ARTICLES

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Dr. Ashish Dshpande

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Bhawna Gulati and Vipul Puri

Fantasy Sports: at the Indian Crossroads
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Nandighosh Karan Nanda and Hitesh Mallick
For Subscription

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Special Edition

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EDITORIAL

Sports and Athletics encompass the favourite pass time of several millennial. They have been pivotal in creating a global unison among diverse cultures and economies, serving as a thread interwoven so as to connect individuals from all walks of life. While they are successful in creating a successful bonding factor, it is to be noted, that they may also be marred with controversies, shortcomings and pitfalls. Law has been the wheel of support that seeks to create a balance between right and wrong, in Sport and Sporting Events. The need to maintain status quo in the interrelationship between its various stakeholders is a precursor for maintaining the integrity of sports. The emergence of Sports law, has involved questions of Competition Law, Intellectual Property Law, Constitutional Law, and other niche areas of Contracts such as endorsements, public policy, moral and ethical conduct of players, etc. contested widely with diverging views. The matters imperative for consideration inter alia is the submission and challenges faced in Disputes Resolution through Court or Arbitration for Sports, and the Implications of Minor Contracts in matters of Sports.

Game set and matchless: A reader on sports and law, Edited by Dr. R Venkata Rao, et al., published in 2016 by National Law School of India University, (NLSIU) Bengaluru has been pivotal in bringing out this special edition of the Journal on Law and Public Policy. In pursuit of this Special Edition, the Centre for Environmental Law, Education, Research and Advocacy, (CEERA), a premier research and advocacy centre at NLSIU organised a Two-Day National Seminar on Legal, Ethical and Contractual Issues in sports in July, 2019, which saw over hundred participants and enthusiasts who presented their research works on allied areas of Sports Law and Policy. This special edition of the Journal on Law and Public Policy is a culmination of the finest papers received in the seminar.

Dr. Ashish Deshpande, in his contribution titled “Unethical Practices in Indian Sports: Issues and Challenges”, discusses the vulnerability of sports to various unethical and contributing factors that leave its image marred and
tainted with controversies, identifying the need for a *sui generis* legislation to safeguard the sanctity of sports and sporting events in India.

In “Competition Issue In Sports: When Commerce Trumps The Spirit Of Sports”, written by Ms. Bhawna Gulati and Mr. Vipul Puri, based on their research and their personal experiences as members of the Competition Commission of India, have identified and examined various issues and anti-competitive factors that may potentially have an adverse effect on competition in the sports sector.

Dr. Sujith S. & Ms. Uma Devi S. have in their contribution titled “Implications on Legal and Regulatory Framework of Sportscasting in India” categorically discussed the legal intricacies that apply to broadcasting of sporting events, the challenges faced in respect of neighbouring rights and delve into matters that affect the legal and regulatory framework for broadcasting, of sports and sports events while taking into account the need to safeguard the public interest in the dissemination of the same.

In their Article titled “Fantasy Sports: At The Indian Crossroads”, Mr. Praveen Tripathi and Ms. Aafreen Mitchelle Collaco identify the need for regulation in the upcoming reality of fantasy sports, and deliberate the dichotomy between “skill” v. “chance” phenomenon in online gaming platforms.

Mr. Rohith Kamath and Mr. Pranav Narsaria, in their article “Taxation and Sports: Can one run a mile?”, highlight the overall growth of sports businesses and provide for a comprehensive overview of the taxation regime in India, and go on to further deal with the various tax planning techniques that may benefit the business of sports in India.

Mr. Arijit Bhattacharjee and Ms. Kavanya Surolia, in their paper titled “Abuse of Dominance and Money Power in the Religion of the World – Football”, discuss the issue of abuse of money power and dominance in football and the manner in which they affect the healthy competition. They also discuss the UEFA Financial Fairplay Regulations of 2011, and make a critical appraisal of the governance in regulation of the European Football.
Mr. Harsh Malpani in his paper titled “Regulating Doping and Need For Level Playing Field In E-Sports” criticises the minimal regulation that is placed onto e-sports industry that has spurred over the past couple of years taking the world by storm. His research provides a background on the menace of doping and seeks to make a critical appraisal of existing anti-doping regulatory regime in the e-sports industry.

Mr. Prakreetish Sarma & Mr. Neil Madhav Goswami, have in their research titled “An Insight on the Menace of Drug Abuse in Sports: with Special Emphasis on Sportsmen of North East India”, have made a comprehensive analysis of the various challenges faced by sports personnel and their desire to Performance enhancement supplements, triangulating them to be victims of drugs, thereby necessitating the need for the development of a sui generis law in the area.

In their paper titled “Caster Semenya, Dutee Chand And The Question Of Sex In Sport: a critique of the discourse on Hyperandrogenism/DSD in Female Athletes”, Ms. Harshi Misra & Mr. Palash Shrivastav have criticised the criteria of sex determination of athletes, challenging the credibility of scientific reasons for backing the regulations that seek to control the amount of testosterone present in the bloodstream of female athletes, as laid out in IAAF Eligibility Regulations for the Female Classification of 2019.

Mr. Vaibhav Singh & Mr. Saurabh Tiwari, in their paper on “Arbitration and Sports Law: Scrutinising the Dispute Resolution Process” vehemently support that arbitration has enormous potential to materialise into a platform for resolving sports-related disputes and relieve the athletes of going through the traditional method of courts and trials in case a dispute arises. The paper discusses the limitations as to Court interferences and other interconnected matters that impact successful arbitration of sport-related disputes.

Mr. Nandighosh Karan Nanda & Mr. Hitesh Mallick have expressed their views on the misconduct involving the transfer and registration of minor players and various other regulatory impediments thereat. Their paper titled Exploitation of Minors in Football: The Need to enact more practical
“rules” makes a critical observation on the existing regulatory shortcomings in the investigation process in FIFA, and associated events.

On an overall, this special edition caters to serve as a precursor for greater research towards strengthening of the governing/nodal bodies and enhance the capacity of the regulatory bodies to develop a robust mechanism that allows for the growth of Sporting Events and activities, with flexibility and agility, as that of the Athletes.

We express our profound indebtedness to Dr. Sudhir Krishnaswamy, Vice-Chancellor, National Law School of India University, for his overwhelming support and encouragement for research-oriented activities of CEERA.

Lastly, as the Chief Editor, I commend the efforts of Mr. Praveen Tripathi, Research Scholar, NLSIU & Asst. Professor, Bennett University and Mr. Rohith Kamath, Research Scholar, NLSIU & Consultant, CEERA, for effectively coordinating the organisation of the Two-Day Seminar in July 2019, and their contribution as Editors of the transcripts received from the Authors.

Dr. Sairam Bhat
Professor of Law, NLSIU
Chief-Editor, JLPP
UNETHICAL PRACTICES IN INDIAN SPORTS: ISSUES AND CHALLENGES

Dr. Ashish Deshpande

INTRODUCTION

“Sport has power to change the world. It has power to inspire. It has power to unite people in a way that little else does. It speaks to youth in a language they understand. Sport can create hope where once there was only despair. It is more powerful than government in breaking down racial barrier” - Nelson Mandela

Sports is one of the modes of physical exercise which connects the world and civilisation. The International Charter of Physical Education and Sports, one of the initiatives of United Nations Educational Scientific and Cultural Organization (UNESCO), through Article 1, confirm that the practice of physical education and sports is a fundamental right for all. The Right to develop ‘one’s physical, intellectual and moral powers requires, according to UNESCO International Charter of Physical Education, physical activities and sports, access to physical education and sports as an assured right to all human beings. Entry 33 of the State List under the Indian Constitution covers powers to enact laws on sports with the state government. The National Sports Day in India is celebrated on 29th August of every year, which is the birthday of Dhyan Chand. There are rules and regulations in each play—a list of do’s and don’ts to maintain the dignity

3. Ibid. See, Preamble, International Charter of Physical Education in Sports.
of those sports. Hockey, Badminton, Cricket, Football are common sports all over the globe, which are very popular. Every nation has its national games. Like, hokey is a national sport for India. Cricket is the national sport of Australia and England; football is the national sport of Brazil, Israel, and Italy, Lacrosse is of Canada and alike. As per the jurisprudential theory, Sports is one of the activities that generate pleasure and promotes health. Multiple factors roam around sports like environment, entertainment, career, health, media, travel agencies, etc. So, to build the whole trust of all those ancillary factors close to sports, there is a dire need to embed ethical values in the sports. Different occasions, based on special events, those sports are being played and celebrated. India celebrates certain days which directly and indirectly connects with sports.\(^5\)

India is a union of states wherein unity in diversity reflects. India follows multiculturalism.\(^6\) There are multiple cultures and, in those cultures, and their different subgroups. Indian provinces are blessed with provinces with unique natural resources compatible with play. It includes hills and mountains, seashores, jungle, mud, massive raining zones, etc. unique and special features. So, based on natural shape and philosophy in that area, sports culture is developed in the specific regional zones. Some of the sporty activities like bullock kart races or buffalo race may be dangerous. So, the state government and occasionally judiciary pitch in to sort those critical issues out. Ministry of Sports and Youth Affairs deals with Sports in India. This ministry deals with different programs for youth development and to nourish the sports environment.\(^7\)

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\(^5\) Example: 29\(^{th}\) of August is the National Sports Day, 21\(^{st}\) June is the International Yoga Day.


\(^7\) See generally, (May 4, 2020, 11:50AM), [https://yas.nic.in/sports/khelo-india-national-programme-development-sports-0](https://yas.nic.in/sports/khelo-india-national-programme-development-sports-0).
With this view, author descriptively analyses the importance of ethics in sports area in addition to legal aspects of sports and highlights issues and suitable solutions to inculcate ethical spirit in sports in India.

**SPORTS ETHICS AND FAIR PLAY**

Ethics, in other words, *Niti* is the soul of every profession. In all sectors, maybe agriculture, business, profession, occupation, service, ethics play a dynamic role. Various federations, boards, and councils deal with ethical rules for their specific sectors. All ethical standards are not expressed, but they are implied too. Most of those rules are customary rules. The concept of ethics is a subjective one which depends upon the fact and circumstances of the case. State-wise, also, the idea can be different. Ethics refers to principles, basis, foundation, a set of archetypes, models, and values that form the character of each person, and they translate through action into their ways of beings. Ethics is thus the set of norms of behaviour and way of life through which human beings tend to realise the value of the "good." In India, to imbibe ethical aspects in life, from childhood itself, stories are being told and narrated to promote and preserve moral values in the next generation. *Ramayana, Mahabharata, Isap Niti, Chankyaniti*, etc. dynamic sources tell us the importance of values in day to day life. Ethics or value education is one of the compulsory courses in some parts of Indian secondary schools as well to generate and promote morality and culture in the minds of the next generation of society.

There are certain rules and skill set applicable for the specific sports.

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State-wise in the state of Maharashtra, *Gudhipadwa*, *Krishn Jnmastami*, *Ganesh Chaturthi*, *Navratri* the auspicious occasions on which sports activities are carried out. Certain religious feelings are associated with sports—*Mela* for races and rustling, *Sankranti* for Kites. Few sports are being played without equipment; few played with types of equipment, few needs animals, few need not have animals.

