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‘TILTING’ IN FAVOR OF POKER: AN ARGUMENT FOR REGULATING POKER IN INDIA

Ms. Gargi Whorra*

Ms. Dipali Rai**

Introduction

Gaming, in its different forms has held a special place in the life of mankind, be it for leisure or as a social activity.¹ However, with the internet revolution and the digitization of real money gaming, an unprecedented boom has been witnessed in the number of gaming and gambling aficionados. This has also been true in the case of poker. The present-day poker hysteria is quite recent in India but across nations, it has lived its transformative stage and even upgraded from a casino game to a legitimate sport. The first instance of this could be traced back to 1970 when Ted Binion started the World Series of Poker (WSOP) in his Las Vegas casino.

Poker is a common feature at most casinos, however, on account of its popularity, it has stepped out of its traditional setting and has appeared in different avenues as a regulated and recognized game. Poker has stepped out of the traditional casinos and is available in many lucrative options. Poker is legal and closely regulated across various nations and growing at an exponential rate in popularity and physical presence. For instance, the brick-and-mortar setup of poker has been expanding from casinos to now

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¹Kim Phillips-Fein, Buy and Hold ‘em’, 41 THE BAFFLER (2006).

in pubs and clubs. Another booming avenue has been the internet which has brought poker straight to the fingertips of the players.

In a recent study undertaken by KPMG, the online gaming industry in the financial year 2019 was already worth Rs. 62 billion and continues growing at a compounded growth rate of 32%.² At this rate, it is estimated that the online gaming industry will be worth approximately Rs. 11,900 crores by the financial year 2023.³ Real money games which include poker, rummy, fantasy sports, and quizzes account for 30-35% of the online gaming market and are worth Rs. 24 billion as of 2019,⁴ particularly, poker sites which are growing unregulated at an exponential rate of 50-100% with around 2 lakh active poker accounts in India.⁵

Poker: A game of skill or mere chance?

It is undeniable that when it comes to issues such as gambling there is an apparent divergence in views. Firstly, those who are in favour of legalizing gambling attach importance to individual autonomy over State interference. On the other hand, those who are against legalizing gambling are of the firm opinion that individual liberty needs to be restricted to maintain societal order. Therefore, in the present context, to balance the conflicting positions, the cardinal test lies in

² KPMG, India's Digital Future: Mass of Niches, KPMG (Aug. 2019), <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf>.

³ India's Online Gaming Ind. Eyes Rs. 11,900 Crore Revenue by FY23, THE ECONOMIC TIMES (Mar. 4, 2019, 04:48 PM) <https://economictimes.indiatimes.com/tech/internet/indias-online-gaming-ind-eyes-rs-11900-crore-revenue-by-fy23/articleshow/68255662.cms?from=mdr>.

⁴ Id.

⁵ Anirban Roy Choudhury, With 50-100% Growth Rate, Teen Patti, Rummy, Poker are Kings of Online Gaming in India, THE FINANCIAL EXPRESS (Sept. 30, 2018, 05:04 AM), <https://www.financialexpress.com/lifestyle/with-50-100-growth-rate-teen-patti-rummy-poker-are-kings-of-online-gaming-in-india/1331590/>.

understanding the very nature of such activities. In the case of poker, the pertinent issue to be determined is whether it lies within the purview of gambling i.e. dependent on chance, or does it qualify to be a legitimate sport i.e. involving a considerable level of skill.

A game of chance is one where the result is based upon luck and the result of the game is entirely uncertain and a person is unable to influence such result by his mental or physical skill. The person indulging in a game of chance wins or loses by sheer luck and skill has no role to play. On the other hand, the result of a game of skill is influenced by the expertise, knowledge, and training of the player.⁶ Ergo, it is pertinent to distinguish gambling as understood in the traditional sense from poker which has time and again been argued to be a legitimate sport involving a considerable level of skill.

It is pertinent to note that the preponderance of skill in poker is relatively high as it involves the study of statistics, probability, game theory, and psychology, which makes it a ‘game of skill’ akin to chess or bridge.⁷ For instance, in the case of horse racing, the Supreme Court observed that “the outcome in a horse race depends on several factors like form, fitness and inherent capacity of the animal, the ability of the jockey, the weight carried and the distance of the race, which are all objective facts capable of being assessed by persons placing the bets. Thus, unlike the lottery, the prediction of the result of the race is an outcome of knowledge, study, and observation.”⁸ Therefore, these

⁶ Law Commission of India, Legal Framework: Gambling and Sports Betting Including in Cricket in India, Report No. 276 (July 2018), <http://lawcommissionofindia.nic.in/reports/Report276.pdf>.

