

## Game of Skill vs Game of Chance – A Debate

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### Abstract

Gambling, as an activity, has been prohibited in various Hindu scriptures or at least allowed under regulation only. It has been described as a vice; an activity prophesied to cause the downfall of a person. The British-era law, Public Gaming Act of 1867, is the governing act for gambling activities in India, being adopted by various states with amendments. Currently, the ambiguous status of the legality of such activities in India has left room for much debate and discourse. States allow games of skill but prohibit games of chance. Some prohibit both, while some allow both. Therefore, proper regulation and the governing mechanism are required to deal with gambling, betting, and fantasy sports.

This paper discusses various cases, legislation, and regulatory instruments currently in operation in India and the inadequacy that remains. Firstly, definitions of 'games of chance' and 'games of skill' will be discussed and compared, and their general legality will be elaborated upon. Thereafter, the paper discusses the history of gambling, ranging from cases and precedents from the United States of America to the legislation currently in effect in India. The question of legality in different states will be elucidated. Further, the paper talks about online and offline gambling and related judicial precedents in India. Thereafter, the paper will detail the issue of fantasy sports and their legality in India, discussing issues such as that of Dream11. The question of morality will be explored too. Lastly, the paper attempts to conclude the urgent need for regulation and control over the gaming industry, exploring all the shortcomings in the system and the current options available to the government.

**Keywords:** Gambling, Game of chance, Game of skill, Fantasy sports, Online Gaming

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## Introduction

**The Game of Chance** refers to the game in which the outcome strongly depends on the element of chance or a 'randomizing device'. A game that involves anything of monetary value, or anything in which the contestant can wager money, is called gambling. Some games of chance may also include a certain degree of skill, but the major element in these games remains chance. The status of legality of chance games varies from country to country and from state to state. Some examples of games of chance are roulette, in which the contestant cannot ultimately control where the ball lands; baccarat; blackjack; craps; slot machines.

As opposed to a game of chance, the **Game of Skill** refers to a game/contest in which the final deciding element of the outcome is the judgment or skill of the player and not chance. Games of skill don't fall under the ambit of gaming or gambling laws and hence don't face any such restriction or regulation. Some examples of games of skill include building sets, card games, educational games, board games, mathematical games, puzzles, guessing games, solitaire, word games, etc.

According to law, games of skill are okay to bet on, while games of chance are not. Gambling requires wagering or betting on an outcome that is based on chance. The item wagered can be anything of value, and is known as 'consideration'. The amount of worth doesn't generally matter. Illegal gambling is prohibited under law.

Whether the game is based on skill or chance depends upon what the majority of the game is based on. If a game has effects of both skill and chance, the element which has the bigger effect determines the legality of the said game. If chance is the bigger factor in the game, the game is of chance, and hence it is illegal to make any bets or wagers at it. One needs to have a chance at winning something of value to be considered as a player of an illegal game. If one doesn't have a chance of winning anything, they aren't playing an illegal game.<sup>3</sup>

## History

The lack of enough preceding cases on the topic has led to Indian courts frequently relying on US court's judgments on gambling activities. The gambling culture in India and the US shares few similarities. Compared to India, the gambling culture in the US is older and vaster than in

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<sup>3</sup> Lexology, *Games of Skill v. Games of Chance - The Legal Analysis*, Klein Moynihan Turco LLP - David O. Klein, 16 Aug. 2018, <https://www.lexology.com/library/detail.aspx?g=0a16536c4f6f48ed966fa8d43b676f10>.

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India. In *People ex rel. Ellison v. Lavin*<sup>4</sup>, the New York Court held that the major deciding element of the legality of the game depends on what the dominant factor of outcome determination is, skill or chance. In *State v. Gupton*<sup>5</sup>, the court held that game of chance “is such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance”. In *People v. Dubinsky*<sup>6</sup> and *Katz's Delicatessen Inc. v. O'Connell*<sup>7</sup>, the US Court declared that the game of poker is illegal as long as a consideration, or anything worth monetary value, is involved. However, in a more recent decision, in the *United States of America v. Lawrence DiCristina*<sup>8</sup>, the New York Court held that poker may be a game of skill since a majority of the decisions made during the game depend on the skill of the player. The expert witness elaborated how the outcome of the game majorly depends on the skill of the person. Such skill is not generally used in games like roulette; hence they are illegal. Ultimately, after reviewing the prosecution's opinion and further expert testimonies by experts, the court held that though chance may be a deciding factor in poker, it is certainly not the dominating factor. Skill predominates<sup>9</sup> chance, and therefore, the game is legal.

