

## Sports Betting: Surveying The Legality Issues And Current Developments

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### Abstract

The unpredictability of the results of sporting events creates a recurring natural thought in the human mind, as to “who will win or who will lose”. Such a question is seemingly not easy to answer before the result is actually out. However, the betters around the world would like to make winning or losing predictions, and in that process they either earn or lose money involved in the betting exercise. Betting here may be defined as- activity of predicting result and placing a wager on the outcome. The same is considered a form of gambling. The sports betting are happening around the world involving various sporting events which include offline as well as online. The legality question comes into play when the sports betting (betters) start influencing the players of a given sport in order to make the result predictable, and thus to win the wager amount. The situation thus raises several questions on sports ethics. Here, the larger question of legality of sports betting assumes critical significance. How far the betting exercise is justified under the law? Can it be eliminated? Should it be legalized? Can the same is subject to legal regulation? Such pressing questions are all dogging the lawmakers and judiciaries around the world.

In the light of the above, the present paper will discuss and analyse the sports betting by surveying the legal developments in few prominent jurisdictions like US, UK, Australia and India, etc. Based on its analysis, the paper will make an attempt to find out the rationalizing factors behind legalization of sports betting.

**Keywords:** Sport, Betting, Legal Issue, US, UK, Australia, India

### 1. Introduction

In the world of sports and games, the results are more often unpredictable; unless and until there is a known big fish which invariably devours the small one. The unpredictability of the results of sporting events creates a recurring natural thought in the human mind, as to “who will win or who will lose”. Such a question is seemingly not easy to answer before the result is actually out. However, the betters around the world would like to make winning or losing predictions, and in that process they either earn or lose money involved in the betting exercise. Betting here may be defined as- activity of predicting result and placing a wager on the outcome. The same is considered a form of gambling. The sports betting are happening around the world involving various sporting events which include offline as well as online. The legality question comes into play when the sports betting (betters) start influencing the players of a given sport in order to make the result predictable, and thus to win the wager amount. The situation thus raises several questions on sports ethics. Here, the larger question of legality of sports betting assumes critical significance. How far the betting exercise is justified under the law? Can it be eliminated? Should it be legalized? Can the same is subject to legal regulation? Such pressing questions are all dogging the lawmakers and judiciaries around the world.

In the light of the above, the present paper will discuss and analyse the sports betting by surveying the legal developments in few prominent jurisdictions like US, UK, Australia and India, etc. Based on its analysis, the paper will make an attempt to find out the rationalizing factors behind legalization of sports betting.

### 2. USA

The United States of America in 1992 legislated the Professional Amateur Sports Protection Act (Paspas) that makes it illegal to bet on professional and amateur athletics<sup>17</sup>. This was a federal legislation that applied to the whole of the United States of America. One of the biggest proponents of this piece of legislation was Senator Bill Bradley<sup>18</sup>. He was concerned by the fact that gambling would injure the integrity of sport by causing fans to question whether a missed shot or a fumble was fixed<sup>19</sup>. Bradley was not the lone advocate to espouse the cause of Paspas; the major sporting bodies like the National Football League, National Basketball Association, Major

League Baseball and the National Collegiate Athletic Association supported him. Pasma faced stiff opposition from Senator Chuck Grassley and the Department of Justice<sup>20</sup>. Both of them felt that Pasma would be a substantial intrusion into the State rights. It is quite ironic that though the Bill was passed in 1992, it left out four major States, States of Nevada, Oregon, Montana and Delaware.

“The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people.”<sup>21</sup>

A case that stands out in the bid to strike down Pasma landscape in America, is Interactive Media Entertainment and Gaming Assn. Inc. v. Holder<sup>22</sup> where the New Jersey horse racing industry filed a suit against the Attorney General Eric Holder stating Pasma is unconstitutional and violated the First, Fifth, Tenth, Eleventh and Fourteenth Amendments to the Constitution of the country. The bone of contention of the plaintiffs was that “raising the revenue by means of State laws authorizing sports betting is right reserved to the individual States”<sup>23</sup>, therefore it was argued that Pasma violates the Tenth Amendment, by unconstitutionally arrogating to the United States of America such express and implied reserved powers of the individual States to regulate matters affecting its citizens including missing of revenue<sup>24</sup>. While dismissing the suit, the Court held that, any violation of the Tenth Amendment is for the State to challenge, but since New Jersey was not a part of the law suit, there was no express observation insofar as the violation is concerned. Therefore an express prohibition on betting in sport is akin to passing a law that puts an end to prohibition.