⁷ At War with Luck, THE ECONOMIST, (July 8, 2010), <http://www.economist.com/node/16507710>.

⁸ Dr. K R Lakshmanan v. State of Tamil Nadu and Anr., AIR 1996 SC 1153.

factors invoke a considerable effort and study by a player to truly play the game of poker.

Considerable research has been undertaken to identify a correlation between skill and outcome in poker. One such attempt was made by Cabot and Hannum⁹ who identified that in the case of computer conducted simulations of Texas Hold‘Em Poker, players who employed skilled strategies won 10 times more than those who employed unskilled strategies. Similarly, Dedonno and Detterman,¹⁰ in their experiment tipped off certain participant players with special instructions with regards to the strategy to be followed and thereafter dealt hundreds of hands of Texas Hold ‘Em Poker. It was observed that the participants who had received instructions on poker strategy performed much better than those who did not.

In another relevant study, the finishing position and the money made by individual players were analyzed during the WSOP tournaments to prove a direct correlation between positive results and skill. It was concluded that players who were assumed to be highly skilled won considerably more matches than those who were assumed to be lesser skilled. The higher skilled players won 54.9 percent of their matchups.¹¹ In fact, Leonard et al. developed the Poker Skills Measure (PSM) test, which is a 35 items paper and pencil task-based psychometric tool¹² to identify, assess and measure poker skills.

⁹Anthony Cabot and Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. Cooley L. Rev. 443 (2005).

¹⁰Michael Dedonno and Douglas K Detterman, *Poker is a Skill*, 12 G.L.R. 31 (2008).

¹¹Steven D Levitt and Thomas J Miles, *The Role of Skill versus Luck in Poker: Evidence from the World Series of Poker*, 15(1) J. Sport Econ. 31(2014).

¹²Carrie A Leonard, J Staples, and Robert J Williams, *Development and Validation of the Poker Skills Measure PSM*, 31(3) J. Gambl. Stud. 849 (2015).

Carrie A. Leonard and Robert J. Williams, have taken their research a step further to identify certain characteristics indicative of a skilled poker player and which contribute to the outcome of their game.¹³ Therefore, the study identifies a direct correlation between the level of skill attained by a poker player and his understanding of mathematical calculations and poker-specific statistical probabilities.¹⁴ A similar study was undertaken by the renowned computer scientist Roman Yampolskiy. He identified specific skills such as calculating the probability of a card, the skill to read players' behavior and body language, and strategically bluff and play for implied odds associated with good poker players and thereby identified poker to be a predominantly skill-based game.¹⁵

Another important aspect is social information processing which indicates the ability of the person to understand and interpret the behavior of other players.¹⁶ The research strongly supports the finding that the better the player, the better his social information processing, including an ability to make mental models of opponents and utilize the information in their gameplay.¹⁷ Therefore, even if poker is to be considered as a game with the influence of chance, it can be best described as a 'mixed' game with skill acting as the predominant factor.¹⁸ Thus research does support this premise since in reality as well though luck might seem to occasionally influence the result of a few individual hands or so, it is the ultimate skill that helps distinguish repeatedly successful poker players from the rest. As

¹³ Carrie A Leonard and Robert J Williams, Characteristics of Good Poker Players, 31 J. Gambl. Issues 45 (2015).

¹⁴ Id.

¹⁵ Roman Yampolskiy, Game Skill Measure for Mixed Games, 27 Proc. World Acad. Sci. Engineering & Tech. 308 (2007).

¹⁶ Id.

¹⁷ A McCormack and MD Griffiths, What Differentiates Professional Poker Players from Recreational Poker Players? A Qualitative Interview Study, 10 Int. J. Ment. Health Addiction 243 (2011).

¹⁸ Leonard and Williams, *supra* note 13.

the common practice is to play many hands, this strongly supports the conclusion that skill is far more dominant than luck, and that poker is predominantly a game of skill.

Poker in the Indian scenario

Since colonial times, the legal regulatory framework applied to real money games in India has treated gaming and gambling based on whether the game involves skill or chance. The Public Gambling Act, 1867 criminalized and penalized common gaming houses¹⁹ and gambling in public or at a public forum, except for games of skill.²⁰ The 1867 Act nowhere defines the term gambling, however, the Black's Law Dictionary defines it as "the act of risking something of value for a chance to win a prize".²¹ Therefore, the Public Gambling Act explicitly excludes games involving the skill and knowledge of the player from the purview of prohibited gaming or gambling.

