

# Issue Brief

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*No. 1*

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## TWISTED WILLOW

*Gambling, Sport & Cricket in India*



**THE HINDU CENTRE**

*for*

Politics and Public Policy

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# TWISTED WILLOW

*Gambling, Sport & Cricket in India*

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## INTRODUCTION

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In the context of the raging controversy over the Indian Premier League betting and match-fixing episodes, there has been considerable public concern over the issues involved and an underlying general anxiety to ensure that Indian sport, especially cricket, is not undermined or robbed of its authenticity by tendencies to fraud and manipulation.

There are several strands to this extremely complicated context of the management of sports in India that need to be separately identified, and their inter-relation to each other clarified for better understanding. This would enable the public and policy makers to be clear about the way forward to ensure a better regulatory system for Indian sport without impinging on the essential freedom of sports authorities, players and the spectators to conduct and enjoy well-played games.

We present here a four-part analysis of the core issues that need to be clarified in order to understand how to handle gambling in sport in this country. The first part of this Issue Brief looks at the philosophical underpinning to the controversy over gambling. In a historical perspective, the argument is made that there is no automatic connection between gambling and morality. The connection between the two is derived and associative. In other words, gambling is not necessarily given a pejorative moral connotation. By freeing the concept of gambling from unwelcome moral negativity, it becomes easier to regulate gambling as an activity.

This Brief traces the ineffectiveness of sports regulation in India thus far including the evident lack of deterrent effect on the incidence of malpractices, especially with regard to cricket, the image of which has taken a precipitous fall in recent days. The other aspect of this controversy is a direct result of the Indian economy moving from a regulated structure to a market economy with the entry of market forces into sports as into other areas. Hence the need to be realistic about the emerging ground reality of sports in a liberalised economy has also to be factored into policy making on sports and cricket gambling or betting. This Brief also looks at the regulation of gambling in other countries which have market economies, offering a comparative perspective for Indian policy making.

The purpose of this Brief is to separate the strands that add up to the complexity of this issue that is agitating the public mind a great deal. We set out clearly the philosophical perspective on gambling and remind the public that the Indian economic context has indeed changed requiring a more updated view of regulation. We hope that this Issue Brief will be a useful guide.

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## SECTION I. *The Moral Greyness of Gambling*

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For the current purposes of exploring morality around gambling, this Issue Brief employs a broader definition of gambling to mean “*the determination of the ownership of property by appeal to chance.*”<sup>1</sup> The phrase “by appeal to chance” implies that it must be a result of the play of natural forces that are not under the control or calculation of any human agency. So ‘pure gambling’ would include the tossing of a coin, where calling “heads or tails” determines a certain ‘right’ or a transfer of property broadly deciding a win or a loss. We call this ‘pure gambling’ because there are also ‘mixed’ cases where the determination of chance blends with other powers (such as memory in case of card games like Bridge).

A few cases of gambling are ‘pure chance’, in others, there is usually some requirement of skill at least in the form of speed and accuracy of calculating “chances” and “probabilities”. What, therefore, constitutes gambling, depends on what is dominant, whether it is chance or skill. When other factors interfere with the result of the gamble such as cheating, fraud and fixing, then it ceases to be ‘uncertain’ and therefore is no longer a game of chance. Because the uncertainty factor is no longer present in ‘match-fixing’ for example, it is *not gambling*. What is of interest to us, therefore, is the strict conceptual need for this separation between the two. It may or may not be true that gambling commonly is connected to vices such as cheating, but conceptually they are different categories.

*Hence, if fixing is a controlling of chance; then regulation is a taming of chance.*

Control is antithetical to gambling and hence fixing is not gambling; but regulation on the other hand, does not alter the nature of the gamble in anyway.

### Age of chance to age of certainty

The Sanskrit word ‘*dyutam*’ is one where the significations of fighting and dicing merge.<sup>2</sup> Very remarkable affinities exist between dice and arrows.

In the *Mahabharata*, the word itself is conceived as a game of dice which Siva plays with his queen.

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1. John A. Hobson, “The Ethics of Gambling” in *International Journal of Ethics*, (Vol. 15, No.2, 1905) p.135

2. J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (London: Routledge & Kegan Paul, reprint 1949) p. 57

The seasons, *ṛtu*, are represented as six men playing with gold and silver dice.<sup>3</sup> In the *Mahabharata*, Sakuni challenging Yudhistira to a contest, tells him “the dice are my bows and arrows, the heart of the dice my string, the dicing rug my chariot.”<sup>4</sup>

But there is something symptomatic of the ‘modern times’ in our understanding of gambling. We cannot equate for example, *the Rg Veda’s* condemnation of gambling with the moral condemnation of it today. The *pre-modern* (to use the term broadly) signifies a certain relation between Divine Will, fate and chance. So, for example, J. Huizinga says that the weighing or pondering of Zeus is at the same time his judging. “The scales of justice – a metaphor born undoubtedly of this Homeric image – are the emblem of uncertain chance, which is in the balance”<sup>5</sup> But modern cultures represent different kinds of anxieties about lottery, gambling and chance. <sup>6</sup> So Neil Duxbury, for example, cites from a *Science* editorial of the 1970s, “*To use a lottery to allocate risks or benefits is not only a denial of rationality...it is also a denial of a man’s humanity...*”<sup>7</sup> If, in the pre-modern, chance had a certain imagination of the divine attached to it, in the modern ‘man’ of science, the rational need for control of the unpredictable becomes more important. Chance then becomes ignorance and irrational. The ‘modern’ is about control; it represents a scientific temperament that believes in ‘certain’ knowledge about the universe, a violent domination of nature reminding us of Francis Bacon and his turn to science. <sup>8</sup>

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3. Ibid at p. 57

4. Gerda Reith, *Age of Chance: Gambling in Western Culture* (London: Routledge: 2000) p. 45

5. J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (London: Routledge & Kegan Paul, reprint 1949) p. 79

6. As per Habermas, the ‘project’ of modernity came into focus during the eighteenth century. The project amounted to an extraordinary intellectual effort on the part of Enlightenment thinkers ‘to develop objective science, universal morality and law, and autonomous art according to their inner logic’. It is in this post-enlightenment modernity that we use the term ‘modern’. See David Harvey, *The Condition of Postmodernity: an Enquiry into the Origins of Cultural Change* (MA: Blackwell Publishing, 1990; 2007 reprint) p. 12

7. Dae Wolfe, ‘Chance, or Human Judgment?’ (1970) 167 *Science* 168 as cited in Neil Duxbury, *Random Justice: On Lotteries and Legal Decision Making* (Oxford: Clarendon Press, Reprint 2004) p. 17.

8. The scientific domination of nature promised freedom from scarcity, want and the arbitrariness of natural calamity. “*The development of rational forms of social organization and rational modes of thought promised liberation from irrationalities of myth, religion, superstition, release from the arbitrary use of power as well as from the dark side of our human natures. Only through such a project could the universal, eternal and the immutable qualities of all humanity be revealed.*” David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (MA: Blackwell Publishing, 1990 ;2007 reprint) p. 12

A temperament that is often reproduced in other positivist fields of social theory which often makes claims of ‘facts’ and ‘truth’ in its epistemology.<sup>9</sup> But to gamble on chance in its purer forms, is an embracing of the uncertainties that embody human life, it is an embrace of the unknown, of the supra-logical, of the mythical.

Lotteries, for example, are blind; they are constructed and generate uncertainty. But on the other hand, it is this blindness of lottery that makes it the fairest; it is the most neutral way of judging and decision making, promoting the fairest form of equality. However, the reader might just note that these arguments are an exploration of what gambling conceptually might mean to us in contemporary lives, and why we conceive of it the way we do; it is not meant to be a moral justification.