In November 2011, the State of New Jersey advocated for a path-breaking legislation that would allow sports gambling of all kinds excepting sporting events that take place in New Jersey<sup>25</sup>. The impact of this legislation on the sports and betting fraternity is immense; it potentially opens up betting on all kinds of sports, for instance one can place a bet at horse tracks throughout New Jersey and casinos in Atlantic city. This legislation has not gone down too well with the national sporting bodies, the National Collegiate Athletic Association, the National Football League and the National Basketball Association who have chosen to challenge in the Federal Court seeking to injunct New Jersey from implementing sport gambling. By ruling on this issue, it would give an opportunity to the Federal Court to give its verdict on the constitutional validity of Pasma. The Federal Court<sup>26</sup> through Michael Shipp, J. found no infirmity as far as Pasma is concerned and restrained the State of New Jersey from enforcing the legislation allowing gambling in sports. The State however chose to test its resolve in the Supreme Court, which is likely to deliver its verdict by 2015-2016. It may be pertinent to note that, Kansas, West Virginia, Georgia and Virginia filed amicus briefs in support of the legislation passed by the State of New Jersey<sup>27</sup>.

In the case of Pasma, §3702 of US Code<sup>28</sup> prohibits the States from making legislation regarding sports betting. It will be interesting to see how the Supreme Court in the United States of America deliberates on the legislation passed by the State of New Jersey. It has to carry the sentiments of the Tenth Amendment with itself, because several courts<sup>29</sup> have interpreted that “the power of the Federal Government is subject to limits that may in a given instance, reserve power to the “States”.

The decision of the Supreme Court of the United States of America with regard to the constitutional validity of Pasma will be tested on three fundamental issues: (a) whether it is an infringement upon State liberties; (b) why is that four States alone in the United States of America have been exempted from Pasma, and (c) whether the legislative piece is in fact effective in curbing gambling in sport.

The United States Supreme Court need look no further than to the Super Bowl, an annual championship of the National Football League, to test the impact of Pasma. Here football fans across the United States of America place high stakes or wager on the Super Bowl annual events. Betting on the Super Bowl is an all American pastime. The question that has time and again been raised is whether Pasma has been able to curb the betting in sport. With modern day technological advancement Pasma is an outdated law and much has changed since 1992. In fact in America every State has casino, where one can find betting to be common amongst the American public and well within the comfort zone of its citizens; courtesy the Internet. From this standpoint, the lesson

learnt is Paspas has been ineffective and has failed to adapt and merge with changing times.

### 3. UK

It was the year of 2005 that the British Parliament enacted a piece of legislation that changed the betting landscape in the Great Britain. The Gambling Act of 2005<sup>30</sup>, came into force with the specific objective to prevent gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime, ensuring that gambling is conducted in a fair and open way and protecting children and other vulnerable persons from being exploited by gambling. Therefore the objectives are clear, the mandate is to ensure gambling exist within restrictive boundaries. This is a path-breaking legislation that allows its citizens to place bets in sport, gamble in a legal manner, subject to safeguards that come with the act. It further defines “gambling”<sup>31</sup> “as an act that can constitute gaming, betting and participating in a lottery.”

The advent of the technology in the modern day ensures that the Act extended the scope of remote communications<sup>32</sup> by which a person can engage in the act constituting gambling through the internet, telephone, television, radio or any other kind of electronic communication.

The Act defines “a game of chance”<sup>33</sup>: as a game played that involves both an element of chance and an element of skill and such a game that involves an element of chance that can be eliminated by superlative skill and a game that is presented as involving an element of chance but does not include a sport. It is logical prudence that sport does not come within the definition of the words “game of chance”.