Subsequently, the Constitution of India placed 'betting and gambling' under the State List (Entries 34 and 62), thereby entrusting States to devise specific laws on the subject matter. Several states adopted The Public Gambling Act 1867 with minor variations, while only a few states enacted their legislation.²² However, most gambling laws have consistently exempted games involving mere skill out of the purview of prohibited gambling. Essentially the term mere skill in a game connotes a preponderating degree of skill over chance and the result is substantially dependent on skill,²³ experience, training, knowledge, and attention of the

¹⁹ The Public Gambling Act 1867 § 1, ACT NO. 3 OF 1867, 1867 (India).

²⁰ Id. § 12.

²¹ Gambling, BLACK'S LAW DICTIONARY (8th ed. 2004).

²² Nishith Desai and Associates, The Curious Case of The Indian Gaming Laws, NISHITH DESAI AND ASSOCIATES (Oct. 2019), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Curious_Case_of_the_Indian_Gaming_Laws.pdf.

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

player.²⁴ Nevertheless, there can be no straitjacketed formula for the same and it is necessarily a question of facts and circumstances.²⁵

In the past, the Indian judiciary has recognized card games such as rummy and bridge as games of skill. The Hon'ble Apex Court concluded that the game of rummy just like the game of bridge required a considerable level of skill to memorize the fall of cards, holding and discarding them.²⁶ India witnessed the exponential rise of poker players as a trickledown effect with many converting from teenpatti and flush to the more complex game of poker.²⁷ In 2000, India had its first legalized avenue to play poker at the casinos in Goa, which not only introduced the game as a part of the casino setup but also hosted professional poker tournaments to attract avid poker players from all over the world.²⁸ However, since casinos are scarcely located and limited to only a few states, the internet boom and the advent of smartphones and cheap internet revolutionized poker in India. Today, poker has discovered its true potential in India by appearing on the online gaming market through various online gaming portals and applications.

The present-day gaming and gambling legislations were enacted before the internet boom and therefore failed to address the issue of the proliferation of online gaming and gambling. Most states have failed to update their legislation following technological advancements.

²⁴ K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226.

²⁵ Manoranjithan Manamyil Mandram v. State of Tamil Nadu, AIR 2005 Mad 261.

²⁶ State of Andhra Pradesh v. K Satyanarayana and Ors, AIR 1968 SC 825.

²⁷ Tara Kilachand, Big Stakes, LIVEMINT (Apr. 2, 2022, 9:38 PM), <http://www.livemint.com/2008/10/23232833/Big-Stakes.html>.

²⁸ Arindam Mukherjee, Grinders in the ATM, OPEN MAGAZINE (Apr. 3, 2022, 7:15 PM), <http://www.openthemagazine.com/article/living/the-grinders-and-the-atms>.

Subsequently, the states of Sikkim²⁹ and Nagaland³⁰ enacted the first set of specific legislation to regulate online gaming and follow a liberal policy to promote gaming and even gambling for economic purposes such as tourism. In 1979, West Bengal amended the West Bengal Gambling and Prize Competition Act 1957 to exempt card games like poker, bridge, and rummy from the ambit of gambling.³¹ On the other hand, states such as Telangana³², Orissa³³ and Karnataka³⁴ have taken the opposite approach and have put in place restrictive laws.

The state of Telangana introduced the Telangana State Gaming (Amendment) Ordinance, 2017, and subsequently the Telangana Gaming (Amendment) Act, 2017, through which it outlawed gambling and betting on all games involving an element of chance, irrespective of whether the game qualifies as one of mere skill. The amendment extends to online gaming and gambling as well. Karnataka through the Karnataka Police Act 1963 has outlawed all such games which involve any element of a chance despite the dominance of skill.

The legal lacuna seems furthermore glaring in cases where citizens participate on foreign-owned poker websites. Since India has no specific laws which directly regulate such activities, a motley of foreign exchange laws, anti-money laundering laws, and internet intermediary regulations

²⁹ Sikkim Online Gaming (Regulation) Act 2008, No. 23, Acts of Sikkim State Legislature, 2008 (India); The Sikkim Online Gaming (Regulation) Rules 2009, No. 7, Acts of Sikkim State Legislature, 2009 (India).

³⁰ Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act 2015; The Nagaland Prohibition of Gaming and Promotion and Regulation of Online Games of Skill Rules 2016.

³¹ West Bengal Gambling and Prize Competition Act 1957, No. 32, Acts of West Bengal State Legislature, 1957 (India).

³² The Telangana Gaming (Amendment) Act 2017, No. 29, Acts of Telangana State Legislature, 2017 (India).

³³ The Orissa (Prevention of) Gambling Act 1955, No. 17, Acts of Orissa State Legislature, 1955 (India).

³⁴ Karnataka Police Act 1963, No. 4, Acts of Karnataka State Legislature, 1955 (India).

under the Information Technology Act 2000 are applied which further complicate the current scenario.