We are attempting to hint at why we need a certain understanding of gambling which is intricately linked to ‘chance’ and ‘uncertainty’ – both being words which take on very different meanings post-Enlightenment or even in a non-western modernity with colonialism etc. Certainty and Predictability is connected to terms such as *rational*,<sup>10</sup> *universal*, *reasoned*, *truth*, *god*, *knowledge*, *west*, *man*, *god*, *knowledge*, *west*, *man*, *mathematical* etc. Concepts of *chance* and *uncertainty* get connected with *ignorance*, *luck*, *mystical*, *irrational*, *emotive*, *feminine*, *non-west*, *religious*, *unscientific*, *barbaric*, *uncivilized*, and *artistic*.<sup>11</sup> These binaries of science versus art, west versus non-west, rational man versus irrational feminine, are linked to the binaries of chance versus certainty. It is this link which has to be understood as the context of our current aversion to gambling, a moral policing of gambling as a vice, as immoral. Gamblers themselves feel conscious of the vice they indulge in,

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9. Gerda Reith analyses chance and uncertainty in the context of the rise of theories of mathematical “probability” in the 18th century and by the 19th century, probability being replaced by the rise of statistics, means and averages as an epistemic shift. The rise of probability theories and statistics are examples of our distancing from chance and uncertainty in the epistemic sense. See Gerda Reith, *Age of Chance: Gambling in Western Culture* (London: Routledge: 2000)

10. Max Weber argued that a strong link was present between the growth of science, rationality and universal human freedom in the Enlightenment thinkers. He called this ‘purposive-instrumental rationality’. This form of rationality affects the entire range of social and cultural life; the growth of such rationality, Weber suggests, does not lead to the concrete realisation of universal freedom but to the creation of an ‘iron cage’ of bureaucratic rationality from which there is no escape. David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (MA: Blackwell Publishing, 1990; 2007 reprint) p. 15

11. “Luck may have a sacred significance; the fall of the dice may signify and determine the divine workings; by it we may move the gods as efficiently as by any other form of contest. Indeed, we may go one further and say that for the human mind the ideas of happiness, luck and fate seem to lie very close to the realm of the sacred.” J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (London: Routledge & Kegan Paul, reprint 1949) p. 56



their own self-conscious knowledge that makes it so hidden and connected with the underworld, with black money, with drugs and alcoholism, a consciousness of having sinned.

## **Gambling, labour and private property**

In the above part we suggested the relation between ‘gambling’ and ‘chance’ that makes it so peculiarly ‘modern’. In this paragraph we hint at the relation of ‘gambling’ with ‘labour’ and ‘private property’. ‘Labour’ and ‘private property’ are the two central concepts that mark the turn to modern political philosophy. Both these concepts are problematic in its relation to gambling. As John Hobson suggests, it is commonly recognised that labour or human effort is the natural basis of the right to property. Similarly, if a worker has put in her labour in the production of a commodity, she deserves a certain right over it, at least in the form of fair wages. For such reasons, property acquired through cheating and fraud is clearly unethical and sometimes illegal. So the problem that Hobson rightly raises is if acquiring property through fraud and cheating is wrong, then gambling does not in any way, violate any obvious canons of justice.<sup>12</sup> The immorality that we today see in gambling is, how can a person make a profit out of ‘irrationality’; the making of money by means beyond labour and yet not being illegal and immoral the way cheating is? The problem, then, with gambling, is not of it being unjust, and so its immorality has to be located elsewhere.

For Hobson, its immorality is located in the fact that it is a damage of the intellect.<sup>13</sup> Calling it an “organised rejection of reason”, Hobson says that it “removes its devotees into a positive atmosphere of miracles, and generates an emotional excitement that inhibits those checks which reason more or less contrives to place upon emotional extravagances.”<sup>14</sup> A sort of teleology is inherent in Hobson’s argument – a teleological movement that starts from barbaric animality, from anarchic passions to a rational, scientific, control driven civilizations. It would be beyond the scope of this Brief to criticise the obvious problems with these assumptions. So Hobson in his moralist voice says: “The practice of gambling is thus exhibited as a deliberate reversion to those passions and that mental attitude which characterise the savage or pre-human man in his conduct and his outlook.”<sup>15</sup> What is

12. John A. Hobson, “The Ethics of Gambling” in *International Journal of Ethics* (Vol. 15, No.2, 1905) p. 138

13. Ibid

14. Ibid

15. Ibid

evident from the quote is a fear of the mythical, the insecurity of the uncertain; and how these assumptions enter into talking about gambling.

Helen Wodehouse suggests that in gambling, the reward does not come from a third party, but with the other bettor. Hence, if one wins, the other has to lose; the gambler desires only her own benefit, and so such cases cause a loosening of social ties. “It sets each man’s hand against his brother and this is of the very essence of immoral action.”<sup>16</sup> Gambling when the development of a culture is concerned, seems to be quite unproductive. “They are sterile, adding nothing to life or the mind. The picture changes as soon as play demands application, knowledge, skill, courage and strength.”<sup>17</sup> Although Wodehouse might be right on this point, it is far too broad a concern, true not just for gambling but other activities as well. For Huizinga, even the practice of law is about two sides, a winning and losing, rather than right and wrong. Many sports like football and basketball are about winning and losing and the same goes for trade and business. What makes gambling a special victim of being called immoral on grounds of breaking social ties?

Gambling is often seen as a gateway to other crimes, or is considered addictive or leading to alcoholism and other vices. But it is hard to even empirically establish a direct cause between addiction and gambling. Further, “recent history suggests a very limited connection between scientific understanding of addiction and regulatory activities.”<sup>18</sup> The theoretical problems of conceptualising addiction are far too many and hence will not be dealt with in this Brief; suffice to say that addiction is an important reason for vice control but cannot become a necessary or a sufficient reason.<sup>19</sup> Further, there is no clear demarcation between addiction and self-control deficiencies. Addiction as a reason, therefore, becomes too vast and unless a more proximate causality is established, it cannot be a compelling reason.<sup>20</sup>

Gambling is similar to certain other ‘vices’ such as alcohol. Alcohol consumption leads to a behaviour which causes road accidents very often. But the latter cannot

16. Helen Wodehouse, “Ethics of Gambling” in *International Journal of Ethics*, p. 79 available in [http://archive.org/stream/jstor-2376182/2376182\\_djvu.txt](http://archive.org/stream/jstor-2376182/2376182_djvu.txt) (last accessed on 30th May, 2013)

17. J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (London: Routledge & Kegan Paul, reprint 194) p. 48

18. Jim Leitzel, *Regulating Vice: Misguided Prohibitions and Realistic Controls* (New York: Cambridge University Press, 2008) p. 67

19. *Ibid*, p. 66

20. Often, stamp collection or coffee consumption is regarded as addictive but cannot be made illegal. Prostitution, on the other hand, is rarely seen as addictive and yet criminalised.

become a reason to prohibit the former, although it can become a reason to regulate it. Many adults occasionally take pleasure in drugs, pornography and gambling, but one cannot immediately assume that this leads to social deprivation and doom. Such a leap in argument is far too weak and paternalistic.

## ***Dyutamandalam* and the ethics of gambling**

*'Pure Gambling' is a plunge into the uncertain; it is the mind of the anarchic... where anarchic doesn't mean it is chaotic or unregulated.* The excitement some see in gambling may even be a reaction to the routine, order and monotony of our neo-liberal economic lives.<sup>21</sup> The normal workday life is a prolonged mechanical repetition which drives this need for 'impulsive', 'instinctual', 'irrational', a drive to wage a mad bet. What prompts sections of the ultra-rich could even be the idleness and leisure they have in their lifestyles.

What cricket and gambling need today is the only common connection between them – they both need integrity. The sportsperson as well as the gambler both need integrity and fairness in their act. But like any other industry, sports-betting is also open to corruption and crime. The neo-liberal turn in India itself, comes with a symbolic shift from Test cricket to what today is Twenty-20. Gambling too has evolved from traditional card games, to Internet-enabled worldwide betting on favourite sports teams. This neo-liberal turn in cricket and gambling, therefore, saw the obvious encounter of cricket and gambling, sometimes an embrace and sometimes as foes. Declan Hill, talking about the sports-betting industry, says "... The rest is the Asian market. It is huge. It dwarfs the European and North American markets. And most of it is illegal, run by the equivalent of Al Capone. This is a vast, powerful market...but the American journal *Foreign Policy* tried to do that in 2006 when it estimated the total size of the Asian gambling market at \$450 billion, for comparison, the size of the entire Asian pharmaceutical industry is roughly \$100 billion."<sup>22</sup> The fact however, is that there is also a certain natural connection between sports and gambling, they lend well to each other, yield and open up to each other, add excitement mutually. But fairness in betting is completely missing in India.