The Act defines “betting”: as accepting or taking bet on the outcome of a race, competition or other event or process, the likelihood of anything occurring or not occurring or whether anything is or is not true”<sup>34</sup>. The section further goes to quantify that one need not bet on an event that is happening, but you can wage a bet on events that have already occurred or has been completed and one party to the transaction already knows the outcome.

Though the legislation advocates for betting of all forms in sports with legal boundaries, it regulates the industry through what is known as the Gambling Commission<sup>35</sup>. Its role is to regulate commercial gambling within the territory of the Great Britain in partnership with the local authorities and the national sporting bodies. The England and Wales Cricket Board, the Football Association, England and Wales, the Horse Racing Regulatory Authority, work in tandem with the Gambling Commission to curb betting by players within the sport, through their own internal bye-laws. The Gambling Commission continues to look for better and innovative ways to improve betting in sport. There have been calls from various sporting bodies asking the Gambling Commission to regulate the types of bets that can be made in a sporting event, because as things stand the Gambling Act, 2005 does not prescribe a specific type of bet that a punter<sup>36</sup> can make in sport nor does it provide the punter with reasonable restrictions.

A punter, therefore, can place bets at half time in a football match as well as full time in the same game, he can bet as to who would score the first goal, the first person to get booked for an offence, the number of corners in a football game, number of aces in a tennis match or double faults during the “live in-play” of the game. This concept of “live in-play” allows the punter to alter his bets in sync with the changing contours of the game.

Sporting bodies have suggested to the Gambling Commission that allowing to place such bets increase the opportunity for corruption within the sport. The Commission has however chosen to remain silent and has called for strong evidence-based justification system to place such restrictions on trade practices<sup>37</sup>. The Commission has based its reasoning on robust foundational principles; sports shall have no control over the evolution of global gambling, increasing availability of gambling most notably online is not something that can be restricted even in the remotest possible manner and licensed gambling operators are financially sensitive, so if they feel that their position is being vulnerable on a particular bet they may withdraw that bet altogether.

The Act of 2005, has laid strong and robust foundation to legalize an act that many mature economies and developing economies fight shy off. Since legalizing gambling and regulating it via the Gambling Commission, the gambling industry has now become worth nearly £2 billion. It will not be an exaggeration to say that English experiment with sports betting legislation has been by and large successful.

### 4. AUSTRALIA

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Australia is one of the earliest proponents of “anti-betting” legislation in sport<sup>38</sup>. Their legislation allows betting in sport only prior to the start of a sporting event through an overseas operator. It makes it an offence to offer or advertise “real money” online interactive gambling services such as online poker and casino to Australian residents. The Act however does not prohibit an overseas operator from providing an opportunity to an Australian citizen to engage in an online gaming activity other than sport. Sports betting through licensed operators is legal, provided that the betting occurs prior to the start of the event. The Interactive Gambling Act as it stood in 2001 banned all types of “live in-play” betting which would be deemed interactive. This provision is in stark contrast to the legislation passed by England, where “live in-play” betting is permitted.

For many years, there has been insistent calls from betting agencies to legalize “live in-play betting” and it appears the legislative body is willing to relent to their request. In fact even till day Australian citizens can engage in “live in-play” betting via an offshore operator as the liability lies if prosecuted only with the operator and not the punter. It is very interesting to study the way the Australian Legislature and the framers of the Act have evolved since its inception. Evolution is the hallmark of a great legal system. In the Interim Report Review of the impact of the Interactive Gambling Act of 2001,<sup>39</sup> the Committee has recommended that the Act lift the ban existing on online gaming websites, the reason being that the ban on website has not simply served its purpose. In fact the estimated loss to Australian citizens by engaging in the activity of online gaming is at AUS 1 billion Dollar

The Committee has recommended that online gaming sites that are currently prohibited as well as sites that are currently licensed that prevent Australians from accessing their online poker tournaments be licensed in Australia, on the condition that they restrict their service to low-risk games and adopt the harm minimization and consumer protection measures as part of the national standard. This recommendation is a great departure from the existing law, primarily as it becomes impossible to curb gambling using a remote communication device.