The ambiguities in the judicial approach

The Apex Court has granted several games protection on account of a preponderating degree of skill involved in such games. Therefore, it has relied on identifying the ‘skill’ involved in a game and its effective dominance over chance.³⁵ However, the Supreme Court in *M.J. Sivani v. State of Karnataka* recognized the limitation of ‘skill’ as an absolute test since no game could completely be based on skill.³⁶ Thus, a game of skill signified also a degree of chance, however, a game of mere skill would signify a dominance or preponderance of skill over chance. Nevertheless, the application of the mere skills test by the Indian Judiciary has brought about further ambiguity and perplexity in determining the legality of poker per se.

In 2019, the Calcutta High Court, Jalpaiguri Bench in the matter of *Indian Poker Association & Anr. v. The State of West Bengal & Ors.*³⁷ directed the police not to disturb a poker event that was organized by the Indian Poker Association in a rented hotel room. The court further observed that poker is a game of skill and ipso facto not prohibited under the West Bengal Gambling and Prize Competitions Act, 1957 and therefore, a legal activity. On the other hand, in the case of *Indian Poker Association v. State of Karnataka*,³⁸ the Karnataka High Court did not determine whether poker was a game of skill but did affirm that where poker is played as a game of

³⁵ *K.R. Lakshmanan v. State of Tamil Nadu*, (1996) 2 SCC 226.

³⁶ *M.J. Sivani v. State of Karnataka*, (1995) 6 SCC 289.

³⁷ *Indian Poker Association and Anr v. The State of West Bengal and Ors.*, 2019 SCC OnLine Cal 3435.

³⁸ *Indian Poker Association v. State of Karnataka*, 2013 SCC Online Kar 8536.

skill, in those cases it would not warrant for any police interference or a license to play the game.

The High Court of Gujarat in *Dominance Games Pvt. Ltd. v. State of Gujarat and Ors.*³⁹ observed that since Texas Hold ‘Em Poker is a variation of a three-card game which is a game of chance and therefore held it as prohibited. The Gujarat High Court seemed to have generalized its opinion about Texas Hold ‘Em Poker to all forms of poker without considering other skill-based aspects of the game. The other problematic aspect of the decision is that the Court held that games of skill played for stakes would also amount to gambling thereby completely denuding the differential treatment meted to games of skill. Presently, an appeal is pending before the Division Bench of the Gujarat High Court. Similarly, the Bombay High Court in *Nasir Salim Patel v. State of Maharashtra and Ors.*⁴⁰ generalized poker as a game of cards and followed the same reasoning as the Gujarat High Court to hold poker as a game of chance and therefore prohibited.

The Delhi District Court held a similar view in its judgment in the case of *M/s Gaussian Networks Pvt. Ltd. v. Monica Lakhanpal and the State of NCT* and observed that poker in the virtual space would be susceptible to a greater degree of manipulation, collusion, and rigging and therefore illegal and prohibited.⁴¹ However, the petitioner subsequently withdrew the petition, and observations of the court no longer hold good in law. Recently, the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 provided for a blanket ban on all online gaming in the state, without providing any distinction between games of mere skill and those of mere

³⁹ *Dominance Games Pvt. Ltd. v. State of Gujarat and Ors.*, 2017 SCC OnLine Guj 1838.

⁴⁰ *Nasir Salim Patel v. State of Maharashtra and Ors.*, 2018 SCC OnLine Bom 6803.

⁴¹ *M/s Gaussian Networks Pvt. Ltd. v. Monica Lakhanpal and State of NCT*, Suit No 32/2012, Delhi District Court.

chance. In *Junglee Games India Pvt. Ltd. and Anr. v. The State of Tamil Nadu and Ors.*, the Madras High Court struck down this Amendment in totality and categorically observed that rummy and poker were games involving significant skill.⁴² It further recognized virtual modes of playing such games as the equivalent of playing them in their physical formats. Therefore, the associated skill of such games is not lost merely on account of the format in which it is being played. The Court also recognized the right to exercise such skill as a protected business activity of the citizens of India under Article 19(1)(g) of the Constitution of India. Therefore, only reasonable restrictions would be permissible and no blanket prohibition could be made in exercising such skill. The Court also observed that such a disproportionate law would effectively erase the distinction between games of skill and those chances and therefore is contrary to the previous judgments of the Hon'ble Apex Court.

Legislative impetus

Despite the existing legal uncertainty surrounding the issue of poker as a game of skill or a mere game of chance, the fact that the poker industry, especially online poker and physical poker tournaments is flourishing, is undeniable. Taking cognizance of the rising trend in gambling and betting and the obsolete nature of the gambling legislation, the Law Commission of India in its report titled 'Obsolete Laws: Warranting Immediate Repeal 2014' observed that the Public Gambling Act 1867 was obsolete and should be repealed.