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21. Horse-racing for example, in 19th century Britain, became thoroughly democratised; no longer being a prerogative of a rich elite, but had become a massive working class entertainment. The first betting house opened in 1847 and three years later, over 400 existed and almost immediately 'an epidemic of gambling was declared to have attacked the poorest class.' Legislations such as the Street Betting Act, 1853, 1874 and 1892 were passed to eradicate all forms of working class betting. But betting simply went underground, unaffected by 'suppression' until betting shops were reinstated in 1961 in Britain. See, Gerda Reith, *Age of Chance: Gambling in Western Culture* (London: Routledge: 2000) p. 77

22. Declan Hill, "The Revolution" in *Sports and Betting Law and Policy* edited by Paul M. Anders & ors (Hague: TMC Asser Press, 2012) p. 11

The chief point of interest for us is metaphorically symbolised by a simple circle called the *dyutamandalam*. The *dyutamandalam* drawn on the ground is a circle that has a magic significance. It is drawn with great care, all sorts of precautions being taken against cheating. The players are not allowed to leave the ring until they have discharged their entire obligation. But sometimes a special hall is provisionally erected for the game, and this hall is holy ground. The *Mahabharata* devotes a whole chapter to the erection of the dicing hall – *sabha* – where the Pandavas are to meet their partners.<sup>23</sup>

## State paternalism and individual liberty

Understanding gambling in its contemporary context suggests that in itself, there is something amoral about gambling.<sup>24</sup> It seems to be unproductive in a larger sense of cultural development, but at the same time, the embracing of uncertainty as a ‘mental state of mind’ is of some need in our culture. But what has to be criticised is a certain kind of exaggerated shunning of gambling that is present in the Indian legal understanding. It is true that gambling is often connected to other vices such as alcohol, cheating, fraud, fixing and so on. Yet, there is a need to conceptually and legally separate the two. A mistaken and misinterpreted view of gambling as implying these other vices automatically would be an error. And so, gambling in itself may not be morally right and yet doesn’t seem to be immoral.

What then can be the possible relations of law with gambling? (1) One way is to argue that gambling is intricately linked to other vices. Therefore, the state must ban gambling or severely control it. (2) It can distinguish gambling from other crimes, and suggest that gambling in itself is a vice and therefore must be prohibited or severely controlled. (3) Gambling is amoral, the law can leave it unregulated and let it evolve on its own. The allied vices such as fixing are anyway crimes, so they are taken care of. (4) Gambling is amoral, but its connection with other vices seems rampant, and hence the state needs to regulate gambling in order to control other vices.

However, the public debates in India today are far more complex than these analytic positions. As we shall see in subsequent parts of this Brief, the Supreme Court itself takes a position which is in between (1) and (2). Our suggestion is however to move to (3) and (4). In popular conceptions, gambling is seen as rampant and at the same time, it is seen as intricately connected to other vices such as match-fixing, alcohol and

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23. J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (London: Routledge & Kegan Paul, reprint 1949) p. 57

24. The term ‘amoral’ in this context refers to those areas of interest that exhibit indifference to and not abiding by the moral rules or codes as a reason.

corruption. Even if it is granted that gambling is a vice in a loose sense, this does not entitle the law to enter this realm. The argument is based on the rights and liberties of individuals to make choices, as long as it is harmless to others. And that the entering of law into the realm of gambling, is an interference which is *paternalistic* in nature. This is to take the ‘post-Locke’ liberal argument that first, there is a general scepticism of what is supreme good or bad and so a scepticism of the paternalistic morality and second, that the highest duty of the state is to respect the rights and liberties of the autonomous individual.

## Dworkin on moral paternalism

Our exploration in this section is of the Indian legal system’s paternalistic attitude to gambling. Here one can refer to Ronald Dworkin’s critique of moral paternalism.<sup>25</sup> He makes a distinction between ‘volitional paternalism’ and ‘critical paternalism’. In volitional paternalism, the state uses coercion to help people achieve ‘*what they already want to achieve*’.<sup>26</sup> So, for example, a rule coercing the wearing helmets or seat-belts is volitional paternalism because the people want to achieve this but still need to be coerced to do it. In case of critical paternalism however, the state uses coercion to ‘*provide people with lives that are better than the lives they now think good*’. He gives the example of a law that prohibits consensual sodomy and homosexuality as critical paternalism because the state thinks that a heterosexual life is better for the society even if the people do not really think so.<sup>27</sup>

For an act to be considered ‘paternalist’, a good outcome has to be achieved for the benefit of the paternalised, at the expense of their autonomy.<sup>28</sup> Here, what is ‘good’ is that which is considered to be good by the state. But it is coercive in that, it is against the autonomy of the individual. So a lot of displacement laws which suggest, for example, that the widening of highways is good for the nation even if it implies the displacement of communities, have a certain paternalistic attitude.

However, based on the above use of concepts from Dworkin, the problem of gambling becomes clearer because it falls neither within critical paternalism nor volitional paternalism. This is because a lot of people know that some vices are actually

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25. See Ronald Dworkin, “Foundations of Liberal Equality” in *Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, 1989), vol. 11

26. Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford, Clarendon Press, reprint 2002) p. 103

27. *Ibid* at p. 103

28. Benjamin Franks, “Vanguard and Paternalism” in *New Perspectives on Anarchism*, ed. Nathan J. Jun and Shane Wahl (Lexington books, Plymouth, 2010) p. 103

connected to gambling and don't try to justify its morality. So even if it is granted that there is something in gambling that has to be restrained and discouraged, the problem is that the state is interfering with certain liberties that citizens enjoy, even if they know that the liberty is being misused for a certain self-indulgent vice. So, to put it more provocatively, the point is to argue that people have a certain 'right to do a wrong', but this has to be qualified with the question of what kinds of wrongs get this right. We aim to establish that gambling is one such example of a 'right to do wrong', because it is a protection of individual liberty which has to trump a certain shade of state paternalism. Connecting gambling to other crimes is both an argumentative as well as an empirical leap to make. This Brief's analysis is, therefore, limited to the scope of gambling itself and to argue that in the spirit of liberties, citizens have the right to do certain wrongs as long as certain qualifications are met. Law cannot make people moral; they have to freely choose to be so based on the right reasons.

## Right to do wrong

Although seemingly paradoxical, the best example of a 'right to do wrong' is civil disobedience, a '*Satyagraha*', which is a conscientious breaking of law for a higher moral good. But the nature of gambling for obvious reasons is different from civil disobedience, more significantly because it makes no claims of morality. In case of gambling, the reasoning has to be that the state has a duty to not interfere with an immoral act which is derived from the wrongdoer's right not to be interfered with.<sup>29</sup> Of course, one is not saying that there is a right to cheat or kill and a right to be not-interfered with in the committing of such acts. But there is a possibility of certain cases falling under the category that we are attempting to establish, special category of vices. J.S. Mill in his classic work, "On Liberty", says that "*...the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.*"<sup>30</sup> And so the wrong that we have in mind when it comes to gambling is of what Mill calls "self-regarding" wrongs. This case is of a conduct which does not directly harm other people, though it may harm the person engaging in it.<sup>31</sup> Waldron, for example, suggests that "*by limiting rights to actions that are morally permissible, we would impoverish the content of our theory of rights.*"<sup>32</sup> This line of

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29. Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford, Clarendon Press, reprint 2002) p. 122

30. Jim Leitzel, *Regulating Vice: Misguided Prohibitions and Realistic Control* (NY: Cambridge University Press, 2008) p. 20

31. Ibid at p.20

32. Waldron, 'A Right to do Wrong' as cited in Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford, Clarendon Press, reprint 2002) p. 126

argument is sometimes also used in other contexts such as legal control of sexual immorality, pornography, conscientious disobedience cases etc. What Waldron mockingly suggests is that if the state limits our rights to only actions that are morally permissible, then *“all that would be left for individual choice and action would be the banalities and trivialities of human life?...the choice between strawberry and banana ice cream.”*<sup>33</sup> Testing the limits of morality is often argued by anti-censorship groups fighting to push the limits of art and aesthetics. So it is important to grant a wide range of choices that an individual has to choose from and decide out of; and this ‘right’ of choice is an important liberty that has to be protected. Gambling may be a vice, but it is harmless (harm as used in tort law) and victimless (in its immediacy it is harmless). And so people must have the choice to make mistakes and learn from it if they wish to, but it is worth asking if the law needs to interfere in such cases.

