

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

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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

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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" (*Business Standard*, 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 while 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.