### The Legal position in India

The Public Gaming Act of 1867 is the act that regulates public gaming activities in India. The legality of betting varies from state to state. Goa, for example, has legalized casinos, as they contribute a big amount to the state's GDP. Indian courts have not decided yet on the legality of poker.

Gambling is part of the state list, which means what state legislatures practice full authority over any such regulations. Thus, states can formulate their regulations. States have made their amendments to the Public Gaming Act, to suit their own needs. For example, Public Gaming Act, 1867 was extended to the Mizo district (now, the state of Mizoram) in 1962.

Gambling has been present in the Indian landscape since ancient times. There are instances of gambling activities in *Mahabharata*. Scriptures like Rigveda, Manu, etc. have dealt with gambling, condemning it. Rigveda says, “The gambler's wife is left forlorn and wretched: the mother mourns the

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<sup>4</sup> 179 N.Y. 164, 71 N.E. 753 (1904).

<sup>5</sup> 30 N.C. 271.

<sup>6</sup> 289 A.D.2d 415.

<sup>7</sup> 302 N.Y. 286.

<sup>8</sup> 886 F. Supp. 2d 164.

<sup>9</sup> Motwani, Tejas RK, Skill versus Chance - The Gambling Debate (September 22, 2014). Supreme Court Cases Journal, Vol. 7, p. 26, 2014, Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2500001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500001).

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son, who wanders homeless. In constant fear, in debt, and seeking riches, he goes by night unto the home of others.” Manu talks about gambling in verse 9.221: “The King shall exclude from his realm Gambling and Betting; these two evils bring about the destruction of the kingdoms of princes.” In verse 9.222, Manu says, “Gambling and betting amount to open theft; the king shall always exert himself in suppressing both of them.”<sup>10</sup>

The growth of gambling activities in modern India has been enormous. Now, gambling has become a popular activity. Major Indian metropolitan cities have casinos or societies which hold regular gaming sessions.

Horse racing has been legalized in India. Many Indian states like Goa, Kerala, Mizoram, Assam, Arunachal Pradesh, Manipur, Meghalaya, Nagaland, West Bengal, and Sikkim have legalized lotteries. As mentioned before, states like Goa, Nagaland, and Sikkim have also legalized online gambling and casinos under the Public Gaming Act, 1976. Under the Bombay Prevention of Gambling Act of 1887, Maharashtra has illegalized all gambling activities. Andhra Pradesh and Telangana have illegalized games of skill under the Telangana State Gaming Act, 1974. The Karnataka legislature has recently passed a bill to amend the Karnataka Police Act, 1963, which seeks to ban all forms of gambling in the state, especially online gambling.<sup>11</sup>

The legality of poker is still a debatable issue in India. As stated above, Indian courts have rarely or never dealt with such cases. This causes us to look at cases dealt with in countries such as the US, which deal with them frequently. Public Gaming Act of 1867 is the British-era law that indirectly deals with gambling activities in India. The Supreme Court has at occasions referred to gambling in a negative tone.

### Online & Offline Gambling

Gambling is an act of betting or putting something at stake, being aware of the risk involved, and hoping to gain by the outcome of a game whose results may be determined by chance or accident which is a purely random act of luck. There exists a very thin line between online and offline

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<sup>10</sup> Firstpost, *Sports Betting is Wrong morally, culturally*, Anurag Kashyap, June 12, 2019 15:06:19 IST, <https://www.firstpost.com/world/sports-betting-is-morally-culturally-and-historically-wrong-6799951.html>.

<sup>11</sup> Hindustan Times, *What's the legal status of gambling regulations in India in 2021?*, Jun 14, 2021 05:19 PM IST, <https://www.hindustantimes.com/brand-post/whats-the-legal-status-of-gambling-regulations-in-india-in-2021-101623671189683.html>.