In 2018, the Law Commission of India under the mandate of the Government of India developed its Report number 276 titled 'Legal Framework: Gambling and Sports Betting including in Cricket in India'

⁴² *Junglee Games India Pvt. Ltd. and Anr. v. The State of Tamil Nadu and Ors.*, 2021 SCC OnLine Mad 2762.

wherein it reviewed the existing gaming laws and recommended the possibility of legalizing sports betting under a licensing regime. The Report also illustrated the benefits of legalization and government regulation such as a source of revenue, employment, and a reduction in incidents of fraud and money laundering. Therefore, the Report structured detailed recommendations to put in place an effective regulatory framework. Specifically, with regards to the game of skill, the Report recommended that since horse racing was exempted on account of it being a game of skill, similar consideration could be extended to other games of skill.⁴³ Therefore, to attain legislative uniformity on the subject matter, the Report suggested a model law by the Parliament which could then be adopted by the states. Furthermore, it proposed the constitution of a supervising authority to provide licenses to gambling operators and regulate such other matters as may be stipulated by the legislation.⁴⁴

Regulatory frameworks across jurisdictions

Arguendo, even if one is to consider poker as a mixed game of skill and chance, the fact that poker is widely played in India, especially through online forums, cannot be denied. This reality is embedded in great apprehension of social risk which affects not only the individual but also social welfare and public order at large. Though, India might have been successful in limiting the physical presence of gaming rooms, however, it has failed to address the apparent rise of underground poker rooms and online poker sites. This problem is further bolstered when poker sites transgress international and domestic borders and are accessed by residents of states where the law prohibits it. Across the world, there might

⁴³ Law Commission of India, *supra* note 6.

⁴⁴ *Id.*

be a lack of consensus on the legality of poker, nevertheless, most regions have tweaked their legal framework to align themselves and efficiently regulate poker through unique and diverse approaches. Therefore, it is pertinent to understand some of the regulatory approaches undertaken across different jurisdictions worldwide.

Gambling monopolies

A monopolistic approach to regulating gambling has persisted across the European states as a preferred model of regulating poker. For instance, Sweden has recognized Svenska Spel as the only state-authorized operator to provide online poker, sports betting, and lottery in Sweden and therefore granting it an absolute monopoly in this regard. The incentive for the state may appear to be mainly financial, as is in the case for most monopolies, however, in this particular regulatory model the justification primarily rests in maintaining social welfare and public order.⁴⁵ The state acknowledges the human desire and tendency to gamble and therefore works towards monopolizing the gambling space, in effect limiting the risk of exploitation, criminal activity, and fraud.⁴⁶ However, this practice has often come in conflict with the underlying fundamental principles of freedom of establishment and provider services⁴⁷ resulting in litigation before the European Court of Justice (ECJ).

Licensing models

Licensing has been a viable and preferable option in many countries, especially when it comes to online poker. It has been offered mainly

⁴⁵ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union: Final Report, EUROPEAN COMMISSION (Jun. 14, 2006) <<http://www.e-collection.isdc.ch/zoom/4362/view?page=1&p=separate&tool=info>.

⁴⁶ Jean-Patrick Villeneuve, Gambling Regulation and Risk, 1(4) EUR. J. RISK REGUL. 415 (2010).

⁴⁷ Treaty on the Functioning of the European Union, Oct. 26, 2012 O.J. (C 326/47) art. 49, art. 56, Oct 26, 1957.

through two formats: restricted licensing and open licensing. In the case of restricted licensing, the number of licenses issued is limited in number, as is the practice in Belgium, Greece, and the Czech Republic. On the other hand, in the case of open licensing, there can be any number of licensees, provided that the applicant meets certain specified criteria, as is the practice in Malta.

To analyze the viability of the licensing model, the United Kingdom provides a comprehensive example through its legislative policy which utilizes licensing as a mode to regulate poker as a form of lawful gambling. In the 1960s, Britain lifted the ban on commercial gambling and introduced a regulatory mechanism under the Betting and Gaming Act 1960 and the Betting Gaming and Lotteries Act 1963 which eventually led to the boom of the gambling industry.⁴⁸ However, the law failed in fulfilling its most cardinal function: public order, effective check on criminal activities, and exploitation of the vulnerable by the industry. This ultimately led to the establishment of the Gaming Board, a specific regulatory body established under the Gaming Act 1968, which successfully exercised control over the gambling industry in the United Kingdom.