Each sport has its beauty. Based on customary rules, those plays are carried out in a very enthusiastic manner. The new generation in India is much into technology and less in the fieldwork. However, if we dig out the glory of Indian sports, we have a lot of regional sports which is known to every Indian. *Mallakhamba* is one of them. In Kerala, *Kalaripayattu* is a popular event with the use of sword and dhaal. Many traditional sports in India has lost space on account of legislative changes made at various level. As per the Arms Act, the use of the sword is banned in public places. Bullock Kart race is a matter of debate in Maharashtra as the state legislation bans on the same. Wrestling or *Mally Yudhhya* is one of the popular Panjabi and Maharashtrian Sports events. Again, there are specific rules as to the mode of touching back on the floor and use of nails and fingers.

*Yubi Labi* in Manipur, Camel Racing in Pushkar, *Kambala* in Karnataka, *Jallikattu* in Tamil Nadu, *Insuknawr* in Mizoram, *Dhopkhel* in Assam, etc. are the popular sports all over India. The sporty spirit is not the only thing
required for pure sports. It should be natural. Sports should be played by merited candidates who are free from any external factors. Skill and power should be examined in pure sports rather than influence and references — personal physical strengths and mental ability to be tested.

ETHICAL ISSUES AND CHALLENGES IN SPORTS

(a). Biased Selection Process:

Sports is not a prerogative of every individual. It requires personal interest, physical ability, and skill set to represent the team. Despite physical capacity and interest, if the skill set is missing, there is no use. So, everybody cannot be a player and also a part of the team. There are traditional and statutory rules for the selection process. So, in case of the biased selection process, the authenticity or calibre of the candidate can be a big question mark before the sports. There is a possibility of biases of team leader or any influential player in the team. Various rules and regulations regulate the selection process. Every federation at the state and national level are governed under Rule 2011 and 2013 respectively. The specific procedure to be followed by the stakeholders. However, if the selection is not made on proper criterion or strategy, it affects the quality of the play and ultimately loses public trust towards that play.

(b). Political interference:

India is the biggest democracy in the world. There are local autonomous bodies created under the Indian Constitution ex officio be a part of sports tournaments. Many politicians are also actively involved in sports. Even, the schools and colleges of politicians may prejudice the specific team or teams in the particular constituency. So, unfortunately, many times, that political interference comes in unwanted situations and creates a nuisance to fair play. Grampanchayat Members, Cooperators, Member of Legislative Assembly, Member of Parliament, etc. take an active part. On account of
birthday celebrations, sponsorships are offered by the political parties, and indirectly politics come in the picture. In the name of local autonomous bodies and local representatives of the state and central government, political parties pitch in the sports tournaments. The moment politics comes in any aspect, the real fun of sports and natural process gets affects.

(c). Doping:

As per the English Cambridge Dictionary, Doping means an act of giving a person or animal drug to make them perform better or worse in a competition. Players’ skill set and physical strength are tested only are he or she projects in the sports. However, in case some additional influential factor is included, then it will not be the original natural game. Unfortunately, to get fast results, quick name, and fame, participant players, get into doping. That doping affects not only the health of individual players but also the dignity of the sports in toto. Unfortunately, India has ranked third in the use of Doping substances.\(^{10}\) Doping is undoubtedly not a good sign for the bright future of Indian Sports. If such negative aspects lead to a debarring specific athlete from specific sports. Moreover, Wrestler Narsingh Yadav was also banned by Switzerland, and in 2018, Maria Sharapova was provisionally suspended after failing drugs in the Australian Open.

To avoid doping practices, The Word Anti Doping Act (WADA), and at the national level, The National Anti Doping Act are active at the national and international level. The use of drugs is a curse in sports.\(^{11}\) There are instances of physical damage as well as psychological issues due to the use of doping on athletes’ health. For example, Lower blood pressure, slow heart rate,


sleep disorder, spam of airways, etc. are physical issues. In addition to this, in psychological aspects, there can be an increase in stress on heart, blood clotting, stroke, and alike. Australia, America, and all over the continents have their specific policies to cope with doping from time to time.

III(d). Influenced umpires:
For competent judging position, umpires need to be with clean hands. There is a different level of referees at various stages. So, at each stage, there may be malpractices by influenced umpires, which affects the natural flow of play.

(e). Sexual Discrimination:
As per the Universal Declaration of Human Rights 1948, everyone is born free and Men and women should be treated equally. Discrimination based on sex is prohibited. Considering the rampant gender discrimination, the government has made specific parameters which empower state and the central legislation to enact special rules and regulations for women. In the representation of women in local autonomous bodies as well, women are considered specially. India is a dominating male nation. Still today, men are preferred as sporty comparing to women. However, at the selection process, representation, nomination, celebration, etc. connecting to sports, there are instances of sexual discrimination. Art 14 of the Indian Constitution prefers equality protection of the law. Article 15(3) gives prerogatives to the state as well as central government to enact special rules and policies for vulnerable groups in the society. There is a thirty-three percent reservation too in local autonomous bodies of the nation to give more participation of women in the governance. India is a patriarchal society. Male domination, in one of the dimensions, denotes the suppression of women. So, to control

12 See Amnesty International, We are all born free (Frances Lincoln Publishers Ltd, 2015)
women at a certain level, sexual discrimination is rampant.

(f). Sexual Harassment:

Dignity and Safety atmosphere is indispensable for a human being. As per the Human Rights perspective, sexual harassment at workplace is one of the callous act which affects the dignity of women; Sports industry is also not an exception for such unwelcome instances. Because of multiple chances of male interference in the sports, it maybe in the capacity of the trainer, management, jury, co-player, etc. there are only chances of sexual harassment that affect the human dignity of women. Ranjita Devis Case (2010) is one of the leading cases relating to sexual harassment of athletes. There was inappropriate and shameful behaviour from the coach. In that case, the hokey coach Mr M K Kaushik was charged with sexual harassment, wherein later, he resigned and quit from the post of Indian national women team head coach. Sexual harassment is a subjective one and has many dimensions. It is not only constrained to actual touch, but it is also extending to showing pornography, talking in an unwelcome manner, and promises for promotion or demotion, etc. modes. Many times, female participants become a victim of sexual harassment at different levels by different people in the sports industry. As per norms in the Prevention of Sexual Harassment Act, 2013, there are mandates on each employer to prevent and resolve through complaint mechanism specific issues connected with Sexual Harassment.

III(g). Corruption:

Corruption is one of the stigmas in public as well as the private sector. This concept is not only connected with monitory aspects, but it can be of non-monitory elements as well. It disturbs all major Indian sports, including

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cricket, hockey, weight lifting, and athletics. To book grounds, nomination as a player or jury or trainer, corruption is one of the hindrances. In spite of the Prevention of Corruption Act, 1988, there are instances of fraud at public as well as private sectors, which affects the dignity of the sports. The stakeholders and corruption are repeatedly using lacunas, and exceptions are practices.

(h). Favoritism:

Certain community people or class of people prefer individual players to be in the team despite their shortcomings in sporty standards. Such a kind of bias affects the chance of deserving candidates to participate in the team. Favouritism based on a specific class, caste, community, sex. If such informal and irrational criteria would lead to injustice to deserving candidates from the play.

SOLUTIONS

a). A strong and comprehensive legal framework to cover sports issues:

In India, legislative protection to the sports industry is pluralistic. The Indian Penal Code, Torts, Indian Contract Act, The Consumer Protection Act, etc. statutes, directly and indirectly, protect sports. However, there is no exhaustive legal protection available exclusively to Indian Sports. Indian sports legislation is not comprehensive to cover each dimension of minutes in sports. So, there is a dire need of a robust legislative framework. Different issues have specific solutions. However, many unaddressed problems need to be resolved by a comprehensive legal framework at the national level. To enhance the player’s interest in sports and to build the confidence of sports as a unique career option, there is a dire need for comprehensive sports

(b). Adoption of the National Sports Ethics Commission Bill, 2016:

There is a proposal for one consolidated comprehensive Sports Ethics Commission Bill, 2016. This Bill is under United Nations Resolution 58/5 adopted by the General Assembly in the year 2003, which has recognised sport to promote education, health, development, and peace. International Convention to this effect is adopted in 2005 at Paris provides for action against doping, and India has ratified the same convention on 10th September 2007. This is basically for constitution of a National Sports Ethics Commission to ensure ethical practices and fair play. It established to eliminate doping practices, match-fixing, fraud of age, sexual harassment in sports, and matters connected therein. This Bill has proposed to have Federation Committee. Those committees should enact their own rules of ethics within one year from its formation. And it should periodically submit records to the National Sports Ethics Committees as and when required. It should also report all the offences to the National Commission for necessary action. Those federations are also bound to adhere to ethical practices dictated by the Commission periodically. The Union Government is under obligation to establish The National Sports Commission within six months from the enactment of this statute. To expedite work effectively, the Commission can recruit staff. It can also involve experts in sports on a contract basis. The Commission can take *sou moto* cognisance of issues on sports ethics. It must prepare annual reports. It can ask the specific federations for amendments in the Code of Ethics. It has all powers of Civil Courts. All the pending cases relating to sports

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shall be transferred to the Sports Commission. No Civil Court is authorised to interfere in the routine of Sports Commission. An aggrieved person can go to the Supreme Court of India in Appeal. There is a provision of punishment for sexual harassment as per Prevention of Sexual Harassment at Workplace Act, 2013. It has given clear cut definitions of Match Fixing along with punishment for it. Besides, there is a penalty for false age and doping. Such offenders will be disqualified from participating in future sports as well. All the official sports federation in India is bound to adhere to the rules and regulations. In case of failure to respect, there is a provision of hefty fine to the specific federation. However, there is an exemption for acts or omissions done in good faith. The Central Government is entitled to remove doubts in this regard and to make rule.

(c). Awareness in society about sports ethics and execution of sports legislation:

In India, legal awareness is one of the hindrances. One side, ignorance of the law is no excuse, and on the other hand, there is no proper awareness amongst all segment of society. Laws should be well known to all, but unfortunately, many of the people do not aware offundamental laws in India. All stakeholders should conduct this awareness campaign in society with the help of social media and NGOs and local autonomous bodies.

(d). Ethical lessons for budding players from schools and universities:

People who possess fearlessness, purity of heart, steadfastness, benevolence, control on senses, worship, the study of scriptures, austerity, uprightness, non-violence, truthfulness, freedom from anger, renunciation, tranquillity, compassion to living beings, freedom from sensuality, vigour, patient, harmlessness, freedom from vanity are present in those born to a divine heritage.\textsuperscript{16} Values are classified into three classes. There can be personal

\footnotesize{\textsuperscript{16} Chitra Lakshimi, Value Education : An Indian Perspective on the Need
values, neighbourly, and the community.

Ethics and value education is a heart of the past, from Ramayana; Mahabharata till modern period, principles of non-violence has been taught and also followed. Panchtantra stories highlight different values of educations in various modes of life. If all individuals followed ethical principles, it would be the strength of society. Schools and colleges should teach sports ethics from the very beginning. Such kind of lessons will help kids to think positively about sports as a career option. Compulsory courses with internal marking, based on skill learning, will enhance student’s interest in fair play. Each age is meant to play specific sports, so, based on their age, specific sports ethics should be covered with practical and theoretical dimensions.