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gambling. Online gambling, which is commonly known as e-gambling or internet gambling, is betting on games over the internet. Some examples include online lotteries, keno, poker, bingo, roulette. Online gambling, commonly known as e-gambling or internet gambling, is betting on games over the internet. Offline gambling includes lotteries, bingo, sports, horse betting, and card games.

**Offline gambling** has been around for an eternity now, and online gambling is in its nascent stage but the advent of the internet and its wide range of users made space for these industries to grow popular. Now, more and more games are being massed online to chance their luck. Online gambling has changed the face of the industry; no wonder the online gambling space is experiencing exponential growth in its revenues and users. The Indian gambling industry, as of 2020, is valued at \$930 million and is expected to grow to \$3750 million by the end of 2024, including the user base from \$90 million in 2019 to \$368 million by 2022. A Major chunk of this data belongs to online gambling, as many prefer online gambling over offline, as it provides major convenience.

The Supreme Court of India has stated on different occasions that constitutional protection of the right to trade cannot be provided to gambling activities and competitions “*which encourage a spirit of the reckless propensity for making easy gain by lot or chance.*” In *State of Bombay v. R.M.D. Chamarbaugwala*<sup>12</sup> the court held that gambling is not traded under **Article 19(1)(g)** but it is an extra commercial that is outside the trade domain.<sup>13</sup>

The Public Gambling Act, which was implemented in 1867, is the current law supervising gambling activities in India. The definition of the term "gambling" remains very unclear to date. The Supreme Court and other courts have at many occasions tried to analyze the term ‘gambling’ and its related laws and they tried to classify their judgments based on the involvement of skill versus chance. As the law is ancient, various developments have taken place since, like the advent of online gambling, poker, and many more.

**The Information Technology Act, 2000**, a broad law that applies to any type of online activity, doesn’t say whether online gambling is illegal. It does not even mention the word ‘gambling’ in specific but gives the government of the day the autonomy to block access to certain websites if found illegal.

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<sup>12</sup> 1957 AIR 699, 1957 SCR 874.

<sup>13</sup> Supra Note 9.

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Poker is a stellar example of the ambiguous nature of gambling. Though it is growing in India, the legality of poker is not yet clear and it is unknown if it amounts to gambling in the first place.

**The legal position in different states:** Many states have prohibited online gambling within their borders. This includes Telangana, Andhra Pradesh, and Tamil Nadu. Many states have regulated online gambling, including Goa, Nagaland, and Sikkim. The remaining states either lack regulation or prohibition. This has been the bone of contention for a long as gambling affects not only an individual but also the society at large and there is an urgent need for its regulation in India.

Karnataka recently passed the Karnataka Police (Amendment) Act, 2021, banning all forms of online games which come under the purview of “games of chance”, including wagering, betting, and gambling except horse races and lotteries. Under the amendment act, online gaming is considered a cognizable and non-bailable offense with fines up to 1 lakh and imprisonment of up to 3 years. The new law has also been introduced to “include the use of cyberspace including computer resources or any other communication device as defined in the Information Technology Act, 2000 in the process of gaming to curb the menace of gaming through the internet, mobile apps”. According to the amended law, “all forms of wagering or betting, including in the form of tokens valued in terms of money, paid before or after issue of it, or electronic means and virtual currency, electronic transfer of funds in connection with any game of chance” will amount to gambling.<sup>14</sup>

Confederation of All India Traders (CAIT) Secretary General Praveen Khandelwal said, “Unfortunately, the Karnataka bill does not distinguish between a game of skill and a game of chance. Game of chance is pure gambling and should be rightfully banned. However, by including games of skill in the ambit of the bill, the proposal has not only gone against established jurisprudence but threatens the thriving Indian gaming start-up sector.” This again highlights the fault line in the legislation which fails to draw a thick line between the game of skill and the game of chance.<sup>15</sup>

In a debate, some of the constituent assembly members were of the view to completely ban betting and gambling, considering some evils that occurred in the accounts of *Mahabharata*, but Dr. Ambedkar had a different view. He said if Entry 45 (present 34) of betting and gambling is removed then the state government will become toothless and will not be able to regulate the

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<sup>14</sup> The Times of India, *Karnataka Ban on Online Gaming comes into force*, Oct 7, 2021, 07:00 IST, <https://timesofindia.indiatimes.com/city/bengaluru/karnataka-ban-on-online-betting-games-comes-into-force/articleshow/86827911.cms>.