However, with the accessibility to the internet and the overall societal opinion about the gaming industry, it was time that the legal regime in the United Kingdom should also be reformed and therefore the Gaming Act 2005 was put into place. The Act created a free and open market for the gaming industry and at the same time kept a vigilant check on criminal

⁴⁸ M CLAPSON, *A BIT OF A FLUTTER: POPULAR GAMBLING AND ENGLISH SOCIETY* (Manchester University Press 1992); C CHINN, *BETTER BETTING WITH A DECENT FULLER: BOOKMAKERS, BETTING AND THE BRITISH WORKING CLASSES* (Harvester Wheatsheaf, 1991).

activities.⁴⁹ Under this framework, the licensing procedure not only took into consideration the financial capacity, software standards, and competence of the license applicant but also the applicant's integrity and track record. At the same time, the Gambling Commission created under this legislation was mandated to monitor activities of all poker websites and was granted the authority to penalize and even cancel licenses in case of breach of the terms and conditions.⁵⁰ Furthermore, the United Kingdom profited from this framework as it imposed a 15% tax on gross profits of the licensee which in turn is borne by the players thereby creating a possible deterrent effect.

Restrictive models

Interestingly, countries have taken recourse to regulatory measures which work on effectively restricting or limiting market access and market presence. Countries such as Portugal, Spain, France, Netherlands, and Italy took steps to enforce ring-fencing which in effect restricted the geographical presence of poker players to only domestically owned and operated websites. This approach puts in place a protectionist prohibitive system whereby only domestically licensed operators are permitted and foreign operators are thereby prohibited.⁵¹

Similarly, most states in the United States have moved beyond the realms of a conservative approach toward gaming and gambling and have legalized casino-style games, sports betting, and lotteries. Much of the credit goes to the diverse nature of the gaming industry and the increased revenue it continues to generate, for instance by 2018 the gaming and

⁴⁹ Department for Culture, Media and Sport, Five Year Plan: Living Life to the Full (Mar 2005) 46.

⁵⁰ Id.

⁵¹ Dr. Salvatore Casabona, The EU's Online Gambling Regulatory Approach and the Crisis of Legal Modernity (Working Paper No. 19, Jan. 2014), <http://aei.pitt.edu/47671/1/WP19-Online-Gambling-Regulations.pdf>.

gambling industry contributed 79.42 Billion US dollars as revenue.⁵² Initially, it was only the states of Nevada and New Jersey that permitted gambling activities but over the years most states have legalized various forms of gambling including poker rooms. However, the issue of online gambling remains unaddressed in most parts of the United States and one reason for this is that gambling is the subject matter of federal, state as well as tribal laws. The federal law primarily governs interstate gambling, international gambling, and relations between the United States and the Native Americans. On the other hand, the states regulate the forms of gambling permissible within their jurisdiction, the geographical area for gambling houses, and the eligibility criteria for gamblers.⁵³

The federal regulation consists of three legislations namely the Wire Act, 1961, Unlawful Internet Gambling Enforcement Act, 2006 (UIGEA), and the Indian Gaming Regulatory Act, 1988 (IGRA). The Wire Act prohibits anyone in the business of betting or wagering from knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.⁵⁴ As of this day, the Wire Act applies to all types of gambling and is not limited to sports betting thereby including poker. Subsequently, in 2019, the Department of Justice clarified that the Wire Act would apply to online gambling as well.⁵⁵

The UIGEA specifically tackles issues pertaining to internet gambling including the processing of financial transactions, thereby effectively

⁵² S Lock, U.S. Gambling Market: Total Revenue 2004-2018, STATISTA (Sep. 2, 2019), <https://www.statista.com/statistics/271583/casino-gaming-market-in-the-us/>.

⁵³ Legal Information Institute, Gambling Law: An Overview, CORNELL LAW SCHOOL (Apr. 22, 2022, 1:27 PM), <https://www.law.cornell.edu/wex/gambling>.

⁵⁴ The Wire Act, 18 U.S.C. §1084(A) (1961).

⁵⁵ Martin Harris, Inside Gaming: New DOJ Opinion Changes Stance on Online Gambling, POKER NEWS (Jan. 18, 2019), <https://www.pokernews.com/news/2019/01/inside-gaming-new-doj-opinion-changes-stance-online-gambling-33149.htm>.

restricting offshore gambling operators. It created a federal crime to be even aware of the receipt by a person in the business of betting or wagering of monies in connection with the participation of another person in unlawful internet gambling.⁵⁶ However, the UIGEA exempts all fantasy sports along with Intra-State internet gambling i.e., initiated and received within a single state, expressly authorised by the laws of the state, and does not violate any other federal gambling laws.⁵⁷

The states also have different regulations concerning legal gambling ages, as some states require the same minimum age for all types of gambling, while others rely on the activity. State laws concerning internet gambling also vary widely. Generally, however, gambling is prohibited unless the state passes legislation expressly permitting such conduct. Only five states i.e Delaware, New Jersey, Pennsylvania, Nevada, and West Virginia have expressly permitted licensing of internet gambling.⁵⁸

On the other hand, Australia has adopted a liberal prohibitive system that provides restricted domestic market access.⁵⁹ Under the federal legislation i.e. The Interactive Gambling Act 2001, an operator can obtain an internet gaming license provided that the services are offered only to persons residing outside Australia and in such countries where internet gaming is not prohibited.