(e). Neutral Media:

Media is the fourth pillars of democracy. So, its status is as good as a legislative, executive, and judicial wing in the states. People trust the news more than what is written in the black and white letters of the law. So, the media should promote genuine players who religiously follow sports ethics. Since ethics is subjective, which depend upon fact and circumstances of each case. So, based on real facts, stories to be promoted. Also, to prohibit malpractices in sports, there a dire need to highlight unethical practices before society and demote such malpractices.

It is not only limited to newspaper, but it covers television, information on the public domain, cinema, etc. As a form of communication, it plays
a dynamic role in the sports industry. It is not only limited to furnishing information but is one of the means of entertainment. Social media is used in a more significant extent as a form of the tweeter, Whatsapp, Facebook, etc. by the players as well as club members and management for exchange of information. Aggressive and fair media can bring miracles. It can convey the right role model to the people. It promotes fair play and can inspire the spirit of clean sport. It can encourage education of ethical and legal rules too through communication.  

(f). **Strict Control of Sports Federations:**

The Ministry of Sports and Youth Development, Government of India has recognised sports federations and bodies. There are 56 different disciplines along with names, presidents and secretaries. It is available on the public domain along with contact details of those federations. For smooth sports governance, there are different models like Ministry of Youth Affairs and Sports (MYAS), Indian Olympic Association (IOA), State Olympic Association (SOA), National Sports Federation (NSF), Sports Authority of India (SAI), etc. stakeholders are working hand in hand. In order to monitor specific sports events, particular federations are created by 2011 and 2013 Sports Codes. However, there is a need for controlling those sports federations under one umbrella.

(g). **Generous honorarium to athletes, jury, and trainers:**

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18 See generally, (May 4, 2020, 11:55AM), [https://yas.nic.in/sports/support-organisations-1](https://yas.nic.in/sports/support-organisations-1).

Money is one of the essential requirements of all human beings. For extra money, there are tendencies of stakeholders who are directly and indirectly involved in the sports to indulge in malpractices. So, in case, proper remuneration is given, there are fewer chances of corrupt practices for sure. Ministry of Sports and Youth Affairs, Government of India, through its revised scheme of human resource development,\textsuperscript{20} has specific favourable provisions governing ample consideration to all stakeholders involved in the sports in India.

**CONCLUSION**

The sports industry in India needs comprehensive legal and ethical enactment for a bright future. Full awareness and adherence to ethical and legal regulations and self-ruling by each stakeholder involved in the sports is the solution to adhere to ethics in the sports. All the stakeholders should be with a clean hand and have zero-tolerance in all aspects of unethical practices. Lessons to be given to the persons who do not follow the rules.

\textsuperscript{20} See generally, (May 4, 2020, 11:55AM),\url{https://www.yas.nic.in/sports/scheme-human-resources-development-sports-0}. 
COMPETITION ISSUE IN SPORTS: WHEN COMMERCE TRUMPS THE SPIRIT OF SPORTS
- Bhawna Gulati* and Vipul Puri**

INTRODUCTION

The word ‘sports’ is defined in the Oxford Dictionary as ‘an activity involving physical exertion and skill in which an individual or team competes against another or others for entertainment’. The definition emphasises three elements of ‘sports’ viz., physical exertion/skill as an action on the part of participants or players of the sport, competition as a medium for demonstration of activities and all this with the broader objective of entertainment.

Of the three essential elements of ‘sports’ as contained in the definition, while the application of skills/physical exertion may be said to form the core of all sports activities, the emphasis on competition and entertainment may vary across sports activities. Sports activities are generally classified as ‘recreational sports’ and ‘competitive sports’ with the former emphasising on the entertainment aspect and latter going beyond the fun part towards professional, performance-oriented competitiveness.

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While there is no apparent need for any strict regulation for recreational sports, certain rules must govern competitive sports to ensure the fairness of competition. An immediate question which arises is if there is a need for regulation, which should be entrusted with this work/task/responsibility? A prompt and obvious answer would be that there can be a sport governing body for each sport which should frame the rules and regulations governing various aspects of the sport. However, this aspect of a governing body further raises multiple related questions viz., what if we have more than one governing body creating its sports ecosystem? What if the rules made supposedly for ensuring the fairness of sport is not fair to the players? What if the sports regulators, who are primarily entrusted with the administrative work, start indulging in the monopolisation of sport? etc. The issues may not only emanate from the regulator’s side but can also arise from the players who are an equal participant in the system.

In some cases, it is the players who may be striving to gain a position to exercise influence on the rules or the regulators by forming associations. At the same time, the interaction between multiple

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3 The Professional Chess Association (PCA) was in existence between 1993 to 1996 as a rival organization to FIDE, the international chess organization. There was a dispute between Hockey India and Indian Hockey Federation for being the national governing body for hockey in India.

4 The Competition Commission of India has investigated against the alleged anti-competitive practices of Hockey India (CCI Case No. 73 of 2011) and All India Chess Federation (CCI Case No. 79 of 2011) in this regard.

5 The Competition Commission of India has investigated against the Board for Control of Cricket in India in this regard, in Surinder Singh Barmi and The Board of Control for Cricket in India, (CCI Case No. 61 of 2010), decided on 29.11.2017.

6 The players of a sport organize themselves as player associations and now UNI World Athletes has been established as a global collective of athletes, organized primarily through major player associations.
stakeholders within the sports ecosystem may have intended/unintended effects on other stakeholders. These may include viewers who are the end consumers of sporting events or the firms in related markets such as media companies which engage in the broadcasting of sports events etc.

The issues raised above have myriad dimensions. However, the scope of this paper is limited to examination of the organisational structure of competitive sports and identification/analysis of the issues which may potentially have an adverse effect on competition in the sports sector emanating from the said organisational structure. Further, to the greatest extent possible, the discussions focus on the specifics of the Indian sports sector and the decisional practice of the Competition Commission of India (hereinafter, ‘CCI’).

The competitive dynamics in the market are primarily determined, or impacted, by structural as well as behavioural factors. Section II of this paper/article examines the organisational structure of competitive sports and its implications on the value chain of sporting events. Section III identifies the specific competition issues for examination and Sections IV, V and VI discuss the issues identified viz., jurisdictional issues, the impact of monopoly in the regulation of sports and that in the organisation of various sporting events, followed by concluding remarks.

**ORGANISATIONAL STRUCTURE OF COMPETITIVE SPORTS AND ITS IMPLICATIONS ON THE VALUE CHAIN OF SPORTING EVENTS**

Any discussion on the organisational structure of competitive sports mandates an examination of the working of the International Olympic Committee (IOC), responsible for governing the organisation of the
Olympic Games. IOC has issued an Olympic Charter (OC) which codifies the fundamental principles and bye-laws adopted by the IOC. Among other aspects, the OC identifies three main constituents of the Olympic Movement viz., the IOC itself, the International Sports Federations (IFs) and the National Olympic Committees (NOCs). It is important to note that the IFs and NOCs are generally formally recognised by the IOC. While IFs are recognised for administering sport at world level, the role assigned to recognised NOCs is the development and promotion of sports in their respective countries, following the OC. The statutes, practice and activities of the IFs and NOCs have to conform with the OC. In practice, this system is followed by most of the sports bodies, Olympic sports as well as other sports with little or no modifications. For example, in cricket, International Cricket Council (ICC) is at the top, which is akin to an IF. There are continental federations such as Asian Cricket Council followed by recognised national bodies akin to NOCs such as Board of Control for Cricket in India (BCCI) followed by State-level bodies recognised by BCCI and so on.

The aforesaid constituent system gives rise to the following implications on the value chain of sporting events:

(a). The Pyramidal structure of sports governance:

The organisational structure described above wherein a single national association per sport operates under the umbrella of a continental or a worldwide federation is popularly called as the pyramid regulatory structure. The pyramid structure also takes within its fold, the regional sports federations affiliated to national association or clubs etc. affiliated to regional sports federations. All member bodies working under the umbrella of a worldwide federation for a particular sport (and under IOC for Olympic sports) are generally required to ensure that their statutes,
practice and activities conform with that of the worldwide federation (and the Olympic Charter in case of Olympic sports). By requiring consistency of statutes, practice and activities with that of the worldwide federation, the pyramid structure ensures a standard code of sports governance across all the levels of the pyramid. This standard code may include technical rules of the sport, rules regarding the conduct of players such as compliance with doping rules etc.

**II(b). Exclusivity in the organisation of representative sporting events:**

The sporting events may be classified as representative sports or what are also called as official sports and non-representative sports. Representative sports include events which feature teams selected by the members in a pyramidal structure. As per the OC, the NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games and the regional, continental or world multi-sports competitions patronised by the IOC. The other non-Olympic sports also confer similar exclusivity to their affiliated or recognised national bodies for the representation of their respective countries.

Similarly, the participating teams selected by regional, state, district bodies directly or indirectly affiliated to the recognised national organisation represent the respective region, state or a district, and so on. This representative system gives rise to classification of sports tournaments as international (where national representative teams compete with each other), national (where state representative teams compete with each other) and so on. All the representative sports activities are organised by the members in the pyramidal structure.

**II(c). Exclusivity or control over the organisation of non-representative**
**sporting events:**

In addition to the representative sporting events, sporting events can also be organised in a manner where the participating teams are not the official representatives of a particular country or state *etc.* Such events are generally organised in the form of sports leagues. Since these events do not feature teams selected by pyramid members, these events can also be organised by agencies other than the designated sports regulators. However, for the organisation of sports events, the organiser may need access to the sports infrastructure and the players, necessitating the need for organiser’s interface with the sport’s regulator.

Given that generally the sports infrastructure is owned/controlled by sports regulators and players may also be bound by their respective contracts with the sports regulators, this interface is inevitable. As the sports regulators consider themselves as the custodian of respective sport, apart from being engaged in organisation of non-representative sporting events, they have also put in place a framework of the “approved” or “sanctioned events” and “non-sanctioned events”. The net result of this classification is that while the sanctioned events may get access to the desired infrastructural facilities and players, no such facilities will be extended to non-sanctioned events, making the organisation of such events a practical impossibility. This framework allows them to exercise complete control over critical inputs and in turn over organisation of non-representative sporting events as well.

**IDENTIFICATION OF ISSUES FOR EXAMINATION**

The primary issue arises from the organisational structure of competitive sports. It follows from the discussion above that there is monopoly/control of sports regulatory bodies in both the governance and organisational aspects of both the representative and non-representative sporting events, which needs to be examined for the likelihood of
leading to competition law issues. The economics of competition law emphasises that monopolies are not bad *per se*, and in specific markets, most efficient results can only be achieved in monopoly form of market structure. Thus, particular markets which are served most cheaply by one firm, and such markets are referred to as the natural monopolies. The competition laws across the world, considering the likelihood of efficiencies in operations, also do not frown upon monopolies just because of their existence and apply the provisions of competition law on a ‘rule of reason’ basis. Thus, the monopolies in governance/organisation of sports events also warrant an objective examination in light of the specificities of the sports sector.