<sup>15</sup> The Hindu, *Karnataka Bill banning online gaming will hurt Indian start-ups: CAIT*, Special Correspondent, 21 Sept., 2021, 16:10 IST, <https://www.thehindu.com/news/national/karnataka/karnataka-bill-banning-online-gaming-will-hurt-indian-start-ups-cait/article36586767.ece>.

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same. He was of the view that Entry 45 is a tool to either permit or prohibit gambling and betting by the state government. Therefore, it was retained in the state list. However, ambiguities such as the ones mentioned above still exist. A panacea needs to be found out.

## Online Fantasy Sports

The term '**fantasy sport**' refers to the type of online sport where the individual players create or bring together an imaginary team, virtually composed of representations of real players of a professional sport such as Kabaddi, Soccer, Cricket, Hockey, etc. Starting in 1952 in the US, it gained a lot of popularity in recent years. It was in 2001 when it started in India through ESPN Star Sports but was stopped after 2 years of functioning. In 2010, it again emerged at a rapid pace with the advancement of the internet and technologies.

In 2017, the high court held that fantasy sports are games of skill and not games of chance, as it required for the players to track the previous track record of the players consistently and then make a decision. This made it clear that fantasy sports are games of skill. The judgment led to the establishment of ventures such as dream11, Hala play, etc.<sup>16</sup>

The courts have followed the predominance test, which is known as the dominant factor test to classify a game as either a game of skill or chance. In cases where both skill and chance are involved, it then goes with the prominent one that majorly dominates the game. This can be observed in many instances.

A three-judge bench of the Hon'ble Supreme Court in the case of *Dr. K.R Lakshmanan v. State of Tamil Nadu*<sup>17</sup> regarded horse racing like a game of skill and observed that "betting on horse racing or athletic contests involves the assessment of a contestant's physical capacity and the use of other evaluative skills. Horse racing is an organized institution. There is nothing illegal in horse racing: it is a lawful sport."

In the case of *State of Andhra Pradesh v. K. Satyanarayana*<sup>18</sup> the court held that the game of rummy involves a substantial amount of skill and even though there is the existence of luck, the effect of skill in the game is more than luck. Since the game is more about memorizing sequences, holding and discarding cards, the court also said that stakes can be involved and will not be illegal.

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<sup>16</sup> Supra Note 9.

<sup>17</sup> AIR 1996 SC 1153.

<sup>18</sup> AIR 1968 SC 825.

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In *State of T.N. v. Mahalakshmi Cultural Assn.*, the Madras high court interpreted the earlier case and held that if rummy is played for stakes, then it will be an illegal act.

### Dream11

Another issue that needs to be discussed is Dream11<sup>19</sup>. It is a fantasy sports platform with over 110 million users playing cricket, football, kabaddi, basketball, hockey, volleyball, handball, rugby, etc. It is based on the format approved by the Federation of Indian Fantasy Sports. The recent decision by the Supreme court dismissing the Special Leave Petition that alleged that Dream11 is not a 'game of skill' since it included betting and wagering, and the court said that it requires considerable skill and judgment and thus is a 'game of skill', reaffirms the judgment passed by the Punjab and Haryana High Court. The judgment has had a large impact, given the huge fan base, and the growth of such platforms has been tremendous, with about 70 startups operating in this domain and more being launched. Thus, it becomes very important to have not only adequate legislation but also precedents. User interests are protected by the Indian Federation of Sports Gaming (IFSG), a self-regulatory body protecting the consumers and standardizing the fantasy sports industry.<sup>20</sup>

It was in the case of *Varun Gumber v. Union Territory of Chandigarh*<sup>21</sup>, where the legality of Dream11 was challenged in Punjab and Haryana High Court. The Court held that since it required the person betting to know the performer, it involves a substantial degree of skill attached to it, thus comes under the game of skill.<sup>22</sup>

**Issue of morality:** The potential concern of privacy of the gambler and ethics of online gaming has always been a part of the debate; the way the online gaming websites collect a large amount of data about the gambler and use it to compile customer profiles has taken a step ahead into the invasion of privacy. The profiles of gamblers are often sold to online gaming companies, which consists of information like name, date of birth, gender, financial transaction details, the games they gamble on, and the behaviour of the gambler can be plotted with the help of this

<sup>19</sup> Indian Journal of Law and Public Policy, *Legitimacy of Dream 11 in India*, Shailee Mishra, <https://ijlpp.com/legitimacy-of-dream11-in-india/>.