Ultimately a well-structured regulatory model provides for better protection and security with several current users switching from unauthorized portals to legitimate and regulated online poker sites. The legalization and regulation of online poker would also result in identifying

⁵⁶ Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5363 (2006).

⁵⁷ Id. §5362 (10)(B).

⁵⁸ Behnam Dayanim, Reade Jacob and Kathryn Harrison, Overview of US Federal Gaming Laws, Gambling L. Rev. 31 (2021).

⁵⁹ Casabona, supra note 51.

criminal and fraudulent activities, underage online gambling, and other existing risks as are prevalent under the present prohibitionist policy.⁶⁰

Risk mitigation: a facet of regulation

On account of the recent development of online poker, it is pertinent that states develop legal frameworks incorporating technological expertise and requirements to efficiently regulate such poker sites and at the same time effectively apply the law for the benefit and the security of the public at large.

Under age gambling and identity verification

It is undebatable that the anonymity available at online poker sites creates an inherent risk of an increase in minors engaging in gambling. However, information technology can help address this issue by verifying the identity and the age of the player to curb underage gambling. Exemplary initiatives have been taken up by several jurisdictions that have resorted to technological measures to regulate underage gambling. For instance, in the United Kingdom, poker websites must establish a procedure for verifying the age of the players and to display a disclaimer stating that underage gambling is prohibited.⁶¹

Furthermore, it is recommended that a two-stage verification procedure be put in place and the staff be given formal training in the same. The first step could involve the user confirming their age along with necessary identity and age proof followed by a second verification at the stage of

⁶⁰ Malcolm K. Sparrow, Can Internet Gambling Be Effectively Regulated? Managing the Risks, SCHOLARS AT HARVARD UNIVERSITY (Dec. 2, 2009), https://scholar.harvard.edu/files/msparrow/files/can_internet_gambling_be_effectively_regulated-managing_the_risks-12-02-2009.pdf.

⁶¹ Conditions and Codes of Practice Applicable to Remote Casino Licenses and Remote Casino Ancillary Licenses 2008.

withdrawal of winnings. This data can be used to verify the identity and the age of the player through an age verification service or data service provider which has developed a database consisting of different sources of information.⁶² For instance, the Gambling Control Commission of the Isle of Man uses Experian, a large data service provider to verify the age of the players.⁶³

Security

Since online poker involves a substantial amount of money, it, in turn, poses a real threat on account of possible fraudulent activities, security concerns including data protection, hacking of accounts, and unknown losses due to collusion in games or by unknowingly engaging with poker bots (computerized programs to play poker online).⁶⁴ Absolute Poker and Ultimate Bet have been examples where the owners or management of the website used their positions to cheat the players by rigging the game.⁶⁵

Several nations require such operators to maintain financial reserves, bonds, or investments of the value of the money and winning amounts held with the operator on behalf of the players at all times.⁶⁶ At the same time, complaint forums and setup independent authorities can further act as a check and redressal mechanism. The authorities can also update lists on recognized, licensed sites, their compliances, and status including

⁶² Sparrow, *supra* note 60.

⁶³ Can Internet Gambling Be Effectively Regulated to Protect Consumers and the Payments System? Committee on Financial Services, 110 Cong. 1st Session 130 (June 8, 2007) (Testimony of Mary Williams in U.S. House of Representatives).

⁶⁴ Steven Titch, Internet Gambling: Keys to a Successful Regulatory Climate, REASON FOUNDATION (Nov. 2012), https://reason.org/wp-content/uploads/2012/11/internet_gambling_regulation.pdf.

⁶⁵ Russell Goldman, Online Poker Players Expose Alleged Fraud, ABC NEWS (Oct. 19, 2007), <http://abcnews.go.com/print?id=3752500>; Mike Bruner, Poker Site Cheating Plot a High-stakes Whodunit, NBC NEWS (Sep. 18, 2008, 6:39 PM), http://www.nbcnews.com/id/26563848/ns/us_news-crime_and_courts/t/poker-site-cheating-plot-high-stakes-whodunit/#.XrpObhMzZPM.