However, before proceeding ahead, another issue of jurisdiction needs to be examined. The competition laws in general, and cases falling under Section 4 of the Act which prohibits the abuse of dominant position, in particular, work on the test of engagement of the relevant entity in “economic activities” for deciding on jurisdiction. The Act considers the issue of jurisdiction based on the entity fulfilling the criteria of being an “enterprise” as defined in the Act. Thus, the international approach and the India position in this regard is also to be examined.

Based on those described above, the following issues have been analysed in this paper.

- Examination of jurisdictional issues in relation to sports regulatory bodies;
- Examination of monopoly in regulation/governance of sports activities;
- Examination of the organisational aspect of sports regu-

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7 Also see, FastTrack Cabs Pvt. Ltd. v. ANI Technologies, CCI Case No. 6&74 of 2015, decided on 19.07.2017.
(a). Examination of jurisdictional issues about sports regulatory bodies:

The first test for any entity to be subjected to the jurisdiction of competition law in India is whether the same qualifies to be an “enterprise”\(^8\) as defined in the Act. In all the cases dealt by CCI in the sports sector,\(^9\) the first defence unfailingly taken by the sports federations/bodies has been that they do not qualify to be an ‘enterprise’ within the meaning of Section 2(h) of the Act. This completely insulates entity from the application of Section 4 of the Act. They rested their defence on the two-pronged argument—firstly, that they operate in the form of non-profit entities and secondly, they do not engage in any economic activity.

As regards the non-profit objectives, the arguments given by the sports

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8 Competition Act 2002 Section 2(h) of the Act- enterprise as a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

9 In the first decade of its enforcement, the Commission has dealt with 4 cases against 3 sports authorities—Board of Control for Cricket in India (BCCI), Hockey India (HI) and All India Chess Federation (AICF). The focal point in all these cases remained the conflict of interest issue given which the sports federation/authority, while discharging its role as the regulator of sports, was guided by its economic/commercial interest.
bodies have centred on their institutional form and consequent ploughing back of all their revenue in the development of the sport. While defining ‘enterprise’, CCI has consistently considered the functional aspect of an entity rather than institutional aspects. Thus, the assessment focuses at the nature of the activity in question. Instead of going into the form of the entity/organisation which is carrying out that activity. Accordingly, CCI has considered the “non-profit” institutional form as irrelevant to the determination of an entity as an “enterprise”.

As regards consequent implication of non-profit institutional form requiring ploughing back of revenues, CCI has noted that though these sports federations may be ploughing back all their revenue into the development of the sport, this does not change the nature of economic activities performed by them. As long as a person is engaged in an activity which requires it to have an interface with the market as well as with other alternatives for the product or service in question, it would be considered as an enterprise, irrespective of whether it is operating with or without profit motive.

Thus, the actual question relevant to the issue of jurisdiction is whether the activities undertaken by the sports bodies have an interface with the market or not. In this regard, it is to be noted that these entities are performing diverse roles in the value chain mentioned earlier, their actions are not only limited to sports governance/regulation but also the organisation of sporting events. While assessing the claims of BCCI, HI (Hockey case), AICF (Chess case), in the several cases against them, the Commission emphasised the nature of the activity performed by them. As regards BCCI, the Commission noted that ‘[i]n addition to being the custodian of cricket in India, BCCI also organises different formats of cricket matches/ tournament. By organising such matches/tournament, it generates income’. CCI relied upon BCCI’s financial statements which revealed
substantial revenues being generated by it from granting media rights to broadcasters, entering into franchise arrangements with business houses, raising sponsorship, etc. Just because such revenue is ploughed back into cricket and allied activities; that does not imply that the said activities of BCCI are not economic. Similar observations were made in the Hockey case and Chess case.\(^\text{10}\)

Considering that the sports regulatory bodies are also carrying on the organisational activities in addition to governance functions, these entities do constitute an enterprise and are subject to the jurisdiction of competition law in India.

It is important to note that the fact of the sports governing body being engaged in organisational activities is an essential factor in characterising the body as an “enterprise”. A related question which arises is that do the competition law authorities restrict themselves to the examination of issues which centre only on the commercial organising aspect? Alternatively,

\(^{10}\) AICF argued that the sport of chess does not generate interest of viewers and there is no income earned through sale of tickets, television rights or advertisements. Further, it was urged that AICF only monitors and regulates these tournaments and strictly keeps itself out of the economic activities associated with organisation of tournaments. The Commission, however, did not buy any of these arguments and held AICF to be an enterprise, observing that AICF being the only organisation from India to be recognised by and affiliated to FIDE, has been mandated to organise national and international championships in terms of its Constitution and bye laws. Since AICF claimed that it was not organising these events as such, the Commission went one step further in observing that “[…] in terms of Section 2(h) of the Act, a person would be an enterprise, irrespective of whether the activities mentioned therein are carried out directly or indirectly through units, divisions or subsidiaries. Thus, if AICF conducts chess events through or in collaboration with the State associations/club, these would be deemed to have been organised by AICF making it an enterprise.” In addition to the above, the financial statements of AICF also revealed that it received income from sale of advertisement space, sale of media rights and sponsorship, as opposed to the claims made by it.
once a sports body is held as an enterprise, all the aspects of its functioning become amenable to review from the competition law perspective. In other words, after concluding that sports bodies are an “enterprise” and subject to competition law in India, the next aspect which warrants examination is that considering the twin roles of regulation and organisation. Should an exception be made for the regulatory role played by these bodies and the consequent purely sporting rules made by them be kept outside the ambit of competition law?

The authors are of the view that there is a strong case for not subjecting purely sporting rules to review under competition law. However, the issue which complicates the situation is that the strictly sporting rules or purely regulatory functions of a sports governing body are so strongly intertwined with the commercial aspects that granting such immunity can create a regulatory gap. Thus, a middle path which can be followed is to subject all the functions/rules of sports governing body to competition law and duly consider the specificities of the sporting rules while deciding on the contravention of the law.

These aspects have been tested in other jurisdictions, primarily Europe. The earlier position taken by the courts in Europe did favour the immunity of sports governing bodies from the application of competition law in so far the issue was purely sporting rule.\textsuperscript{11} However, the same has changed with the decision in \textit{Meca-Medina}\textsuperscript{12} case. In \textit{Meca-Medina} case, two professional swimmers were banned for using

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a prohibited substance by the International Swimming Federation (FINA) Doping Panel. The European Court of Justice (ECJ) in this case, decided on the lines that a sporting rule (i.e., a purely sports governance issue) may also have economic implications. Therefore it may need to be tested for inherence and proportionality to the objectives pursued. The effect of this judgement is far-ranging as it brings at least prima facie all the sporting rules within the jurisdiction of competition laws. There has been some criticism of Meca-Medina judgement as well, and it has been felt that it overturned the previous position taken by the European Commission and ECJ.13 As per the previous position of law under which purely sporting rules were explicitly considered as non-economic and kept outside of the purview of common law and competition law. However, that approach adds an element of ambiguity and uncertainty in the functioning of sports governing bodies.

It is essential to understand what could have brought about such a significant change in jurisprudence which subjected all decisions of sports bodies to competition review. One underlying reason could be the fact of intertwined regulatory-commercial functions discussed above which was a factor even at the time of earlier decisions, and second and more relevant to the change could be the changing character of sports in a commercial sense. In previous times, when commerce in sports had not gained so much relevance, pure sporting rules may not necessarily have significant economic implications to justify their subjection to competition law scrutiny. Contrary to this, in recent times, the commerce of sports has surpassed the spirit of sports. This reflects in the size of the “sports market” and nature of

complaints being received by competition agencies across the world. Thus, *Meca-Medina* may be considered more as a ruling influenced by the change in circumstances surrounding the sports sector than a shift in the position of the competition regulator. Under the circumstances, it appears prudent to subject all the rules to scrutiny under competition law. This rigour of European Courts to subject sports regulators and their activities to competition law was reemphasised and reflected in later cases\(^\text{14}\) also. Thus, the international position which emerges is that the sports bodies should be and can be subjected to jurisdiction on competition laws even for decisions strictly taken as a part of sports governance. At the cost of repetition, however, it is reiterated, that the contravention analysis needs to factor the specificities of sport.

The aforesaid approach is in sync with the decisional practice of the Commission. In the *Chess* case, the Commission categorically held that the ‘system of approval under the pyramid structure of sports governance is a normal phenomenon of sports administration. However, rules governing the players and the organisation of sports events/ tournaments often create a restrictive environment for the economic activities that are incidental to the sport. Unlike other abuse cases, these could be justified if it is demonstrated that the restraint

\(^{14}\) *See*, MOTOE case and International Skating Unions Case (ISU Case). In ISU Case, ISU eligibility rules allowed ISU to impose severe penalties, including a lifetime ban from all major international speed skating events, on speed skaters for participating in competitions that are not approved by the ISU. ISU had discretion to impose such penalties, even if the independent competitions pose no risk to legitimate sports objectives, such as the protection of the integrity and proper conduct of sport, or the health and safety of athletes. European Commission found such rules to be restrictive of the commercial freedom of athletes who are prevented from participating in independent skating events. Further the eligibility rules were found to be preventing independent organisers from putting together their own speed skating competitions because they are unable to attract top athletes.
on competition is a requirement to serve the development of sport or preserve its integrity.\footnote{See, Hemant Sharma & Ors. v. All India Chess Federation, CCI Case No. 79 of 2011, decided on 12.07.2018 para 53.}

In *Hockey* case, names of individual players were not included in the ‘48 probables’ for the camp held at Bangalore for preparation and for selection of the Indian team which went to London to play four (4) nation test match \emph{etc}. Selection of players is essentially a regulatory issue. Still, given the allegations that the intent was to penalise players who participated in a competitive league (\emph{viz}. World Hockey Series/WSH) and to exclude such competitive leagues, the Commission/CCI analysed the case on merits instead of exempting HI from its jurisdiction for discharging a purely regulatory function.\footnote{CCI, however, on merits was satisfied that the exclusion of certain players from the selection of probables for the Indian team was not account of their participation in WSH. Rather, the exclusion was on account of non-participation in training camp, which was mandatory. Such finding appears to be a passive acceptance of the exclusive jurisdiction of the sports bodies to take decisions relating to purely sporting rules.}

The aforesaid observations of CCI and the international decisional practice unambiguously indicates that the sporting federations/bodies are subject to the provisions of competition law. This is attracted not only where they compete with the other economic agents as an organiser of leagues/events/tournaments but also for their purely sporting rules which may potentially affect the economic activities carried out by other participants in the sports ecosystem.
(b). Examination of monopoly in regulation/governance of sports activities

The monopoly in regulation is an age-old concept. Such monopolies are pervasive across sectors and sports is no exception. One view as regards such a monopoly is that the conferment of legal monopoly status to regulatory agencies, including sports federations, may lead to problems similar to the monopoly on the market side. This takes away the competitive pressure on regulatory agencies required to improve their working; it may adversely impact the quality of regulation\textsuperscript{17}. The converse view is that the monopoly in regulation is most suitable for achieving the overall objectives of regulation. It leads to standardisation of regulatory approach, non-discrimination between various regulated entities, orderly growth of the concerned sector and prevention of wastage of resources on duplicate bodies meant to perform the same role. In the context of sports, the monopoly in the regulatory sphere assists in the prevention of conflict within the sport. This is essential for the selection of national athletes and teams, and the identification of champions at each level of the sport, besides preserving the integrity and uniformity of sports.\textsuperscript{18} The peculiar character of sports necessitates

\textsuperscript{17} Howard Baetjer, Jr., a lecturer in the department of economics at Towson University in an article notes, “The legal monopoly status of government regulatory agencies is a problem. It means that when and if these agencies do a bad job of assuring quality in their industries, the public is stuck and they have nowhere to turn, so there are no systemic forces at work to improve the agencies’ performance or replace them with better quality-assurance providers”. Howard Baetjer, Jr., Government Regulators are Monopolies, FEE (August 02, 2016) (May 5, 2020, 12:05 PM) HTTPS://FEE.ORG/ARTICLES/GOVERNMENT-REGULATORS-ARE-MONOPOLIES/.

pyramid structure and consequent monopoly in regulation. Given these characteristics, the pyramid structure helps in maintaining singularity of governance principles and rules, both on and off the field. (including the rules of play, anti-doping regulations, anti-corruption regulations etc.) Further, it also aids in the equitable distribution of revenue from the elite to the grassroots level, encouraging participation, development and competitive balance.