The present case of gambling, however, is much narrower in scope. Gambling is more a category of moral indifference than of immorality. It is, therefore, not within the scope of this Brief to argue for a right to do something immoral, but to merely argue that there needs to be a strong right to do something non-moral such as gambling. This, however, does not in anyway intend to ignore the allied vices that come with gambling such as fixing, corruption, black money etc. They are crimes and there is little confusion about it.

This leads us to the next part of the paper. The first part attempted to establish a certain moral greyness that almost borders on a moral indifference in gambling itself. However, it acknowledges its relation to other crimes, but conceptually finds the need to distinguish between gambling itself and other vices and crimes. But in the second part of this section, the relation of law to gambling will be put to question. It was suggested that the law need not interfere with cases such as gambling because it is an interference with the liberty of citizens to make choices even if the choices are morally grey. Hence, the conclusion is that the law must not interfere with gambling, it must not prohibit or severely curtail or control it. It, however, must regulate it with the purpose of controlling and prohibiting associated crimes such as black money and fixing, but not with controlling gambling in itself.

There is a need for ‘vice’ in a society. Adults have to be allowed to ‘choose it’ or refuse it. Alcohol and tobacco are examples of this; legalisation of marijuana in some other countries is another such example. Hence there must be legal means of procuring the vice. The channel of availability may be constrained, it may require licenses depending on the vice (but the licensing process has to be transparent and devoid of excessive moral judgment surrounding it), it can fix quantity limits, advertising can be

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33. Ibid at p. 126

controlled, warnings can be given such as in cigarette sales etc. Liberty is also about trusting the rational choice of its agents. But the lack of self-control, for example in cases of addiction, puts 'rational choice' into question.

Therefore what the law ought to do is not to prohibit the addictive vice but allow for 'self control' in the rational decision making process of the agent. This is possible through all the above mentioned means including control on usage of the vice. Regulation, therefore, is to enhance the rational decision making of the citizen and not a curbing of 'decision making power' itself.



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## SECTION 2

### *Legal Framework of Gambling & Sports Betting in India*

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The Indian legal framework on gambling is complex and evidently ‘dated’. When it comes to sports-betting, the law is clearly in the grey. A provisional definition of sports-betting for the purposes of this section is that *it is a form of gambling that involves betting money on the outcome of a sporting event*. In this section, we shall discuss the gambling law framework in India and suggest that the law is inadequate and unclear with regards to sports-betting.

It is an open secret that unregulated betting involving substantial wealth and money has its own subterranean life in India. Online gambling and betting is also on the rise, and several websites operate and thrive from India and abroad.<sup>1</sup>

### **Indian laws in an era of ‘globalisation’ of gambling**

The nature of betting itself has become trans-national and it is no longer a localised phenomenon with community-based social concerns. Sports events are visible live all over the world. The Internet, with its web of worldwide connections when commercialised, contradicts all conceptions of ‘locality’ and instead moves in the realm of the ‘virtual’ and the ‘hyper-real’.

The Information Technology (Intermediaries guidelines) Rules, 2011, passed through a notification on April 11, 2011, by the Government of India under Section 79(2) and Section 87(c) (zg) of the Information Technology Act, 2000, pertains to regulation of Internet gambling. Section 3(2)(b) states that the intermediary, through rules and regulations, terms and conditions, *must inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information relating to or encouraging gambling*. In this provision, gambling has been put along with other categories such as defamatory, blasphemy, obscene, pornographic, paedophilic etc. Hence, a joint reading of the IT Act and the Public Gambling Act suggests that a responsibility is on the Internet Service Provider (ISP) to impose on all their subscribers, terms of use which prohibit any content which “encourages money laundering or gambling or is otherwise unlawful in any manner whatsoever”. There is also an obligation to disable such content once the authorities gain the knowledge of this. Also, there is no foreign direct investment allowed in betting/gambling/lottery

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1. FICCI cites a KPMG Report “Online Gaming: A Gamble or a Sure Bet”, that the betting market in India would be around Rs. 300,000 crores and hence a possible revenue of Rs 12,000 to 19,000 crores for the government. See FICCI *Sports Betting in India*, p.3, available on <http://www.squiresanders.com/regulating-sports-betting-in-india/> (last accessed on 30th May, 2013)

industry in India. Under Section 30 of the Indian Contract Act, 1872, agreements by way of wager is void and no suit shall be brought for recovering anything alleged to be won in such a wager. The exception to this law is horse-racing.<sup>2</sup>

## Constitutional provision

As per the Constitution of India, Entry 34, List II of the Seventh Schedule empowers the State governments to legislate on matters concerning gambling and betting. Therefore, several State legislations such as the Tamil Nadu Gaming Act, 1930, and the Bombay Prevention of Gambling Act, 1887, exist in most of the States. However the Public Gambling Act, 1867, is a Pre-Independence central legislation. It was after Independence that several States enacted their own laws pertaining to betting and gambling which overruled the Central legislation. But certain States such as Uttar Pradesh, Punjab, Himachal Pradesh and Madhya Pradesh have adopted the Public Gambling Act to their territory via Article 252 of the Constitution.

An important constitutional question was raised in *State of Bombay v. R.M.D. Chamarbaugwala*<sup>3</sup> on the question of whether gambling is of the nature of 'trade or business' falling under Article 19(1)(g) or Article 301 of the Constitution. To this, the Supreme Court held that *"We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject matter of a fundamental right guaranteed by Article 19(1)(g)."*<sup>4</sup>

With a strong moralistic tone, it was held that gambling would not be protected as a 'trade or business', under the Constitution of India. This was reiterated by the

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2. Insurance laws today are considered not to be a wager in most nations including India. But it is interesting to note that towards the middle-ages, in Genoa and Antwerp, the emergence of life-insurance was seen in the form of betting on future eventualities of a non-economic nature. Bets were made, for instance, "on the life and death of persons, on the birth of boys or of girls, on the outcome of voyages and pilgrimages, on the capture of sundry lands, places or cities". Such contracts were repeatedly proscribed as illegal games of chance, amongst others by Charles V. Even in the 17th century, dealings in life-insurances were still called "betting". See, J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture*, (London: Routledge & Kegan Paul, reprint 1949) p. 53

3. AIR. 1957 SC 699

4. An argument in similar moralistic vein was made with regards to Article 301 as well, excluding gambling from its ambit.

Supreme Court in several later judgments including *K.R. Lakshmanan v. State of Tamil Nadu and Anr.*<sup>5</sup>

## State laws on gambling

The Public Gambling Act makes gambling illegal, when it is made a business to earn profits and commissions. This Act doesn't define gambling but Section 12 states that the Act does not apply when a game of skill is involved. In the *R. Lakshmanan*<sup>6</sup> case, the Supreme Court in defining "gambling" said that it consists of consideration, an element of chance and a reward. The result of the gamble must be wholly uncertain. State laws such as the Madras City Police Act, 1888 in Section 3, says that "Gaming does not include a lottery but includes wagering or betting". Similar is the case with the Tamil Nadu Gaming Act, 1930, the Kerala Gaming Act, 1960, etc. The Preamble of the Public Gambling Act states: "*whereas it is expedient to make provision for the punishment of public gambling and the keeping of common gaming-houses*". Similar preambles are present in other State legislations as well.<sup>7</sup> The intent of most laws seems to be the curbing of gambling and prohibiting it in gaming houses for reasons *causing debasement of public morality and wide spread exploitation and threat to peace and order*"<sup>8</sup> Hence, these laws attempt to prohibit public gambling, gambling-houses and commercial gambling of any form.