⁶⁶ Williams, *supra* note 63.

permissibility to advertise or not.⁶⁷ It is pertinent for regulatory authorities to time and again, independently test and verify the integrity of gaming software used by such sites.

To keep the game fair and to secure players against other players including poker bots, the operators may be required to maintain a hand history database and to mandatorily apply approved poker bot detection software.⁶⁸ This database can also be pooled to create a common database that can be shared with all licensed and regulated sites to weed out and bar known cheaters at the point of registration. An in-depth background check, financial and criminal track record along with integrity and societal credibility of an individual is an essential step for regulators to verify and approve license applicants.

Restricting access

To prevent violations of jurisdictional restrictions, regulators need to ensure that websites are collecting information with regards to the geographical location of the user and restricting players accessing poker sites from excluded jurisdictions. At the point of registration, poker site operators require users to provide their details including addresses. However, this would require further cross-checking against reliable, regulator-approved databases. To further facilitate jurisdictional prohibitions, several state-of-the-art technologies can be utilized. For instance, geolocation techniques identify the physical location of the player using the IP address and automatically deny access to players who attempt to log in from an excluded location.⁶⁹ Operators would be

⁶⁷ Jamie Wiebe and Rachel A Volberg, Problem Gambling Prevalence Research: A Critical Overview, *CANADIAN GAMING* (Dec. 2007), http://canadiangaming.ca/wp-content/uploads/cga_research_and_studies/How_Prevalent_is_Problem_Gambling.pdf.

⁶⁸ Sparrow, *supra* note 60, at 32.

⁶⁹ *Id.* at 47.

mandated to utilize relevant technologies such as firewalls, database protection software, and high-quality servers to secure their online portals. At the same time, internal controls are to be put in place such as extensive training of employees on data protection technologies, relevant policies, norms, and ethics. Furthermore, to enforce compliance with privacy and data security requirements, regulators may undertake regular audits and in case of any breach, the law should provide for adequate penalties against the defaulting operator.

Conclusion

The issue of including poker under the general umbrella of gambling and betting has created a practical hindrance in streamlining its regulation in India. Unlike other industries, the dilemma posed by poker is on account of a lack of consensus on the nature of the game. The approach towards addressing it is still reactionary and the decision of its future in India has been pivoted on social, moral, and political opinions. Though the judiciary has been considerably proactive, it too has failed to take a joint front on the issue. This is mainly due to the divergence and in the case of some states the lack of effective legislation that lays down a definitive policy for the industry and the people to follow. Therefore, the approach especially in courts of different states has been irregular, inconclusive, and varied depending from case to case.

Therefore, building on the experiences of other nations, the time is apt for India to put in place a holistic legal framework to effectively limit and efficiently regulate poker gaming in India. It is further pressing considering the drastic increase in online poker and gaming and the alarming lacuna in the present legislation in this regard. The experience of various countries is valuable at this junction to streamline a legal framework for poker, especially online poker, which offers a balanced

environment where the field is regulated and at the same time conducive enough for sites to operate within. In furtherance of the recommendations by the Law Commission of India⁷⁰ and considering the existing regulatory frameworks across jurisdictions, it would be advisable for it to encompass a licensing procedure thereby enabling only licensed operators to provide poker gaming services in India.

To bring in greater transparency in the present scenario in India, it would be advisable for all transactions between players and operators to be cashless and linked to their aadhar/pan card. This would further facilitate proper taxation of such income under the relevant tax laws. The law should also clarify the forms of permissible and prohibited players to restrict minors, persons dependent on government subsidies, and persons whose income falls below the taxable limit. Furthermore, it should set out permissible stakes at different levels of the game as per the income group to which the player belongs. It should also incentivize and encourage proper gaming, and keep a vigilant check on problem gambling.

Specialized regulatory agencies and supervisory bodies should be put in place which can keep a check on collusion in gaming, rigging, and fraudulent activities with the power to take cognizance of such offenses and to penalize for the same. Stringent action should be taken under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 against intermediaries engaging in unlawful advertisement or transmitting content encouraging gambling. Regular audits and scrutiny of licensed operators should be undertaken specifically to ensure that operators are complying with license conditions and employing prescribed relevant technologies to ensure data security,

⁷⁰ Law Commission of India, *supra* note 6.

privacy security, age, and identity verification. The advantages of a structured legal regulatory framework for poker not only check the haphazard growth of online poker but also creates an investment avenue. Therefore, in the present scenario where poker has a significant presence and several people are preferring their right to engage with it as a game of skill, prohibitive practices would appear unreasonable. The pragmatic road ahead is putting in place a workable regulatory legal framework based on the recommendations of the Report by the Law Commission of India and the best practices adopted by the poker gaming industry globally.