For these reasons, there does not seem to be any discernible harm to the competition process because of monopoly in regulation. It indeed would be antithetical for a sport to have multiple regulators laying down their own set of rules for the sport and administering the sport in their different ways. This plurality of rules would surely lead to the elimination of viewer interest in the sport. Thus, given the objectives sought to be achieved, there does appear to be significant arguments in favour of monopoly in sports regulation, flowing from the pyramid structure. However, as stated above in discussions on the aspect of jurisdiction, the behavioural aspects are also relevant, and the decisions of the sports governing bodies which may be purely sporting may also in some cases pose competition issues and therefore may require examination.

(c). Examination of Organizational Aspect of Sports Regulators

After examination of the pyramidal structure, the next aspect of being examined is whether the regulators of sport should at all be engaged in the organisation of sporting events. Generally, the regulators do not engage in commercial activities, and their activities are limited to regulating the sector in a manner which facilitates the development of the sector and preserves the interest of all the stakeholders, be it the consumers or the service providers/sellers of goods. However, it is essential to note that generally, the regulators are also not tasked with funding the growth and development of the sector which they regulate. The fact that sports regulators are tasked (or
instead they have tasked themselves) with the additional object of funding the development of the sport make their case distinct from other general regulators and therefore needs to be examined in the context of the same spirit.

As stated above, the primary rationale for organising events from the viewpoint of sports regulators is ensuring the availability of funds required to promote and develop the sport. The organisation of the sporting event implies revenue generation for the organiser through multiple sources of revenue associated with the organisation of sporting events viz., revenue from sponsors of a sporting event, revenues from media companies engaged in the broadcasting of sporting event, revenues from the sale of official merchandise etc.

To better understand the stakes involved, it would be appropriate to consider the evolution of commerce of sports over a period of time. In earlier days, the sports events generally organised were representative events, and the extent of commerce in sports was minimal, or in other words, there were no active “markets” for sports. To illustrate this point, the example of cricket can be given. In the year 1983, BCCI had to organise a fundraising concert featuring Lata Mangeshkar, a renowned Indian singing artist, to reward the players with a number of Rs. 1 lac each, after India won the World Cup. In contrast to the same, each member of the Indian team which won the T20 World Cup in 2007 received Rs. 80 lakh from BCCI. The rights for the 1999 World Cup were sold for $12 million while the combined rights for the 2003 and 2007 World Cups were sold for $250 million.

Further, not only the commerce of representative events increased manifold, the sports regulators also started organising the non-representative events on a grand scale. BCCI forayed into IPL, and Sony Entertainment Television paid $1.026 billion for television rights for
the first ten years of the IPL. Similarly, Hockey India, the governing body for the sport in India started Hockey India League, and All India Football Federation began the Indian Super League and so on.

Though there is a need of sports regulatory bodies for access to funds, it is equally critical to mention that the organisational aspect which leads to a unique situation where a regulator is a commercial beneficiary of the object of its regulation. This situation may imply that the regulator itself may monopolise the organisation of all sporting events (representative or non-representative) by using the regulatory framework. In competition law parlance, the regulator may gain a dominant position in the market for organisation of sports events by it being in a position to determine the very factors on which a new player may enter the market for organising such sporting events and compete with it. The sports regulator may choose to create permanent entry barriers or may provide for a regulatory framework which makes the entry of a new player possible on paper but acts in a manner which denies entry in practice. Given the dual roles performed by one body, one regulatory and the other commercial, it may be difficult to segregate motives for regulatory prescription and/or intervention. This situation arising from an inherent conflict of interest may lead to such a situation which may be regarded as one of “inevitable abuse”. The ever increasing financial stakes further strengthen the likelihood of such “inevitable abuse” in the conduct of sports governing bodies.

Further, under the guise of development of sports regulator may adopt a protectionist approach. They may justify their restrictive conditions by

arguing that free/unbridled entry may have an adverse effect on the sport. Moreover, by not doing so, the sport may lose the standardisation in terms of rules, or that there may be overexploitation of sport leading to drop in viewer interest, or that the players may participate in events organised by private players for commercial reasons disregarding the representative sports etc. Some of the justifications mentioned above have also been relied upon by sports federations/bodies while defending their respective positions in cases before CCI.

Thus, based on the aforesaid discussion, it is noted that there are pros and cons of the sport’s regulator also being a commercial organiser. In such a situation, it is imperative to undertake a finer analysis of the issues and to explore the possibility of the most efficient outcome considering every aspect.

In a case decided by CCI against BCCI, it was categorically observed that competition cases relating to sports federations usually arise due to the conflict between their regulatory functions and their economic activities. The main issue, in that case, pertained to a restrictive clause that was inserted in the Indian Premier League (IPL) Media Rights agreement entered into by BCCI with the broadcasters of IPL. Under said clause BCCI undertook that “it shall not organise, sanction, recognise, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league”. This, as per the allegations, foreclosed entry and led to the denial of market access to other competitive leagues.

Applying the reasonability test\(^20\), CCI recognised that though free entry

\(^{20}\) In the said BCCI case (Case No. 61/2010), CCI observed that for a meaningful analysis “[i]t is necessary to appreciate whether the impugned clause in the IPL Media Rights Agreement and the impugned rules of the BCCI rules are
is one of the necessary conditions for competition to flourish, given the specificities of specific sectors,\(^{21}\) entry may be subject to regulatory requirements. Thus, the effects of such entry rules specified by the regulator must be evaluated on a case-by-case basis taking into account the legitimate regulatory goals such as quality, safety, orderly growth of sports etc.\(^ {22}\) In BCCI case, the CCI decided that the aforesaid clause in the Media Rights Agreement imposes insurmountable entry barrier in contravention of competition law and the same restriction cannot be justified considering the specificities of sport.

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In place to serve the development of the sport or preserve its integrity or otherwise. If the impugned restrictions impede competition without having any reasonable justification for protection of the legitimate interest of the sport, the same would fall foul of competition law.\(^ {21}\) In Hockey India case, CCI provided detailed observations on specifics of sports, “[s]port has certain specific characteristics, which are often referred to as the „specificity of sport”’. These specificities can be on the aspect of sporting activities and of sporting rules such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions. The specificities can also be with respect to a structure notable among them are: the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level; organised solidarity mechanisms between the different levels and operators; the organisation of sport on a national basis; and the principle of a single Federation per sport.’\(^ {22}\) In the said BCCI case (Case No. 61/2010), CCI held that ‘the impugned clause in the IPL Media Rights Agreement and Rule 28(b) create an insurmountable entry barrier in the relevant market for organization of domestic professional cricket leagues. In the absence of any plausible regulatory rationale or necessity of the same for promotion of the sport, the anti-competitive effect of the impugned clause is indubitable. Based on the foregoing assessment, the Commission concludes that the representation and warranty given by BCCI in the IPL Media Rights Agreement…………amounts to denial of market access for organization of professional domestic cricket leagues/ events in India, in contravention of Section 4(2)(c) read with Section 4(1) of the Act.’
In Hockey case, the issue centred on the alleged exclusion of individual players from the selection of probables for the Indian team on account of their participation in a non-sanctioned event (WSH). The issue before the Commission was whether HI is misusing its regulatory powers and promoting its Hockey League to the exclusion of WSH. Thus, engaging in practices resulting in a denial of market access to rivals, in contravention of Section 4(2)(c) of the Act. The Commission, on perusal of the evidence on record, was satisfied that the exclusion of certain players from the selection of probables for the Indian team was on account of their non-participation in training camp, which otherwise was mandatory, and not owing to their participation in WSH. Another allegation in Hockey case was that HI was using its dominance in conducting international events in India to enter into the market of holding a private event. Applying the inherent proportionality test, CCI found no contravention against HI.

Interestingly, after CCI gave its finding in the BCCI case, another information was filed against it by Pan India Infraprojects Private Limited. Though the first case against BCCI alleged a general denial of market access to players interested in the organisation of private cricket leagues, the subsequent case (hereinafter, referred to as the ICL case) filed against it focused specifically on the conflict between IPL and the Indian Cricket League (ICL) which was launched by Pan India Infraprojects Private Limited in the year 2007.

\[\text{23 Though the earlier decision vide which CCI found BCCI to be liable for contravention was remanded back by erstwhile Hon’ble Competition Appellate Tribunal. However, vide its order dated 29.11.2017, CCI confirmed the stand taken by it in its earlier order.}\]

\[\text{24 Formerly known as M/s Essel Sports Private Ltd.}\]
ICL was the first of its kind tournament in India which ran successfully for two seasons before the third season was allegedly thwarted on account of abuse of regulatory power by BCCI. Supposedly, IPL, promoted/organised by BCCI, was only a belated move to adopt a similar format of the game which took away the first-mover advantage from ICL. BCCI allegedly issued several warning letters to players, office bearers and affiliated entities and to stadiums restricting them from participating in any unauthorised tournament/matches, failing which they were liable to lose their benefits and privileges. Besides, as per the allegations, BCCI also adopted other strategies to frustrate the organisation of private cricket league by any competitor. Meanwhile, in June 2009, ICC amended its regulations intending to grant complete discretion to BCCI in the process of approving unofficial cricket events, i.e. events not organised by ICC or its members. Such amendment was allegedly influenced by BCCI to obstruct ICL and any other emerging rival cricket league. Rule 32, which explains the concept of ‘unofficial cricket event’, was amended and a section on ‘Disapproved Cricket’ was inserted. Because of this amendment/modification, any cricket match not approved by the member in whose territory it is being played will be deemed as ‘disapproved cricket’, and thus denying it the access to the infrastructure, players etc.

