this, if the guardian has entered into the contract for the minor, then the contract could be enforced. If the contract is done for the benefit of the minor, then the contract could be enforced. Furthermore, the players can be protected for employing their skills and gameplay without the fear of pressure from restraint of trade via section

¹⁹Ibid

²⁰Rishika Mendiratta, 'A Primer on e-Sports in India- Analysis of Player Contracts and Intellectual Property Issues' (*Kheladhikar*, India, 11 July 2018) <<https://kheladhikar.com/2018/07/11/a-primer-on-esports-in-india-analysis-of-player-contracts-and-intellectual-property-issues/>> accessed 30 November 2020

²¹ Indian Contract Act 1872

27 of the Indian Contract law.²²

2. Performers' Rights

The amendment of the Copyright Act has included performers' rights in a definitive precision. Section 2(q) of the Act provides that '*in relation to performer's right, means any visual or acoustic presentation made live by one or more performers.*'²³ This by interpretation includes the performance of professional players in the e-sport forum. There are players in the e-Sports community who are known to employ an interpretative and profound gameplay style. As every other sport, a successful gameplay requires intense training and hours of preparation. This can be read along with the meaning of Section 38 of the Copyright Act.²⁴ In the case of *Star India Pvt. Ltd. v. Piyush Agarwal*,²⁵ the court held that the meaning of work within Section 2(y)²⁶ of the Act can be read along with Section 38 which provides the right of the performer to have copyright for his/her performance. Therefore, interpretative and unique gameplays of players can be protected.

3. Image Rights

The image or publicity rights of the players are protected within the ambit of the common law principle of 'passing off'. This was initially discussed in the case of *Zacchini v. Scripps-Howard*,²⁷ wherein the court held that the performer is protected from getting his performance broadcasted without his/her consent. The 'right to publicity' has derived interpretation in the Indian Courts primarily through the judgement of *ICC v. Arvee Enterprises*,²⁸ wherein it was held that the right to publicity and right to privacy go hand in hand and the individual subject to these rights must be protected against the violation of these rights. The judgement has

²² India Contract Act 1872, s 27

²³ Copyright Act 1957, s 2

²⁴ Copyright Act 1957, s 38

²⁵ *Star India Pvt. Ltd. v Piyush Agarwal* 2014 (58) PTC 169 (Del) at p. 175.

²⁶ Copyright Act 1957, s 2(y)

²⁷ *Zacchini v Scripps-Howard Broadcasting Co.* 433 U.S. 562

²⁸ *ICC Development (International) Ltd. v Arvee Enterprises and another* 2003 (26) PTC 245

recognised this right by reflecting through Art. 19 and Art. 21²⁹ of the Indian Constitution. Furthermore, the judgement of Puttaswamy³⁰ recognised that image rights are mainly derived from the UK common law principle of 'passing off'. These judgements clearly establish the image rights protection given to players.

V. Contractual Obligations And The Intersection Of Insurance Laws In E-Sports

e-Sport tournaments involve players who are assigned specific roles in the team. Each team member (in tournaments) is bought either through auctions or through private negotiations. In sporting events, the team managers and coaches choose team players according to gameplay strategies and team ethos. There may be instances where any of the key players are injured or are unable to turn up for the tournament, which may result in a detrimental effect to the team especially in terms of investments that were incurred. Therefore, e-Sport organisations need to enter into insurance contracts to cover risks such as non-appearance to the tournament. This is used when the substitutes do not actually match up to the expectations that the management intended to execute in gameplays.

Furthermore, personal accident covers can also be provided to professional players. This is definitely conditional to the nature of the accident and injury that occurred. Some of the injuries that are identified include mental trauma, wrist injuries due to repeated gameplays and practice overhauls. This is different from insurances that are incurred due to a single defined event such as a physical injury caused due to a ball being hit onto the leg with immense force while playing football.