Most State laws mention the penalties, punishments and powers of the police in enforcing the law. But there is little empirical evidence on how effective these laws have been. Under Section 5 of the Tamil Nadu Gaming Act, 1930, if the magistrate or Superintendent of Police has reason to believe, based on credible information and necessary inquiry, that a gaming-house has been established, he may enter himself or authorize certain ranked officers, by force if necessary, to take individuals in the gaming-house into custody. The penalty and punishment are also archaic. Section 9 of the Tamil Nadu Gaming Act, 1930, for example, suggests fines not exceeding Rs. 200 or imprisonment not exceeding one month on being found gaming or present for the purpose of gaming in a common gaming-house.

5. AIR 1996 SC 1153 or 1996 SCC (2) 226

6. AIR 1996 SC 1153

7. The Madras City Police Act, 1888 in Section 3 defines "Common gaming-house as *Common gaming-house, room, tent, enclosure, vehicle or any place whatsoever in which cards, dice, table or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying using or keeping such house, room, tent, enclosure, vehicle, vessel or place whether by way of charge for the use of instruments of gaming or the house, room, tent, enclosure, vehicle or place or otherwise howsoever, and includes any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened, kept or used for the purpose of gaming.*

8. See; Preamble of the Assam Gaming Act

The fine for opening or keeping a gaming-house does not exceed Rs. 500.

## Skill and chance

In *State of Andhra Pradesh v. K. Satyanarayana* the question was whether rummy is a game of chance or skill. The Supreme Court held that rummy is not entirely a game of chance such as the 'three card game' because rummy requires certain other skills such as holding and discarding cards. Since it is mainly and preponderantly a game of skill, and is of the same character as games such as Bridge, it would not fall within the purview of gambling. But a recent Madras High Court decision gave a twist to this law.<sup>9</sup> It agreed with the Supreme Court that a game of rummy is one of skill, but held that if it is played by the members with 'stakes' the provisions of the Chennai City Police Act are attracted. It entitles the police to take action if such illegality is carried on in the premise, i.e., the illegality of playing rummy with stakes, profits and gains.

In *K.R. Lakshmanan v. State of Tamil Nadu and Anr*,<sup>10</sup> the Supreme Court asserts that a game of skill, where although the element of chance necessarily exists, is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player.<sup>11</sup> It is the dominant element of 'skill' or 'chance' that determines the character of the game. The question before the court in this case was on whether betting on horse-races is gambling or not. The Supreme Court, by invoking the distinction between skill and chance, held that betting on horse-racing is a game of skill and hence excluded from the realm of betting and gambling. "We have no hesitation in reaching the conclusion that the horse-racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained jockey can touch the winning post."<sup>12</sup>

## Exceptional legislations

The Lotteries (Regulation) Act of 1998 gave State governments the authority to hold lotteries. But this permission is qualified by conditions such as Section 4(h), no lottery shall have more than one draw in a week, or Section 4(j), the number of bumper draws of lottery shall not be more than six in a calendar year, etc. Two States,

9. *Deputy Commissioner of Police v. Mahalakshmi Cultural Association*, decided on 22.3.2012 by Madras High Court division bench in W.A. No. 2287 of 2011.

10. AIR 1996 SC 1153 or 1996 SCC (2) 226

11. Ibid

12. AIR 1996 SC 1153

Goa and Sikkim, allow casino gambling and in all other States legal gambling is restricted to horse racing.

The Goa, Daman and Diu Public Gambling Act, 1976 was amended to legalise certain forms of gambling.<sup>13</sup> Section 13A: “Authorised Game.— (1) Notwithstanding anything contained in this Act, the Government may authorised any game of electronic amusement/slot machines in Five Star Hotels {and such table games and gaming on board in vessels offshore as may be notified} subject to such conditions, including payment of such recurring and non-recurring fees, as may be prescribed.”

Sikkim is the other Indian State to have legalised gambling through Sikkim Casino Games (Control and Tax Rules), 2002 and Sikkim Regulation of Gambling Act (Amendment) Act, 2005. Sikkim is also the first Indian State to legalise online gaming through the Sikkim Online Gaming (Regulation) Amendment Act, 2011.

Based on the discussion so far, the following brief conclusions can be made. First, for an act to be called gambling, the nature of chance must dominate over skill. Therefore, horse racing being a game of skill, betting in it would be an exception. Second, gambling itself is seen as illegal and prohibited in most States, except a few such as Goa and Sikkim. Most States make gambling-houses illegal and prohibit gambling for profits and gains. Third, gambling laws are clearly archaic and dated; the law has not evolved with the times. A strong moralist tone is evident in the judgments which condemn the vice of gambling, and is clearly a *paternalistic law*. The courts have rarely been self-critical in questioning this assumption of the immorality of gambling itself.

And the most significant point is one on sports-betting. The reasoning that holds good for the validity of betting on horse-races, or even rummy, must hold good for betting on sports as well. The Supreme Court in the *R. Lakshmanan* case cites the Encyclopaedia Britannica, 15th edition, to make the point that “Betting on horse racing or athletic contests involves the assessment of a contestant’s physical capacity and the use of other evaluative skills”. If bets can be placed based on evaluating horses on the basis of the breed, age, previous performance etc, and if there is a skill involved in such bets, why would the same reasoning not hold good for betting on sports such as cricket (which clearly don’t involve horses)? For these aforementioned reasons, sports-betting doesn’t seem to fall under the scope of ‘gambling and betting’ but seems closer to horse-racing which is considered a game of skill.

One of the possibilities of regulating sports-betting, therefore, can be by passing a

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13. Inserted by the Amendment Act 11 of 1992 and Amendment Act 13 of 1996 in Section 13 of the Act.

**Central Legislation.** If sports-betting is a skill, then it doesn't fall on the State List of the 7th Schedule, it may even be regulated as a trade or business falling under Article 301 (Entry 42 of the Union List).

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## SECTION 3

### *Not Cricket*

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Greyness surrounds the moral, philosophical and legal positions on gambling in India. The inability by national and international cricket authorities to put an end to the evils arising out of betting in cricket is a telling example of the consequences of having archaic laws governing gambling in India.

Lamenting on the fatal blow inflicted on the appeal that the game held to its passionate followers, India's Central Bureau of Investigation (CBI) said: "The romanticism associated with the game is perhaps gone forever. Increasingly, in the playing fields around the world, the music of sweetly timed strokes is being replaced by the harsh cacophony of ringing cell phones."<sup>1</sup>

This chapter will throw light on the measures taken by the International Cricket Council (ICC), cricket's international governing body, and the Board of Control for Cricket in India (BCCI), the Indian cricket board, to minimise the effect that gambling and betting have on the game in the country.

### **A decades-old menace**

Betting on cricket in India gained momentum in the late 1980s and early 1990s, coinciding with the surfeit of one-day internationals during this period.<sup>2</sup> After the revelations of match-fixing by South Africa's captain Hansie Cronje in April, 2000, an investigation was done by the CBI into allegations of match-fixing and malpractices related to betting.<sup>3</sup>

The CBI, besides exposing the crimes committed by a few of India's cricketers, analysed the magnitude of the menace, confirmed that betting in the game is "perhaps the biggest organised racket in the country", and warned that "there are clear signals that the underworld mafia has started taking interest in the betting racket and can be expected to take overall control of this activity".<sup>4</sup> It also spoke about the inadequacy of the national laws on betting and gambling to tackle the problem, which had already assumed huge proportions.