Further, this case also brought another interesting allegation of how BCCI blacklisted the Informant from participating in the bids for allocation of media/broadcasting rights for IPL, owing to some pending litigation filed by Pan India against BCCI, by putting restrictive conditions in the tender.

25 For Instance, as per the allegations, BCCI imposed a virtual ban on players and also pressurized various PSUs and companies to terminate the employments of players associated with ICL.
Pan India has alleged that such conditions were specifically targeted to it due to its involvement in establishing a competing professional cricketing league (*i.e.* ICL). As the case is still pending with CCI, authors refrain from commenting any further on the allegations in the instant case.

These cases bring into sharp focus the issue of the level playing field in markets where the sports federations/bodies are entrusted with dual roles. Wherein independent judgment as a sanctioning authority becomes subservient, or at least is perceived to be subservient, to its economic interest as an organiser of competitive leagues/events/tournaments. It is interesting to note that in *Hockey* case, despite not finding any behavioural/conduct related violation, CCI commented on the structural aspect while stating that the ‘*present system itself, with the possible conflict of interest between the “regulatory” and “organising of events” roles of Hockey India, has raised certain potential competition concerns in the mind of the Commission*.\(^\text{26}\)

On the remedial aspect, on one end of the spectrum, there can be an ideal organisational structure which resolves the aforesaid conflict of interest by completely segregating the regulatory role from the commercial aspects of sports. The primary opposition to this idea stems from the need for ensuring the availability of funds to the sport’s regulator for the development of the sport. However, this objection has no sound basis, and it is a misnomer that a regulator has to engage in commercial operations to raise funds compulsorily. The non-sport regulators also need to raise

\(^{26}\) CCI specifically observed that ‘circumstantial evidence which, though not establishing violation of the Competition Act, further persuades the Commission about the inherent potential of violation, and the need for clear articulation and separation of the two roles of HI’. 
funds, albeit for a limited objective of funding their activities and to this endeavour, they use various revenue instruments *viz.*., license fees, the fee for regulatory services *etc.*. The similar revenue streams can be allowed to accrue to the sports bodies, thus leading to complete segregation of roles and yet ensuring the availability of funds for the development of the sport.

In the aforesaid suggested model, the sports bodies should give up the organisational role encompassing both the representative and non-representative events. However, it is equally important to note that the organisational structure wherein the sport’s regulator performs both the regulatory and commercial functions cannot be *per se* considered against the letter of competition law. Thus, as stated above, though complete segregation can be an ideal solution, yet another model can be proposed which duly accounts for specificities of sports and also resolves competition concerns. There are certain specificities of organising representative sports events. Teams in such events represent the pyramid members themselves which imply the representation of a state or a nation and therefore such events necessarily derive their value being monopoly events. There cannot be any possibility of having more than one event at the same level for representative events. Thus, there may be some justification for sports bodies to play the role of the monopoly organiser itself. However, there seems to be no justification whatsoever for these sports bodies to monopolise the market for non-representative events. Thus, a more practical, the approach may be to reserve the right to organise the representative sporting events exclusively for the sports bodies.

However, another approach which can be considered is to allow the sports bodies to organise both representative and non-representative sporting events but making it incumbent for them to act as an impartial regulator devoid of any self-economic/commercial interest when it comes to deciding on the issue of organisation of sporting events by third-party organisers.
To this effect, they would have to put in place adequate safeguards in its processes and procedures to remove any perceived, potential, or actual conflicts of interest caused due to the dual role performed by it.

**CONCLUDING REMARKS**

The paper succinctly captures the competition law jurisprudence that has evolved so far with respect to the sports sector. Generally, competition laws apply to only economic activities of an enterprise and exempt the non-economic functions; there can be an argument that purely regulatory functions, being devoid of economic nature should not be subjected to competition law. However, the strictly sporting rules or purely regulatory functions of a sports governing body are so strongly intertwined with the commercial aspects that granting such immunity can create a regulatory gap. The decisional practice of the Commission as well as the international jurisprudence supports the view that though sports bodies discharge certain functions which are purely regulatory. The potential ability of such rules to have implications on the commercial sphere brings them within the ambit of competition laws, not only for such economic activities but also for the discharge of purely regulatory functions. Indeed, while analysing all such cases, a cautious approach needs to be adopted that interweaves the competition analysis with the specificities of sports to optimal enforcement/outcomes.

Generally, the sports bodies perform three types of functions: governing the regulatory aspect of the sports, organisation of representative sporting events and organisation of non-sporting events. While efficiency considerations tilt the balance in favour of having a monopoly of the sports body for the purely regulatory functions, the organisation of sporting events has its pros and cons. The discussion in the paper brings out that considering the increasing commerce in sports and the consequent
possibility of trumping of the spirit of sports, a remedial framework is required. Though complete segregation of regulatory functions from commercial functions may be the ideal situation, there appears to be some valid justification for having a monopoly of the sport’s regulator in the organisation of representative sporting events. For non-representative events, the sport’s regulator should not participate as an organiser as its mere presence in the market is sufficient to raise conflict of interest issues. As regards the controlling/regulatory concerns expressed by sporting authorities, in view of the authors, such concerns are somewhat illusory given that separation of roles would allow the sports regulators to regulate all these aspects in an even more robust manner. The sports regulators have already started putting in place the system of sanctioned and non-sanctioned events, which, however, at present, is shadowed by the conflict of interest. Separation of functions will help in achieving the same objectives as the present framework with additional merit of the sport being free of the evil of potential abuse of dominance by the sports regulators. In the event, it is not considered appropriate to per se prohibit sports bodies from organising non-representative sports events, the minimum which could be required from them is to put in place a safeguard mechanism to ensure that a conflict of interest does not influence the decisions.

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IMPLICATIONS ON LEGAL AND REGULATORY FRAMEWORK OF SPORTSCASTING IN INDIA

Dr. Sujith S\textsuperscript{1} and Uma Devi S\textsuperscript{2}

A PREFATORY

Sports have been instrumental as a medium of enthusiasm and celebration for the human race since time immemorial. Sports and sporting events have witnessed revolutionary changes in the wake of technological advancements and globalisation. The progressive improvements in the communication and information technologies in the broadcasting of sports have proffered, diminution of the gap between the sports, media and the people. For example, the rural traditional sporting events have been explored in the virtual spheres as more digitised and accessible to the people worldwide. Thus, making the sports to move from its traditional ambit of recreational activity to the realm of entertainment and business. These changes tend to facilitate more value to sports and sporting events as an economic good.

Being a good of economic value, the aspects of branding, franchising, merchandising, licensing, makes sports involving in it or within its ambit the application of intellectual property rights. Both industrial properties and non-industrial IPs can be applied in Sports. In the case of patent laws, it deals with the encouragement of technological advancements in sports and sporting events whereas trademarks and designs gear a particular characteristic to events, teams and players. Trademarks in the sports business also tend to create brands, logos, taglines, captions. Copyright law

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also casts protection of expressions of ideas in literary, musical-dramatic, photographs, sound recording and cinematographic films. Copyright provides the owner with the right to sell, reproduce, make copies, do derivative works, licence and assign work. Sports and sporting events have been created mostly over copyright regime. Broadcasting rights are another set of proprietary intellectual right created under the Copyright Act, 1957. For most of the sports organisations, the sale of broadcasting rights and media rights now is the most significant source of revenue, generating enormous funds. With this background, authors are trying to probe into the convolutions on the rights of the broadcasters in sports, and thereby conceding to the fact of their active and unavoidable involvement and importance in the sphere of sports and sports events.

**BROADCASTING IN INDIA**

Broadcasting can be commonly be understood as the means to give off or to send images, sounds, etc., through space using radio waves. The public receives these waves by way of different receptor technologies such as television, radio etc. Telegraph, telephone and wireless communication were the earlier means of broadcasting technologies.

There are numerous laws in the regulatory sphere which provides broadcasting and access to the broadcast. The Indian Telegraph Act, 1885 (*hereinafter “Telegraph Act”*) is the first legislation to provide a legal framework for almost all sorts of communication technologies, including broadcasting. The Telegraph Act granted monopoly rights to the government in broadcasting. Establishment of Telecom Regulatory

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Authority of India (hereinafter “TRAI”) was another remarkable initiative taken by the Government of India in the year, 1997 to regulate telecommunication services including broadcasting and cable services. Broadcasting was not included in the Telecom Regulatory Authority of India, Act, 1997 (hereinafter “TRAI Act”) but was notified later under the definition of telecommunication services\(^4\). Licensing provisions were also provided like wireless operating licenses. Apart from this, The Indian Wireless Telegraphy Act, 1933 (hereinafter “Telegraphy Act”) regulates wireless communications including television and radio services. Users are required to obtain wireless licenses for possessing and using wireless equipment. Sports broadcasting companies are required to obtain two types of licenses under the present statutory scheme, \(\textit{viz.}\), the grant of permission to offer broadcast services under the Telegraph Act and licenses for operating of wireless under the Wireless Telegraphy Act.

Another legislation on broadcasting is Prasar Bharati (Broadcasting Corporation of India) Act, 1990, (hereinafter “Prasar Bharti Act”) which constitutes an autonomous broadcasting corporation to manage and conduct public broadcasting through Doordarshan and All India Radio. The sports broadcasting companies, including various channels of sports who have broadcasting rights, is required under the Prasar Bharti Act to share the content with Prasar Bharati. This sharing of content is applicable for feeds of sporting events of national importance, which is held within India or abroad. This sharing is done for terrestrial transmission and DTH broadcasting (free-to-air) by Prasar Bharati. The nature of the events, like whether it is of national importance or otherwise will be decided by the Ministry of Information and Broadcasting in consultation conjointly done

with three agencies, viz., the Ministry of Sports and Youth Affairs, Prasar Bharati and the Sports channels.

**BROADCASTER’S RIGHTS**

The broadcasters and broadcasting organisations play an essential role in contributing exclusive right over the distribution of sports and sports events in public. The intellectual property right conveys exclusive proprietary rights to the author for his work. This exclusive right includes the right to distribute and disseminate the work to the public as well. Right to broadcast is one of the rights of the author of the work to communicate to the public. This right is held irrespective of the right of issuing copies of such work.

‘Communication to the public’ means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion. The definition covers dissemination of work through wireless, or wireless distribution means. ‘Work’ here means any literary, dramatic, musical or artistic work or a cinematographic film or a sound recording. The right to broadcast the work is only vested with the author. The author’s work is converted into broadcast signals to distribute it. The above-said right to broadcast the contents and the signals can be said to be ‘communication to the public’.

The author’s right to broadcast can be utilised by him with the help of different agencies that usually act as intermediaries between the author and the public for distribution of work. These agencies offer large scale commercial publication of the works. Such agencies are generally held

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5 The Indian Copyright Act 1957- Section 14.
6 The Indian Copyright Act 1957- Section 2(ff).
7 The Indian Copyright Act, 1957 Section 2(y).
as broadcasting organisations. The broadcasting organisations will be assigned or are given licenses for broadcasting by the author. Rights of these broadcasting organisations are also set out in the Indian Copyright Act, 1957 as neighbouring rights for 25 years for the work. The neighbouring rights include the right of reproduction of works of author and such other allied rights as are set out under the Copyright Act. Since the contents of the work are within the ambit of an exclusive right of the author, and broadcasting organisations simply have the right to distribute the content without right over the signal.