Other notable insurances that can be taken by e-Sport organisations and players are death insurance, disablement insurance, event cancellation insurance, key man insurance, cyber insurance, equipment insurance and

²⁹ Constitution of India 1950, art 19 & 21

³⁰ *Justice K. S. Puttaswamy (Retd.) v Union of India* AIR 2017 SC 4161

disgrace insurance.³¹

Disgrace Insurance: In terms of disgrace insurance, if the players indulge in an activity or an instance that hampers the reputation of the team and brand image, then the organisation involved in the team can claim the contract value equivalent to the amount used to remunerate the professional player.

Property Insurance: These insurances cover gaming equipment damage. It includes damage incurred due to loss of equipment, theft, fire, accidental damage to property and so on and forth.

Event-cancellation Insurance: These insurances cover financial losses, hiring costs, low attendees rate in on-site events, ticket sales, venue costs and reputation damage control.

Event Liability Insurance: Through this insurance contract, the event organisers can claim contract amount in case the policy covers accident or injury caused to attendees in case of events such as an accident, stampede or even instances such as tripping at stairs. This also includes coverage for damaging the event venue.

1. General Observations in Insurance law and e-Sports: Understanding the scope of Contractual Obligations

In terms of loss of items and injuries to the attendees, the *prima facie* liability rule can be applied, wherein the event organiser can prove that the loss/injury did not arise due to the negligence that occurred due to his/her part or the workers in the event. Furthermore, the event organisers while having possession of the gaming equipment in the premises will most likely establish a bailor-bailee relationship wherein the event organiser actively arranges the equipment to meet the broadcasting needs (i.e., giving time for teams to prepare for the tournament, arrange the equipment as per the camera team plan, interior and aesthetic arrangements, so on and forth.) In that case the strict liability rule will apply. However, the event organisers (if applicable) can prove that they

³¹ G & M International, <<https://www.esportinsure.com/our-services/esports-team-insurance/>> accessed 27 February 2022

have taken reasonable care to ensure that the damage, theft or loss of property did not occur due to neglect or misconduct.

VI. COMPARATIVE OVERVIEW

In the previous sections, the Indian laws pertaining to players' rights and general clauses of contracts were discussed. This section will focus on the laws and organisations that regulate the e-Sports contingent in the national level of some of the leading e-Sports contingent, namely South Korea and US. The analysis would enable more research and highlight ways of possible dialogues that can set forth a stable e-Sports regiment in our country. Firstly, the e-Sports Federation of India is not recognised by the Ministry of Sports.³² This goes on to show that a certain level of uncertainty is set forth for players who wish to represent our country in international forum.

Another problem is that sporting regulation authorities have not actively provided schemes for player insurances. The exception to this statement is only applicable to Board of Control for Cricket in India (BCCI) which provides insurance coverages to players.³³ Such an extensive policy is prevalent due to the capital that BCCI manages to create every year.

South Korea, which happens to be the leader of e-Sports at the present moment has express and specific laws pertaining to e-Sports. With regards to the intellectual property rights, Art 13 of the Game Industry Promotion Act³⁴ expressly provides that creative elements in games would be promoted as a matter within Intellectual Property Rights. In the US, the Sherman Anti-Trust Act prohibits unreasonable restraint in trade,³⁵ which can be compared with the provisions given under section 27

³²Abhimannu Das, 'Indian Gaming and Esports Policy Discussed in Parliament' (*AFK Gaming*, 7 February 2021) <<https://afkgaming.com/esports/news/lol-patch-1211-riot-previews-super-massive-patch-with-more-system-changes>> accessed at 27 February 2022

³³ Medical Benevolent Fund- Players & Umpires, (*BCCI*, 30 September 2019) <[https://www.bcci.tv/articles/2019/news/126413/medical-benevolent-fund-players-umpires#:~:text=PLAYERS%20%26%20UMPIRES%20MEDICAL%20BENEVOLENT%20FUND,\(Maximum\)%20during%20their%20lifetime.](https://www.bcci.tv/articles/2019/news/126413/medical-benevolent-fund-players-umpires#:~:text=PLAYERS%20%26%20UMPIRES%20MEDICAL%20BENEVOLENT%20FUND,(Maximum)%20during%20their%20lifetime.)> accessed 27 February 2020