With respect to wagering agreements that provide for “live in-play” or “in the run” betting, the Act prohibits such an act except when it is undertaken using a telephone. The primary objective of this limitation as envisaged by the framers of the Act was to reduce the risk of professional gamblers, particularly where this form has the characteristics of the highest risk form of gambling. This aspect of betting is carried during the course of a game or a match. Such an act, “live in-play” or “in the run” betting can be split into three parts: (a) betting on the final outcome of an event, adapting to the changing contours of the game/match, (b) betting on particular contingencies such as who will score the next goal in a football match or whether the first corner will be taken from the right hand side of the goal post and (c) betting on the next ball in cricket or the next point in tennis (micro events).

This essentially would mean that in sport there is what is called live in play betting, that would mean one could place bets every second and every minute. This potentially can change as the game evolves. So the Australian legislature thought it fit to allow this form of betting only through telephone and not via the internet forum.

It is perhaps a sign of change or evolution and keeping up with times, that the Committee has again departed from the complete ban on ‘live in-play’ events that the original Act envisaged to a more realistic approach to sports betting. The committee recommended that an alternative to the existing ban be investigated so as to relax the ban on “live in-play” betting. This new suggestion would allow simple bet types such as which team will win the match but continuing to restrict live in-play betting on micro events or discrete contingencies within an event. What the Committee does however recommend is that there must be a complete ban insofar as micro betting is concerned which is again different from the system adopted by the Great Britain. The Australian laws have shown the tenacity to change with times, proactively shown immense maturity in dealing with betting in the sporting industry.

## 5. INDIA

Having travelled across the globe and ruminating how the various legal systems work, it gives us the opportunity to explore whether India finds a place amongst the global sporting elite. It is obvious that India does not have a legislation like Paspas or the Gambling Act of 2005 or even the Interactive Gambling Act of 2001, on the contrary what India possesses is an archaic legislation called the Public Gambling Act of 1867, Which constantly reminds us of the fact that the legal system is yet to breakaway from its colonial shackles.

In terms of legal jurisprudence the law that exists in India as on this day<sup>40</sup> is straightforward. Betting in any form of sport is banned and is illegal with the sole exception of horse racing. The Supreme Court<sup>41</sup> speaking

through *Kuldip Singh, J.* held a legal wager in the sport of horse racing is one of mere skill and will attract the provisions of Section 49-A of the Madras City Police Act of 1888 and Section 11 of the Madras Gaming Act of 1930. To arrive at such a conclusion the Supreme ruminated on the decisions in *R.M.D. Chamarbaugwalla v. Union of India*<sup>42</sup> and *State of A.P v. K. Satyanarayana*<sup>43</sup>

The questions posed before the Supreme Court of India in *K.R. Lakshmanan case*<sup>44</sup> were fourfold: (1) What is gambling? (2) What is the meaning of the expression “mere skill” in terms of Section 49-A of the Madras City Police Act of 1888 and Section 11 of the Madras Gaming Act of 1930? (3) Whether running a horse-race by the club is a game of chance or mere skill? and (4) Whether wagering or betting on horse-races is “gaming” defined by the Police Act and the Gaming Act?

It is well known that, the States in the Union of India have the powers under List II (State List) of Schedule VII of the Constitution of India to legislate in matters pertaining to gambling and betting. In pursuant to this constitutional provision, States in India have created several enactments like, the West Bengal Gambling and Prize Competition Act of 1957, the Bombay Prevention of Gambling Act of 1887, the Madhya Bharat Gambling Acts of 1949, Madhya Pradesh Public Gambling Act, 1867, the Orissa Prevention of Gaming Act of 1955, the Punjab Public Gambling Act, 1867, the Delhi Public Gambling Act of 1955, the Kerala Gambling Act of 1960, the Karnataka Gambling Law, the Meghalaya Prevention of Gambling Act of 1970, the Pondicherry Gaming Act of 1965, the Tamil Nadu Gaming Act of 1930, the Goa, Daman and Diu Public Gambling Act, 1976, the Sikkim Casino Games (Control and Tax Rules), 2002 and finally the Sikkim Regulation of Gambling (Amendment) Act of 2005.