Internationally, various efforts have been put forth to address the right of the broadcasters. Under the Rome convention, 1961\(^8\), the rights for 20 years to authorise rebroadcasting, “fixation” (recording), reproduction and communication to the public of their broadcasts. Earlier, the government of India had a monopoly over broadcasting. The private organisations were only having a chance for commercial advertising and sponsorship of programmes. The positive responses by the judiciary in the matter of Secretary, Ministry Of I&B v. Cricket Association of Bengal, paved the way for opening up of broadcasting regime over to private organisations.\(^9\) In the said case, the Supreme Court negated the concept of monopoly over broadcasting and recognised the right of a citizen to broadcast. Generally, broadcaster’s rights include: broadcasting, rebroadcasting, fixation, reproduction and communication to the public of their broadcasts.

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\(^8\) The International Convention for The Protection Of Performers, Producers Of Phonograms And Broadcasting Organizations (Rome Convention), 1961- the convention does not protect pre-broadcast signal rights as they are not intended for public dissemination.

\(^9\) Secretary, Ministry of I&B v. Cab, (1995) 2 SCC 161, wherein the SC held that the every citizen has a right to telecast and broadcast to the viewers/listeners any important event through electronic media, television or radio and also provided that the government had no monopoly over such electronic media as such monopolistic power of the government was not mentioned anywhere in the constitution or in any other law prevailing in the country.
In India, the sports sector is governed by laws including National Sports Policy, Sports Law and Welfare Association of India, Sports Authority of India and the Sports broadcasting law. The sports broadcasting law was a significant contribution towards securing the broadcasters’ rights over the sports and sports events. Considering its nation-wide importance the Parliament of India has passed the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007(*hereinafter “SBS Act’*). The object of the SBS Act is to provide access to sports events of national importance. The Act ensures this through the mechanism of sharing of sports broadcasting signals with Prasar Bharati. In this Act, ‘broadcaster’ means any person who provides a content broadcasting service and includes a broadcasting network service provider when he manages and operates his television or radio channel service.\(^{10}\) According to Section 3 of the SBS Act, puts an obligation on every owner or holder of rights concerning the content and as well as the provider of television or radio broadcasting services shall share they are broadcasting sports events of national importance with Prasar Bharati whenever they are going for live broadcasting in Indian territory. The provision is significant once we see into the judicial disposition of the Apex Court in *Secretary, Ministry of Information & Broadcasting, Govt. of India and Others v. Cricket Association of Bengal and Other*\(^{11}\) that the right to use airwaves and the content of the programmes has to be used in the best interest of the society, which thereby necessitates the need to regulate

\(^{10}\) The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharti) Act 2007_Section 2(1) (a).

\(^{11}\) Secretary, Ministry of Information & Broadcasting, Govt. of India and Others v. Cricket Association of Bengal and Other (1995) 2 SCC 161
it to prevent the monopoly over information. The airwaves are public property. The concentration of the right to broadcasting in the hands of few say for instance, within the central agency or any private players will hitherto pause potential danger for the dissemination of information and affects consumer interests and broader public conscience.

The ‘live broadcasting’ under Section 3 can be employing cable or through DTH network or can be in the form of on radio commentary broadcasting. This sharing of live broadcasting shall be in such a way to enable them for re-transmission of the same on Prasar Bharati’s terrestrial or DTH networks. The SBS Act states that this sharing should be done without advertisements. However, an exception to Section 3 provides that where the broadcasting service provider can share the live feeds even with advertisements based on sharing of revenue. The revenue from advertisements of broadcasting shall be shared between the owner and holder of the content and Prasar Bharati in not less than 75:25 proportion for television coverage and 50:50 for radio coverage. The SBS Act also empowers the Central Government to impose penalties for the violation of the provisions of the Act, including suspension of registration or licences, revocation of licences etc., and pecuniary penalty up to Rs. 1 Crore\(^\text{12}\).

In 2017, the Supreme Court of India, in *Union of India v. Board of Control for Cricket in India & Ors.*\(^\text{13}\), while considering the SLP before it, upheld the decision of the Delhi Court wherein the High Court has prohibited the sharing of a live feed of cricket by Prasar Bharati with other cable operators through Doordarshan Channel. ESPN and STAR had exclusive rights over

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\(^{13}\) *Union of India v. Board of Control for Cricket in India & Ors Civil Appeal No. 10732-10733 of 2017*, (Supreme Court of India).
the live feed of cricket broadcast. According to Section 3 of the SBS Act, ESPN and STAR have to mandatorily share the live broadcasting signals of sporting events of national importance with Prasar Bharati. The court here found that Section 3 only authorise Prasar Bharati to share re-transmission of signals through its terrestrial and Direct to Home networks rather than sharing it with other cable operators. In this case, the validity of Section 3 of the SBS Act was not challenged by ESPN and STAR. Here, the BCCI (Board of Cricket Control of India) has issued licenses to broadcast live feeds to Doordarshan and other media operators. The court stated that the object behind the SBS Act is to provide access to sporting events of national importance to the public at large through the mandatory sharing of signals of sports broadcasting. The sharing should be done with Prasar Bharati as per revenue sharing prescribed by law. The court further stated that the SBS Act, 2007 provides that such sharing to Prasar Bharati is to enable them to share it only with the terrestrial and DTH operators or networks only. However, this right is subjected to the provisions of the Cable Act, 1995. Moreover, according to Section 8 of the Cable Act, 1995 it also imposes an obligation on the cable operators to transmit Doordarshan and such other channels which are operated by the Government of India as notified thereunder.

In ESPN Software India Pvt. Ltd. v. Prasar Bharati & Another14, the Delhi High Court considered the constitutionality of Rule 5 of the SBS Rules, 200715 conjointly with Section 3 of the SBS Act, 2007. The court while upholding the validity of the provisions held that there shall be sharing of broadcast signals of sports events with Prasar Bharati without including advertisements even though such advertisements are included by the

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14 ESPN Software India Pvt. Ltd. v. Prasar Bharati & Another WP(C)3611/2013 (High Court of Delhi).
content owner himself or by the broadcast service provider.

In Star Sports India Pvt. Ltd. v. Prasar Bharti & Ors.\textsuperscript{16}, the decision passed by the Delhi Court in ESPN case\textsuperscript{17} was challenged, on Section 3 of the SBS Act, 2007 wherein the appellant STAR Sports shared some contents with Prasar Bharati of world feed that is which includes the live play of the event - Live feed. These feeds contained some additional feature including those which enhances viewer's interest. The Prasar Bharati challenged such features as advertisements and hence violative of Section 3 of the SBS Act, 2007. The appellants contended that the onus of every broadcasting agency is to transmit as received from the content owner of which the appellants are not obliged to remove or alter what has been received, as they had no control over the live signals received.

And further, the features were improvements which can be termed as ‘On-Screen credits- for example logos etc. made by the event organisers only which thereby cannot be treated as advertisements at all. Hence, Rule 5 of the SBS Rules are ultra vires of Section 3 for prescribing mandatory removal of commercial advertisements by the agencies themselves. The court rejected the contention of appellants that they had no control over the signals received from the content owner or holder and that it violates the contractual terms of the copyright owner of the broadcast. The court finally held that the live feeds should be shared without any logos or features even if the content holder or owner is including such since it constitutes

\textsuperscript{16} Star Sports India Pvt. Ltd. v. Prasar Bharti & Ors.Civil Appeal No.5252 OF 2016 (Supreme Court of India).

\textsuperscript{17} WP(C)3611/2013, (High Court of Delhi).
advertisements under Section 3 of the SBS Act.

(a). Internet broadcasting in Sports:

More significant advancements in the technology, especially in cases of broadcasting over the internet and live streaming are alarmingly increasing day-to-day. The broadcasting over the internet realm is devoid of any regulations. Broadcasting over the internet was not earlier covered under the Indian Copyright Act, 1957. The legal regulation of internet broadcasting came up only in the year 2016, where under Section 2(ff) of Copyright Act, internet broadcasting was included under communication to the public.\textsuperscript{18} Under Section 31D of the Copyrights Act, statutory licenses can be issued to any broadcasting organisations for the copyrighted works.

Further Section 31D (3) states that there shall be the difference in the payment of royalties for any broadcasting organisations of television and radio broadcasting. The statutory licences issued under Section 31D is for broadcasting by appropriately authenticating the valid source of the work, i.e., like the author. The work should be given credit without making any material alterations whenever and wherever it is reproduced and at the time of broadcast. Internet broadcasting is included under the said provision is still a question that we should further ponder on.

(b). Implications of Unauthorised Use:

The Copyright Act permits fair use of the copyrighted works. In the context of copyright due to the rapid advancements in technology and the booming up of sports as a significant entertainment business, the author’s works are

\textsuperscript{18} DIPP, Office Memorandum dated September 5, 2016 (May 6, 2020, 11:41AM) \url{https://dipp.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf}. 
most often threatened by way of signal and content piracy, unfair dealings, etc. Signal piracy happens when a person decodes an encrypted signal without authorisation. It can be during a standard transmission or from a stolen event. This might eventually slow down the reception of the signal or interfering with the quality of the broadcast for which one has paid.\textsuperscript{19} If that happens in the sports sector, then signal piracy can cost significant profits to unauthorised users.

Piracy can be in different forms, \textit{viz.}, satellite piracy, content piracy etc. Satellite piracy has been identified to have three methods of stealing; one is that where the cable operators are stealing signals using satellite dishes and set-top boxes and distributing those over the cable systems. Variations are possible in individuals using assemble dish and STB signals. The most common method, however, is to hack access cards (in STBs) and steal pay per view signals, either for individual use or broadcasting.\textsuperscript{20} Signal piracy leads to violation of broadcaster’s rights and will drag them to financial instabilities. In most of the sports events, live streaming is the primary income-generating venture for the broadcasters. Signal piracy results in the illegal transmission of broadcast by one sender to the unintended sender within a network or outside the network. Such instances are rampant in major sports events like, for example, in 2008 Beijing Olympics illegal broadcasting and re-transmission of sports telecasts over the internet was detected.\textsuperscript{21}

\textsuperscript{19} Also See, (May 6, 2020, 11:41AM) \url{https://www.icsworld.com/Private_Investigation_Case_Types/Signal_Piracy_Investigation.aspx}.


\textsuperscript{21} Seetharamani Sharma, \textit{Signal Piracy: A threat to Asia Pacific Broadcasters}, \textsc{Wipo Magazine} (February 2018)
In India, similarly, the instance of Indian Premier League in 2017 wherein the official sports broadcasting was with STAR sports is regularly undermined by unauthorised online transmission of cricket matches. These matches were telecasted illegally on the internet via different remote servers. Therefore, India is not an exception to the rampant signal piracy.