<sup>20</sup> Business World, *Supreme Court Upholds Dream11 Online Fantasy Sports Format As 'Game Of Skill'*, 23 Oct. 2021, <http://www.businessworld.in/article/Supreme-Court-Upholds-Dream11-Online-Fantasy-Sports-Format-As-Game-Of-Skill/06-08-2021-399702/>.

<sup>21</sup> CWP No.7559, 2017.

<sup>22</sup> The Indian Express, *Explained: How has the Karnataka Police Act been modified to clamp down on gambling?*, Johnson TA, 28 Sept., 2021, <https://indianexpress.com/article/explained/karnataka-online-gambling-police-act-7537988/>.

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information, which can be easily exploited. This can be used in a negative way to retain the customer, hook them to the platform even if they suffer loss. This raises a huge question regarding the ethics of online gaming.

There are other unanswered questions, like the consent of the gambler, being informed, deception, and public versus private domain. The main characteristic of online gaming is it is easy to access: one can play online in their pyjamas 24 hours a day without any limit, remaining undetected and unnoticed. This has made it very convenient for today's youngsters to get addicted to it. Money being spent online makes many forget that they are spending real money. The payment system needs the gambler to provide their credit card or account details to a website, which might even turn out to be an illegitimate one, which might take the money and simply shut down, or might even fail to pay when the gambler wins. The card and account details are always vulnerable to theft by hackers.<sup>23</sup>

The U.S. passed legislation in 2006 that bans the use of credit cards for online gambling, and it is not legal to operate a gambling site.

Law Commission in its 276<sup>th</sup> report said that boycotting it in totality would not bring in the desired results as it is impossible to prevent such undertakings from functioning; it gave recommendations regarding the legitimization and regulation of betting and gambling.

Under Entry 31 of List I of the Seventh Schedule of the Indian constitution, the parliament has retained all power to enact legislation that deals with web-based betting and gambling. Bringing online gambling and betting under the supervision of the concerned authority can reduce its ill-effects to a very large extent. Knowing the operator's identification card, PAN and Aadhar card details will help positively regulate the activities of those undertaking the transaction and will ensure transparency.

### Conclusion

Based on what has been discussed above, it can be conclusively understood that the absence of uniform legislation or proper regulation in India on gambling has created much space for different interpretations. It is time we bring in proper reforms to have a check on these issues. There is a need for proper demarcation of what 'game of skills' refers to, to prevent any ambiguity

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<sup>23</sup> Legal Service India E-Journal, *Gambling & Its Related Legislation*, Amit Kumar, <https://www.legalserviceindia.com/legal/article-3373-gambling-and-its-related-legislation.html>.

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presently being faced by the people. The courts have meticulously drafted out a method to classify the game of skill and game of chance and have also provided us with the interpretations in subsequent cases, but the truancy of a clear definition still poses a problem. There is a need for change. However, the change should be made keeping in mind the present position of the gambling industry in India as it is booming and the decision will affect the whole bunch of start-ups in the gaming industry. Rather than banning it in totality, we could have clear legislation on the same, whereby its effects will be under scrutiny and can be regulated properly in time.

Thus, proper regulation is of the essence. With the onset of the COVID-19 pandemic, the gambling industry has shifted to online platforms. The online setting has left much room for fraudulent activities and other illegal activities. Moreover, many states allow gambling activities, while many states don't. Obsolete laws have created confusion among the citizens. Formal guidelines and guiding principles need to rule the gambling industry, to ensure proper transparency and prevent illegal activities. Proper regulation will ensure that citizens can engage in legal gambling activities in a safe environment, while also letting the newly emerging gaming industry flourish.<sup>24</sup>

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<sup>24</sup>News 18, *Gambling's legal status in India needs a revamp—now*, 23 June 2021, <https://www.news18.com/news/partner-content/gamblings-legal-status-in-india-needs-a-revamp-now-3881477.html>.