1. Central Bureau of Investigation: Cricket Match-Fixing and Related Malpractices: A Report by CBI (November 1, 2000)

2. Ibid

3. <http://www.espnricinfo.com/india/content/story/84318.html> (last accessed on 30th May, 2013)

4. Ibid

The ICC, in the aftermath of the above incidents, formed the International Anti-Corruption Unit, which was later renamed as the Anti-Corruption and Security Unit (ACSU).<sup>5</sup> The BCCI and the ICC both have their Anti-Corruption Code, which compels every player or participant under either or both the boards to comply with it.

## International Cricket Council

- The ICC, in its Code, clearly defines the “offences” under its jurisdiction.<sup>6</sup> Its Code would apply to all matches and tournaments under its umbrella, and in any case where its jurisdiction overlaps with that of the respective national cricket boards, the ICC would get the first preference.
- It concerns itself only with the conduct of the players and participants, and not bookmakers or punters.

‘Offences’, as defined by the ICC, comprise of:

- Fixing, accepting reward/money to do it, failing to perform to one’s abilities in a match, inducing fellow participant to do any of the above. (Minimum ban five years, maximum, lifetime.)
- Betting, with any party on any match or event associated with the Board, inducing a fellow player or participant to indulge in it, ensuring a particular outcome in the knowledge of an advantage in betting. (Minimum ban two years, maximum, lifetime.)
- Illicitly using valuable information in connection with a match for betting, providing someone else this valuable information for use in betting, or inducing a fellow player or participant to indulge in using or providing this valuable information. (Minimum ban six months, maximum, five years.)
- Providing or receiving any gift or reward for helping an outsider to use any valuable information, or know the upcoming events on the field of play, and failing to disclose to the concerned authorities under ICC, or a national board, about any such giving or receiving of such gifts. (Minimum ban one year, maximum, five years.)
- Failing to cooperate with investigation. (Minimum ban six months, maximum, two years.)

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5. International Cricket Council – Anti Corruption Overview <http://www.icc-cricket.com/about/35/anti-corruption> (last accessed on 30th May, 2013)

6. *Anti Corruption Code for Participants, ICC*: [http://icc-live.s3.amazonaws.com/cms/media/about\\_docs/518b77cc897f1-Anti%20Corruption%20Code%20for%20Participants.pdf](http://icc-live.s3.amazonaws.com/cms/media/about_docs/518b77cc897f1-Anti%20Corruption%20Code%20for%20Participants.pdf) (last accessed on 30th May, 2013)



The trial and punishment will be handled by the anti-corruption tribunal of the ICC, and additional fines may be imposed exclusive of the ban. An appeal can be made by the concerned individuals or parties, or the ICC, against the decisions of the anti-corruption tribunal. The appeal will be heard at the Case of Arbitration for Sport (CAS), whose decision will be binding on all parties.

## **Board of Control for Cricket in India**

The BCCI, which governs cricket in India, also has an anti-corruption code similar to that of the ICC.<sup>7</sup> Its investigation unit is called the Anti-Corruption Unit.

The decisions are handed out by BCCI's Disciplinary Committee, and for any legal recourse, the concerned party will have to file an appeal within 14 days of having been given the punishment.

If the offence is more than 8 years old, no investigation will be done by the BCCI.

Despite these laws, however, the rampant betting in the country, which has come to light with the recent IPL controversy, clearly show that they are not able to work effectively in cleansing the sport from the menace.

## **Need for an overhaul**

The CBI, in its report on match-fixing and related malpractices, cites the lack of fear of the bookies (who determine 'odds') and punters (who place bets with the bookies) getting caught: "A primary reason for the growth of this racket is the relatively liberal provisions of the Public Gambling Act. The ingredients and punishments under this Act differ from State to State. Even as it is debatable whether betting on cricket attracts provisions of this Act, since cricket theoretically is a game of skill, the maximum punishment under this Act [is hardly a deterrent]. For example, in Delhi, for a first offence is imprisonment for six months and a fine of Rs.1,000 and for subsequent offences, a maximum punishment of imprisonment of one year and a fine of Rs.2,000. Hence, for a bookie or punter dealing in crores of rupees, the provisions of this Act are no major cause of worry."<sup>8</sup>

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7. *Anti-Corruption Code for Participants, BCCI*: <http://www.bcci.tv/bcci/bccitv/index/anticorruption>

8. Central Bureau of Investigation: Cricket Match-Fixing and Related Malpractices: A Report by CBI (November 1, 2000)

What is evident from the above reasoning is the drawback in the public gambling laws. The laws are archaic; penalties and punishments these laws prescribe, such as Rs. 200 and Rs. 500 in the Tamil Nadu Gambling Act, is proof of this. With such structural problems, it is not enough to merely tweak the laws but they need a complete overhaul.

The BCCI has employed the services of ICC's ACSU in the IPL, but with revelations of fixing in the league in the past two years, the unit hasn't been able to work efficiently enough to prevent these.<sup>9</sup> "It does not need divine eyes to see that *satta* [betting] in cricket and other games is reaching an alarming situation. The extent of money that it generated is diverted to clandestine and sinister objectives like drug trafficking and terrorist activities," said Dharmesh Sharma, an Additional Sessions Judge, of a Delhi trial court. "It is high time that our legislature seriously considers legalising the entire system of betting online or otherwise so that enough revenues can be generated to fund various infrastructural requirements for the common man and thus check the lucrative business in organised crime."<sup>10</sup>

Why, in spite of the laws of the BCCI and the ICC, has cricket betting assumed such proportions, so as to threaten the game? Lessons may be learnt from a deeper analysis of the regulation of gaming in the United Kingdom and Australia.

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9. <http://www.thehindu.com/sport/ipl2013/its-a-bolt-from-the-blue-bcci/article4720631.ece> (last accessed on 30th May, 2013)

10. <http://www.espnricinfo.com/india/content/story/475479.html> (last accessed on 30th May, 2013)

## SECTION 4

### *Regulation of Gambling in Other Countries: Lessons for India*

In order to better frame an approach to regulation and legislation on sports gambling, we examine here the experience of other countries in the regulation of gambling.

In the United Kingdom (UK), commercial gambling became legally permissible in the second half of the century, but the change in the stance of the state from prohibition to regulation only took place about a decade ago. This change was largely on account of technological advancements and social attitudes that evolving laws had ushered in. Earlier during the 19th and 20th Centuries, gambling was not legally permissible. The 1845 Gaming Act imposed punishments of fine and imprisonment for gambling in common houses and simultaneously recused the state from the task of settling gambling disputes.<sup>1</sup>

However, this is not to say that the popular perception of gambling itself was negative or its prevalence low through this period. In fact, one of the reasons for the 1845 enactment was the clogging up of courts with gambling disputes.<sup>2</sup> A commonly held belief amongst the English parliamentarians was that gambling had percolated from the aristocrats to the commoners.<sup>3</sup> Laws were devised to prohibit gambling by the working class. Arguments before the Commons' Select Committee on the legality of gambling were paternalistic in their reference to the social-economic impact of gambling on the poor and simultaneously legitimised gambling by the aristocrats. For instance, Admiral Rous argued that "*the poor should be protected; but I would let a rich man ruin himself if he pleases.*"<sup>4</sup> In conformance with this view, the Gaming Act, 1845 criminalised gambling within common houses, but did not restrain gaming by the rich. This was a result of deliberate effort by the legislators who perceived gaming by the aristocrats as a form of leisure and that by commoners a social evil that exacerbated poverty and crime.<sup>5</sup>

1. United Kingdom Gaming Act, 1845

2. Review of the Gaming and Lotteries Act, 1956-86, Report of the Inter-departmental Group, Department of Justice, Equality and Law Reform, Ireland, 2000.