Echoing the sentiments of Lord Hewart, C.J.<sup>45</sup>, the Supreme Court<sup>46</sup> is of the belief that, even if a scintilla of skill was required for success, the competition could not be regarded as of a gambling nature. This sentiment is perhaps very important. All that a sporting competition needs to show is that; its participants possess and showcase a wee bit of skill for the sport and not to attract the wrath of the country's gambling law. Against the backdrop of the two *R.M.D. Chamarbaugwalla*<sup>47</sup> and *Satyanarayana*<sup>48</sup> cases the Supreme Court in *K.R. Lakshmanari v. State of TN.*<sup>49</sup>, examined whether horse racing is a game of chance or a game involving substantial skill.

Section 3 of the Police Act, 1861 defines “gaming”: as one which does not include a lottery but includes wagering or betting, except wagering or betting on a horse-race when such wagering or betting takes place, on the date on which such race is to be run and in a place or places within the race enclosure which the authority controlling such race has with the sanction of the State Government set apart for the purpose.

For the purposes of this definition, wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt of distribution of winning prizes, in money or otherwise, in respect of any wager or any act intended to aid or facilitate wagering or betting or such collection or distribution.

The Act defines “instruments of gaming”: as any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or records or evidence of any gaming, the proceeds of any gaming and winnings in money or otherwise distributed or intended to be distributed in respect of any gaming.

A definitive read of the word “gaming” would clearly exclude the betting or wagering insofar as horse racing is concerned, but to showcase how archaic the definition of “instruments of gaming” is concerned, one need not look further than one’s smartphone or a laptop, especially in this day and age of technological advancement, one could technically place a bet using a gadget and yet not attract the wrath of the Police Act.

Prior to the verdict of the Supreme Court in 1996, it would be pertinent to know the Madras High Court held<sup>50</sup> that horse racing is a game of chance and was gambling in nature. The reasoning advanced by the High Court of Madras is perhaps the best logical analysis on this issue. The High Court took the view that even though skill is involved in the process, it is not the skill of the horse but that of the punter and based on such skill, the punter cannot say with any certainty that his horse without fail will emerge victorious.

Substantiating on their view, the High Court believed that the most astute punter in the industry cannot

definitively, with the kind of knowledge and experience he possesses, be sure of his punt being successful. To a great extent, the High Court was right, because even in horse racing, the concept of “live in-play” betting is yet to kick in, since bets are advanced before the start of the event, the better will have to use the data available to him prior to the start with a hope that his punt hits the jackpot. It showcases that there is an element of preponderant chance in the scenario based on which the High Court delivered its verdict.

The High Court went on to hold, horse racing is a competition on speed which will depend on a variety of changing and uncertain factors, which with the best knowledge and skill of the better cannot be reduced to a certainty, though of course such knowledge and skill the probability of success of a particular horse may be approximated. The High Court finally concluded that betting on horses does involve an element of gambling.

As against the order passed by the High Court, the Madras Race Club preferred an SLP before the Supreme Court and in an attempt to lay down the law on this contentious issue, thought it fit to rely on precedents in R.M.D. Chamarbaugwalla and Satyanarayana<sup>51</sup> cases to determine whether horse racing, would constitute a game of skill for the purposes of Section 49 of the Police Act and Section 11 of the Gaming Act.

The Supreme Court through Satyanarayana case<sup>52</sup> defines the expression “game of mere skill” to mean “mainly and preponderantly a game of skill”. In this case, they held Rummy<sup>53</sup>, to be a game of skill much to the disappointment of its cousins—Poker<sup>54</sup>. Little did the Supreme Court realize the import of this judgment. Games like Poker, which requires substantial amount of skill, much more than Rummy does not have the benefit of this judgment.