³⁴ Game Industry Promotion Act 2006

³⁵Sherman Antitrust Act 1890, s 1

of the Indian Contract Act.³⁶

Apart from these developments, the inclusion of the e-Sports Federation Act in Korea gives stability for regulating matters pertaining to e-Sports. This model goes on to show that India must also derive official recognition from the government via a legislation or a notification from the ministry of sports to make the most of international opportunities and also receive funds.

In 2018, an attempt was made to grant recognition to the e-Sports industry through the 'The Sports (Online Gaming and Prevention of Fraud) Bill, 2018'³⁷ which was not passed by the legislature. This Bill has extensively given provisions on operator/organisation within the definition of licensee to take part in international tournaments.³⁸ Players are also included in the Act as a 'member' of the team enumerated in the definition part of the Act.³⁹ Moreover, the Bill has also given powers to the 'Online Sports Gaming Commission' to make rules whenever necessary and in the Financial Memorandum given under the Bill the Funds for the Commission would be derived from the Consolidated Funds of India.⁴⁰

VII. SUGGESTIONS

Based on the analysis made, certain inferences can be laid down by revisiting and recognising problems. Firstly, the awareness mechanisms are very minimal. Players can be subject to unconscionable contracts and to avoid such instances, players would require legal advice. Secondly, Internet has enabled almost omnipresent access to resources, but proactive recognition of e-Sports leagues and gaming must be fostered through governing authorities. This would improve the industry in the long run by growing influx of foreign investment. Thirdly, conferences and discussions on Intellectual Property and its interface with e-Sports must be convened by experts to devolve and analyse major issues and

³⁶ Indian Contract Act 1872, s 27

³⁷ The Sports (Online Gaming and Prevention of Fraud) Bill 2018

³⁸ Ibid s 2 (i)

³⁹ Ibid s 2(j)

⁴⁰ Ibid 12

improve the scope of players' contracts. Fourthly, Inclusion of e-Sports specific law would also increase the legal development in e-Sports law enforcement. Lastly, the recognition of the ESFI as a governing body would improve the infrastructural and financial arrangements for training and enforcement of conscionable contracts.

VIII. CONCLUSION

e-Sports Fraternity in India cannot thrive as long as the rights of the players are protected in the long run. India has a knowledge economy which could potentially bring youngsters laurels in the field of e-Sports. Previously, Indian gamers had to join servers from neighbouring Asian states. But with the inclusion of Indian servers in the gaming space, this trend has explicitly given hopes in ensuring that the Indian gamers would be included in greater numbers. As much different as it sounds, comparing physical exertion to mental exertion and dexterity has brought in conceptual extensions in the field of Intellectual Property Rights and Insurance laws. Furthermore, e-sports and insurance intertwine as attributes such as team reputation, brand image, goodwill of the team hold relevance in the industry. A lot of investment is being put into e-sports and the growth of the industry has paved ways for situations wherein challenges and obstacles need to be recognised and addressed. For instance, attendee accidents in e-sport tournaments are likely to occur and the event liability insurance coverage would potentially solve the consequences (through compensation to injured attendees) arising from such accidents; property insurances would cover the damages that occurred due to damage in gaming equipment (which is necessary for the gameplay and training sessions). These instances and observations go on to show that the economic and moral rights of players are respected and protected under law through formation of contracts (including insurance and intellectual property agreements). However, through the comparative analysis made in the paper we can infer that India has a long way to go in terms of recognition of e-sports in the legal system as exponential changes are brimming in a wide scale.

To briefly encapsulate the observations and analysis made herein, a comprehensive law on e-Sports would potentially benefit negotiations and contract awareness amongst lawyers and players.

FORM IV

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