3. M. Clapson, *Popular Gambling in English Culture, c. 1845 to 1961* (University of Warwick: 1989)

4. Ibid

5. Ibid

## Experience with criminalisation

The criminalisation of gambling among commoners in 1845 aggravated the class inequalities debate. The exclusion of the working class from the privilege of this leisure sport led to a demand for democratisation of gambling.<sup>6</sup> In any case, laws prohibiting gambling and lotteries were not successful in the UK. Legislation between 1845 and 1968 saw a proliferation of common gaming houses and street betting.<sup>7</sup> Gaming houses found loopholes in the law to continue their business.<sup>8</sup> With the increase in the popularity of gambling houses, law enforcement agencies acquiesced to the prevalence of gambling. Even when they conducted raids, they were mostly farcical, as they did so after informing the gambling houses. In any event, on most occasions, gamblers were in a position to pay the fines imposed.<sup>9</sup>

As per Clapson, the period between the First and the Second World War also saw a rise in subscription to lotteries. A famous lottery at the time was the Irish Hospitals' Sweepstake. The Irish Sweepstake gave a public cause appeal to the sporting impulse of lottery. The proceeds from the lottery, apart from the expenses and prize money, were used for funding hospitals in Ireland. The lottery had a large number of subscribers in England. It may be noted that the lottery's popularity coincided with the momentum of the Home Rule Movement in Ireland. Subsequently, the law in the UK was amended to prohibit subscription to foreign lotteries. Given the popularity of lotteries, the government legalised lotteries for public purpose within the country. However, there were many restrictions on the prize amount, deduction for expenses and the entities that may conduct lotteries. Overall this period did see a paternalistic stand by the government in restraining the "sporting impulse".

## Reasons for regulation

After the Second World War, there was a trend toward recognition of the legality of speculative activities such as national bond markets which would assist in funding the government through the depression. There was a growing realisation, in both the UK and Ireland, that the state could earn revenue by regulating and taxing gambling and gambling houses.<sup>10</sup> The state also felt obligated to ensure fairness in gambling to protect players. The Royal Commission on Betting and Lotteries in

6. M. Clapson, *Popular Gambling in English Culture, c. 1845 to 1961* (University of Warwick: 1989)

7. Ibid. See also: Steve Donoughue, *Executive Summary: The Gaming Act, 1968*, 2013

8. Steve Donoughue, *Executive Summary: The Gaming Act, 1968*, 2013

9. M. Clapson, *Popular Gambling in English Culture, c. 1845 to 1961* (University of Warwick: 1989)

10. Review of the Gaming and Lotteries Act, 1956-86, Report of the Inter-departmental Group, Department of Justice, Equality and Law Reform, Ireland, 2000

1949-51 recommended new legislation that would “outlaw gaming if a game had unequal chances for the bank or had a levy on the stakes”.<sup>11</sup> This paved the way for the legislation of 1960 that sought to legalise private betting and betting by not-for-profit societies.

Furthermore, the laws prohibiting gaming and lotteries had failed to keep a check on these activities and instead aggravated the conditions of the players. The purpose of legalising private gambling and off-course horse racing was not to give impetus to gambling but to overcome existing circumstances: crime, poverty, bankruptcy, the obligation of the state to protect consumer interests and society. Legislators vociferously argued against demand driven growth of the gambling industry, and thus the legislation did not allow gambling houses and lotteries to be advertised. This, they argued, would stimulate demand.

### **More liberalisation, better regulation**

Legislators’ inadvertences while drafting the 1960 Act led to the legalisation of commercial gambling or casinos. The Act that only aimed to legalise private gaming also gave legal sanction to commercial gambling houses. To tackle this, the 1968 Gaming Houses Act was notified which sought to prevent the proliferation of casinos through licensing requirements. Existing casinos were thus required to fulfil the requirements under the new legislation. The number of casinos that existed in the UK came down from 1,200 to 125 by the year 1972.<sup>12</sup>

The muted de-criminalisation and regulation of gambling and casinos through the 1960s legislation was guided by the prohibitory attitude. For instance, casinos were only allowed to be set up in permitted areas. However, in years to come, the gaming industry was to undergo a significant change of social attitude and technological advancements that allowed for greater liberalisation. The initiation of the state-owned National Lottery in 1994, which was telecast on the BBC, was a precursor of this change.

In 2005, the Gaming Commission substituted the Gaming Board of 1968. The principles for regulating gambling were restated as: (a) gambling should not become a source of crime or support it; (b) gaming should be conducted in a fair manner; (c) children and other vulnerable groups should be protected from being harmed or exploited by gambling.<sup>13</sup> There was a demand for gambling to be treated like any

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11. Steve Donoghue, *Executive Summary: The Gaming Act, 1968*, 2013

12. Ibid

13. United Kingdom Gambling Act, 2005

other leisure industry<sup>14</sup>, where the role of the state was not prohibitory but to protect the consumers.<sup>15</sup> As is evident from the first principle, the state recognised that gambling itself was not a criminal activity, but that it could lead to crime, at which point there was a need for state intervention.

## Should the same principles be applied *in toto* to India?

As evidenced in the preceding paragraphs, the evolution of gambling regulation laws in the UK was in response to the prevailing socio-economic and political circumstances. The principles that shaped the English law are at best of persuasive value for India. Any attempt at legislating for India must bear in mind the social circumstances in India, the ability of the state to prevent gambling from supporting other criminal activity, the capacity of the state, industry, and the civil society to insulate against problem gambling.

According to a report by FICCI, gambling is rampant in India.<sup>16</sup> Since the exposé of May 2013, the government has released statements clarifying that it has not recommended regularisation of betting.<sup>17</sup> The government is, however, reviewing the need for a new law to tackle malpractices in sports. Given that existing prohibitions to gambling have not prevented betting in sports, the moot question for India is whether deterrence or regulation would reduce the social impact of gambling.

FICCI has recommended regulation of betting, which, in its opinion, would also increase state revenues.<sup>18</sup> However, before opting for one of the two options, a review of the socio-economic and technological circumstances in India is in order.

As per a report by the INTERPOL and FOPAC, gambling in India takes place through various routes including *Hawala* routes.<sup>19</sup> *Hawala* transactions do not

14. Gambling Review Report 2001; Reports of the Royal Commissions on Gambling 1932 -33, 1949 -51, and 1978

15. 'United Kingdom Gambling Act, 2005: A Bet Worth Taking?', Select Committee on Culture, Media and Sports, United Kingdom, 2012

16. 'Regulating Sports Betting in India – a Vice to be Tamed?', FICCI, September 2012

17. 'Union Ministry of Youth Affairs and Sports has made no recommendations to regularise betting to the Union Law Ministry', Press Information Bureau, May 29, 2013, Release Id: 96280

18. 'Regulating Sports Betting in India – a Vice to be Tamed?', FICCI, September 2012 FICCI cites a KPMG Report "Online Gaming: A Gamble or a Sure Bet", which has estimated a revenue of Rs. 12-19,000 crores from the betting industry

19. 'The Hawala alternative remittance system and its role in money laundering', Harjit Singh Sandhu, INTERPOL & FOPAC, accessed at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/FinCEN-Hawala-rpt.pdf>

rely upon negotiable instruments and are immensely difficult to track. The recent IPL gambling racket has revealed that various participants relied upon *Hawala* transactions to gamble. Unless all monetary transactions can be monitored electronically, clandestine gambling would continue. Such unregulated gaming would not only cheat the national coffers of taxes, but also lead to money laundering.

In addition, in the UK, the consumer protection lobby is extremely strong. The Gambling Commission is avowed to protect the consumer's right to: (a) a fair game; (b) access a variety of gambling products; (c) to be protected from problem gambling. The importance of these rights is manifested in myriad rules and codes of practice for gambling in the UK. A claim for these rights was pushed by various associations, including the Advertising Standards Association and gambling support groups such as GamCare and Gordon Moddy Association before the Joint Committee on the draft Bill. In the absence of such a socio-legal movement, the state may fall short on its duty to protect consumers while legalising gambling.