Recently mature sporting economies have led the way insofar as Poker is concerned. A recent decision that emerges from the United States of America clearly establishes that poker is a game that requires enormous amount of skill<sup>55</sup>. The Judge in this case goes to hold that in Poker, the pot went not to the luckiest amongst the participants but to the most deft. The player who could guess his opponents intentions and disguise his own, make calculated decisions on when to fold and hold and quickly decide how much to wager. These aspects of the game made the Federal District Court, Brooklyn, hold Poker a game of skill (this in striking contrast to Indian Supreme Court’s decision). Further, Rummy is a game of chance, every competent player in Rummy has a memory worthy to be proud of, but it does require intellectual intelligentsia from its participant to enable Rummy as a game that involves skill. Therefore, poker would any day attract the trapping of a game played using intellectual intelligentsia whereas Rummy is game where there is an element of chance and to a lesser extent skill. It is not through mere skill that a participant of Rummy wins, but the same yardstick cannot be applied to Poker.

The Supreme Court in K.R. Lakshmanan v. State of T.N.<sup>56</sup> relied on various decisions from courts around the world and their own decisions to conclude that horse racing is a game where winning depends substantially and preponderantly on skill and not on chance. They further placed reliance on an extract from Encyclopaedia Britannica<sup>57</sup> definition of ‘gambling’:

“Betting on horse racing or athletic contests involves assessment of a contestant's physical capacity and the use of other evaluative skills”.

It is logical prudence, horse racing is a sport whose rightful claim to be a game of skill is not what the jockey or the horse possesses but the intellectual intelligentsia of the punter. The decision of the Supreme Court in K.R. Lakshmanan v. State of TN.<sup>58</sup> requires reconsideration by a larger Bench: the foundation upon which the judgment is based seems flawed. Based upon the rationale, horse racing is a game of skill as the participants of the sport possessing skill can never be the yardstick. It is the skill and the intellect possessed by the punter, which should define a sport as a “game of skill”. End of the day, it is the punter’s skill that is being put to test and not that of its participants.

To call it a game of skill is flawed because the law as it stands today allows a punter to punt prior to the start of a race based on the data collected by him and has to take a “chance” on whether the horse that he places his bet on, emerges victorious at the finishing line. This leads to an interesting question, why legalize betting in horse racing and call it a sport of skill, when there are other sports in India that require the same if not more skills to participate? The Supreme Court has failed in its endeavor to lay down guidelines as to what are the inherent

qualifications required for a punter for the sport to be called a “game of skill”? This analysis of the Supreme Court needs reconsideration, because world over especially in countries where betting in horse racing is permissible it is skill of the punter that makes the sport a game of skill and not a self proclaiming certificate from the Apex Court based on the inherent skills of the game.

## 6. Concluding Remarks

After surveying the current developments in prominent countries, one thing seems certain that betting issues are dogging almost all the jurisdictions around the world. Given the practical difficulty in controlling the range and extent of betting exercise, no law can effectively eradicate this practice as the same has and will be continued unabated in one form or another. The need is to allow and recognize certain aspects of un-harmful betting. Such recognition will potentially achieve its target of controlling substantially the evil sides of betting. Laws of the countries at the moment are wholesomely focusing their energies on complete eradication of sports betting as they perceive the same as evil for the society. Lawmakers should rather focus on allowing certain aspects of sports betting which are not per say ‘bad’. Legalizing some good aspects of sports betting will eradicate current corrupt practices and will introduce element of transparency in the whole affairs. If this happen, then a substantial amount involved in betting exercise could be seen to be transacted as per law and in public view. Such transactions involving huge amount of money then can be brought within the country’s tax net. This will then create real prospects of generating collectible revenues in a State. In addition, public will also not resort to underhand dealings in sports betting.

In this connection, countries like Australia and England have shown model legislations on sports betting which can go a long way in eradicating sports corruption. They are pragmatic legislations enacted with foresight in mind, and will show a way forward in legalizing the sports betting and resulting benefits to the State economy. Other liberal legal systems around the world will do well to replicate the English and Australian legislative experiments in the area of sports betting.

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