Furthermore, a move to regulate gambling would involve a concomitant expansion of the bureaucracy. The establishment of a regulator at the central and state level, auditing mechanisms to oversee these commissions, state consumer protection bodies, and transparency mechanisms would have to be established for meaningfully regulating gambling. In the UK itself, the establishment of the Gambling Commission in 2005 was expected to cost between £9 and £11 million.<sup>20</sup>

Despite these factors, a perusal of the systems developed in the UK to monitor and regulate gambling is essential to further the discussion on de-criminalisation and regulation of gambling.

## Lessons to be learnt from the UK and Australia

The Department of Culture, Media and Sports in the UK recommended that a law to regulate gambling would extend the choice and availability of gambling products. While it would provide consumer choice and protection, it would increase access to gambling and could lead to an increase in problem gambling.<sup>21</sup> The contrary view, that evidence did not suggest such an increase in problem gambling was also received by the government when it was reviewing the need to recognise casinos. The Committee was unable to conclusively take a stand on whether further liberation of the industry

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20. Joint Committee Report on the Draft Gambling Bill, House of Lords and the House of Commons, United Kingdom, 2004

21. Department of Culture, Media and Sports, Draft Gambling Bill: Regulatory Impact Assessment, Cm. 6014 – III, November 2003, para 1.63

would increase problem gambling.

However, various review committees suggested means for ensuring that the state doesn't fail to fulfil its duty to protect. Some of these measures adopted in Australia and the UK are discussed below.

- **Single regulatory body:** In the UK there is a single regulatory authority to review the functioning of all betting and gambling houses. A single regulator would ensure a common philosophical approach to gambling, smooth administrative functioning, and consistency.
- **Licensing:** Casinos and betting houses are required to secure a license.<sup>22</sup> To ensure that gambling does not proliferate the gaming commission is empowered to allow expansion of casinos upon determining the existence of the need for such expansion. However, such restrictions would not apply to lotteries, which is inherently less addictive.
- **Distinction between different forms of gambling:** While regulating gambling the state may make a distinction between different forms of gambling on the basis of their addictiveness.<sup>23</sup> For instance, lotteries that are weekly or bi-weekly are considered non-addictive because of the time it takes to secure results and to re-enter for the lottery. Whereas sports that allow for continuous stacking, such as blackjack and Russian roulette are considered hard gambling as they are much more addictive.<sup>24</sup>
- **Protection to minors:** Minors should not be encouraged to gamble and their employment in the sector should be restricted to areas where they would not be exposed to gambling. Gambling advertisements should not target minors and their access to such advertisements should be restricted.<sup>25</sup> Gambling advertisements should include information about sources of help to deal with problem gambling.
- **Provision of opt-in protectionist measures:** The State and industry could devise codes for implementing protectionist measures such as allowing provisions for players to bar themselves from gambling; requiring casinos to display clear information about the chances of winning and losing; and rules on casinos offering credit to players. In

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22. United Kingdom Gambling Act, 2005

23. 'United Kingdom Gambling Act, 2005: A Bet Worth Taking?', Select Committee on Culture, Media and Sports, United Kingdom, 2012

24 Ibid

25. Also see Review Report, Gambling Review Body, Department for Culture, Media and Sport, United Kingdom, July 2001



the UK prior to 2005, a person had to secure membership to a casino to gamble and a 24-hours waiting period in order for it to be granted. However, this requirement has been removed under the 2005 legislation which aims to provide consumers access to a larger spectrum of regulated gambling products, and allows opt-in measures.

- In Australia, the law requires mandatory warnings to be provided to the player when s/he manifests an alarming gambling trend. In a report, the Select Committee on the Interactive Gambling Amendment Bill recommended that access to live odds at sporting events and through other broadcast means be prohibited, which, it opined, would promote gambling.<sup>26</sup> It acknowledged that it wasn't possible for the state to intervene and block access to every online gaming website.
- Role of the industry: In the UK, the industry is itself encouraged to play a vital role in preventing problem gambling.<sup>27</sup> The Joint Committee endorsed the views of the Department that “the industry has a duty to finance measures to limit and treat problem gambling”. Accordingly, it recommended that “the industry should set up a voluntarily funded Gambling Trust. All limbs of the industry – lottery, table games, casinos and horse racing – should be required to contribute to the fund. Such a fund could provide support for treatment, education and research that would be a crucial counterbalance to deregulation. The distribution of funds by the trust should be overseen by the Gambling Commission.

Perhaps the most prominent and common feature of the two countries' decision to regularise gambling is the degree of research and scrutiny that they conducted. Over various reports, different aspects of the gambling industry were scrutinised, such as the cost of regulation, the impact on society and vulnerable groups, the ability of law enforcement agencies to monitor and prevent malpractices, expected revenues to the state and their use for ensuring that gambling remains a safe sport.

Any move to regulate gambling or betting in India should be similarly based on a scrutiny of the socio-economic scenario. Exhaustive research needs to be undertaken to estimate the percentage of population that participates in gambling, the percentage of players addicted to gambling, the revenues that the state is expected to generate through means of taxations and licensing fees, and the percentage of such revenues that would be utilised for detecting and preventing crime, running campaigns to support problem gamblers and protect children.

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26. Second Report, Parliamentary Joint Select Committee on Gambling Reform, December 2011

27. Department of Culture, Media and Sports, United Kingdom, Gambling Review Body Report, Cm. 5206, July 2001

As per press releases, the Minister for Law and Justice has stated that the Centre was planning to legislate for a standalone law on malpractices in sports.<sup>28</sup> The Minister for Youth Affairs and Sports has also stated that a separate law should be enacted to address the issue of betting and fixing in sports.<sup>29</sup> In deciding between deterrence and regulation of gambling or betting, a thorough study needs to be conducted, public consultations carried out, and stakeholders' opinions solicited, before the law is amended. An attempt should be made to avoid a kneejerk reaction in policy making and public engagement and scrutiny should be encouraged.

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28. 'Government to go in for a stand-alone central legislation to curb any dishonest activity in sports', Press Information Bureau, May 25, 2013, Release ID: 96219

29. 'Conference of Ministers and Secretaries of States and Union Territories in-charge of Sports & Youth Affairs concludes in New Delhi', Press Information Bureau, May 25, 2013, Release ID: 96215

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## CONCLUSION

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**I**n the wake of the betting and performance compromising scandals surrounding the Indian Premier League, there is a need to clear the intellectual and moral confusion around the nature of gambling itself and to evolve a legal framework to deal with it.

Our aim in this Brief was to point to the moral greyness surrounding gambling and to distinguish it from other crimes and vices such as cheating and fraud. We then proceeded to examine the issues that need to be addressed if the legal framework is to move from outright ban to regulation and control.

The Indian legal framework has a paternalistic attitude towards gambling, one of prohibition and punishment. Quite apart from the practical issue of whether such laws can be enforced effectively with reasonable resources, the point that we make is that paternalistic laws in areas such as gambling are inappropriate. Instead, we suggest that there is a need to have a “right to do a wrong.” Here, a right implies a fundamental liberty to make choices and “wrong” implies certain victimless, amoral wrongs such as gambling. Based on the importance of liberty and individual choice, we suggest that the law not prohibit gambling but make a moral-philosophical argument for regulating gambling.

While the IPL scandal has brought into the public policy debate the need for a new legal framework to deal with gambling in relation to sports, attempts at reform should move cautiously, after a detailed examination of the various issues involved. Before amending the laws or introducing new laws, intensive research, citizen engagement and stakeholder participation should be encouraged.

On the basis of the experience in other countries, some of the key issues that should be assessed before legislating for or against gambling and betting are listed below.

- The impact of higher deterrence on crimes such gambling and betting.
- The incidence of crimes such as theft, murder and cheating that may result from gambling before and after legalising, and their impact on law enforcement resources.
- The type of regulations needed to protect minors and other vulnerable sections from gambling.

- The proportion of the population that would be involved in addiction and other forms of problem gambling.
- Expenses on campaigns to limit gambling and support for those suffering from problem gambling.
- The cost of regulating the business of gambling in such places as casinos and the cost of maintaining a regulatory body at the State and/or Central level to regulate and monitor compliance with fairness codes and best practices.



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