In the international forums, various efforts have been taken to address this issue of signal piracy and to protect the neighbouring rights of the broadcasting organisations. For instance, WIPO, in the year 2006, brought about a draft proposal to provide a stringent and efficient legal structure for curbing unauthorised use, especially the cases of piracy. As an extension to the draft a Study on the Socio-economic Dimension of the Unauthorised Use of Signals (2009-10), was conducted for providing an overview of possible effects and implications of the treaty. The study identifies the broadcast sector having the impact of technologies and the potential ramifications of unauthorised use of broadcast and also the socio-economic impact of the treaty on different stakeholders. Nowadays, the form and nature of piracy itself vary. The pirates are often not held liable as they are not usually identified. It remains an unsolvable puzzle for the investigators as it takes new forms and shape and also remains as unpredictable.

Piracy is often identified as the result of disparities that exist in socio-economic setup and also due to the unequal distribution of technologies among people. The distinctiveness of the content and competition among the market players forms the basis for piracy both in content and signals, especially in sports. This may be due to copyrighted materials being not available as on-demand, or maybe due to policy barriers or due to stringent regulations such as censorship or it may also be due to inadequate legal protection for the broadcasters. In the entertainment market, signal

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**Implications on Legal and Regulatory Framework of Sports casting In India**

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Id.
piracy arises due to the large gap in the demand of the consumers, and the accessibility and affordability of the content of the broadcast.\textsuperscript{23}

Even though we have different international and national laws to regulate the broadcasting sector,\textsuperscript{24} these instruments play a limited role in protecting the rights of the broadcasters. The issues like protection of pre-broadcasters rights, limited protection to simultaneous rebroadcasting of a broadcaster etc. are not envisioned under the existing laws. The online piracy over signals happens when there is the simultaneous recording of the content and transmitting in its different platforms, including the internet, cable, terrestrial network, DTH etc. Of about the pre-broadcasting signals, they are more susceptible to piracy than a traditional broadcast signal.\textsuperscript{25} The live streaming and the unauthorised transmission by the use of the internet are the most crucial episodes in broadcasting.

\section*{THE IMPACT}

The crucial role of the regulator is to preserve the interest of authors and the consumers at par without compromising the rights of the broadcasters. The impact of broadcasting on the freedom of expression by sustaining the right to development through innovative measures is vast, and at the same time, accessibility and affordability is another issue concerning consumers and other stakeholders.

Sports and media in a closer look are whole realms in terms of the

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24 For instance, See \textit{Rome Convention For The Protection Of Performers And Broadcasting Organisations 1961}.
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25 \textit{Infra}, Note 19.
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entertainment business. For sports broadcasting, the author only has authority over the content as it is his exclusive right. The potential value of the content depicts the scope of revenue it can generate, this is why sports events which have the majority of the world population as its followers are so commanded over by the entertainment industry. Prying and snooping in sports reaps broader public and thus a more significant economic advantage for the sports broadcasting organisations.

The commercialisation of broadcast has the potential of booming the media environment, especially in sports and sporting events. Still, at the same time, the issues like piracy, theft and unauthorised use must be curbed to give protection to the broadcasters. While introducing different measures, including technical and technological solutions to the problems, still law tries to strike a balance between the interests of the public and the rights of the broadcasters.

The human rights, social, political and economic implications of Sportscasting depicts a broader picture of demand of a more significant amount of control of the sector. Consumer interests and public conscience in terms of dissemination of information is a decisive factor. Primarily, there is a need for balancing the rights of the broadcaster’s rights and consumer interests. The provisions of payment of damages for consumer rights violations are not much explored. Irrespective of jurisdictions the sports industry is growing, and at the same time, the social and political obligations of the sports industry for Sportscasting is enormous. The content of the broadcasting should be accepted when it comes to public interference. The freedom of broadcasters lies in a broader platform between authoritarian and libertarian concepts. In a social perspective, the rights of the performers are not extended to Sportspersons.
Further, Intellectual property regime has proved to be a more suitable measure to preserve the rights of the broadcasters at the same time the SBS Act was conducive enough to attribute the notions of access to information. In this digital era, the precepts of fair use should be applied to fill in the gaps for both facilitating the access to works and access to information. The regulatory framework hitherto conveys a broader scope of control of Sportscasting. However, it cannot be exhaustive in itself. The law and regulatory framework have to procure ways to tackle the social, political and economic problems affecting the broadcasting realm at the same time protecting the rights of consumers and the public at large.

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INTRODUCTION

Fantasy Sports in India has recently witnessed a boom in the online gaming sector. In 2019 alone, the Media and Entertainment sector reached $25.7 billion, where the online gaming sector retained its position as one of the fastest-growing segments. There has been a significant growth of 43 per cent in the online gaming segment. Expectations are that online gaming in India would reach Rs.187 billion by 2022. With gaming websites like Mobile Premier League and Dream11 taking the lead, it is imperative to have specific regulations around these fantasy and online sports.

Despite the phenomenal growth and potential, the regulation of fantasy sports in India is still a dream. Fantasy sports are a form of games in which participants assemble virtual teams of athletes and compete on the athletes’ real-world statistical performance. The concern of law for fantasy sports
arises, due to the involvement of the online exchange of money. It is still at the crossroads of battling with state regulations and litigation, to which even the courts though trying to come with solutions, however, it does not answer governance issues. As the typical question which arises in the legal framework of fantasy sports is based upon the classification of games as “wagers/gambling”. This rest upon the debate between “skill” or “chance”. While the games of skills are permitted under the law, the same is mostly unregulated.

On the other hand, games of chance are strictly prohibited and punishable. Historically, gambling is considered a sinful and pernicious vice, and the same practice was discouraged. This approach of law is based on the historical treatment of gambling as a sinful and pernicious vice and deprecated its practice. This treatment seems quite contradictory, as, throughout history, one can notice the popularity of different forms of gambling prevalent in India.

The regulatory framework of the fantasy sports in India is mostly self-regulated within the bounds of the limited jurisprudence as established under Public Gambling Act, 1867. Few precedents on the interpretations of its provisions and pari materia statutes have been applied to the online games and their business. Due to this outdated jurisprudence, it is even more imperative to carefully examine the challenges and opportunities the establishment of ‘Fantasy Sports’ brings to India. Its resemblance to a wagering contract and at the same time falling as an exemption under the current regime gives rise to public policy concerns.

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7 The State of Bombay v. R. M. D. Chamarbaugwala, AIR 1957 Bom 699
This paper aims to examine the current regime governing the legality of the Fantasy Sports in India, by comparing the antedate jurisprudence on the present day’s technological advancements. In this endeavour, we first introduce the operation and governance of fantasy sports in India. Then we divide out discussion outlining the traditional understanding of “skill” v. “chance” and its application to the following technological and economic development scenario of Fantasy Sports, to evaluate the appropriate way forward.

FANTASY SPORTS AND SELF-REGULATORY BODIES

Fantasy Sports is an ad hoc system of gaming to physical sports, wherein users assume greater control in their choice of sportspersons and then compete with their drafted team in online contests. The users act as the owner of the professional sporting team by assembling their team in virtual space against other users in a specific tournament or time frame. In drafting their team, users rely on the statistical knowledge of players performance in real life and expectations from the players in future. Contest results are based on the real-life performance of the sportsperson, wherein fantasy points are generated based on the real-life statics of individual sportsperson’s performance. (For example, the Dream11’s cricket segment provides following points system for batting – Run = +1; Boundary Bonus = +1; Six Bonus = +2; Half Century Bonus = +8; Century Bonus = +16; Dismissal for a duck = -2). The team with highest cumulative fantasy points in a pre-defined tournament or time frame is deemed as the winner. Users need to demonstrate their skill in the selection of a team with players who earn the highest points to stay on top of the ladder board.

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Further, this skill is required to be demonstrated throughout the tournament or timeframe, and users can edit their line-up within the set deadline to improve their teams’ cumulative points. However, in doing so, they are required to stay below specified budget credits. Thus, users must select those sportspersons who provides maximum points and not just the top costly players.

Similar to the governance of the real sports events by various sports federation, Fantasy Sports contests are also governed through their fantasy sports organisations established by members who have stakes or interest in these businesses. To name a few - the Rummy Federation,9 Federation of Indian Fantasy Sports,10 and All India Gaming Federation,11 which are self-regulatory bodies registered under the Societies Registration Act, 1860 for the development of their games. Since there is no specific legislation regulating fantasy sports in India, the online and fantasy sports industry have taken steps to govern itself. For instance, the Federation of Indian Fantasy Sports (hereinafter “FIFS”) has prepared a Charter for Online Fantasy Sports Platform (hereinafter “Charter for OFSP”).12 The charter aims at creating best practices and set up a minimum standard in the Indian Online Fantasy Sports Platforms (hereinafter “OFSP”).13

The lack of a specific legislative framework to govern Fantasy Sports in India has led to self-regulation by its member’s association. Self-regulation is an essential regulatory process whereby a specific set of rules and code

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13 ¶ 1.1.2 of FIFS Charter for OFSP
of conduct are laid down for the Fantasy Sports sector. Self-regulation is found to be an appropriate measure in setting industry or sectoral norms, in the absence of or in addition to existing law.\textsuperscript{14} In self-regulatory bodies, policymakers and stakeholders can work collectively to achieve essential reforms in Online Fantasy Sports Platform for an industry, which calls for quick action and support. As the field of operation of Fantasy Sports involves more significant technical superiority and innovations, it is appropriate that members establish a standard code for themselves without much of governmental interference for the common good of the sector which is still in its development phase.\textsuperscript{15} The Government should not impose a top-down approach; instead, it should embrace a collaborative outlook as this sector is in its nascent stage of development. Since Fantasy Sports is service offered by various entities, it caters to a higher standard of consumer satisfaction. The same can only be achieved if these self-regulatory bodies set a minimum standard to keep the trust of the consumer\textsuperscript{16} and an appropriate dispute resolution mechanism.\textsuperscript{17}

In the absence of specific law, the self-regulatory role is carried out within the bounds of the general laws. The applicability of the same is apparent in various sectors. For example, a society or company involved in the business


\textsuperscript{15} Ibid Daniel; See also, P. Grajzl & P. Murrell, \textit{Allocating Lawmaking Powers: Self-regulation vs Government Regulation}, 35 \textit{Journal of Comparative Economics} 520-545.


\textsuperscript{17} See, FIFS Ombudsman Rules (2020) (June 04, 2020, 6:57 PM) https://fifs.in/ombudsman/.
of Fantasy sports should be incorporated with an objective as stated under the Society Registration laws, Company law and Contract law. The same should not be opposed to public policy. Further, while carrying out the business, general laws relating to Information Technology and Intellectual Property Rights will be applicable as well. Certain self-regulatory bodies might even attract anti-competitive concerns; therefore, they are still bound by the general law of the land. In addition, since Fantasy Sports will be considered as services, the consumer redressal mechanism must be adopted under appropriate consumer protection laws.¹⁸

Fantasy Sports usually involves a Pay-to-play format. The format revolves around an entry fee paid by users which are further distributed amongst the users on the platforms.¹⁹ According, to FIFS the member who offers its pay-to-play OFSP should restrict its players to Indian users.²⁰ No international payment or transactions would be processed in respect of users’ deposits or as a prize or platform fee.²¹ Measures such as these, ensure the safety of online users and e-transactions. These associations aim to create an environment which nurtures credibility and integrity for OFSP in India.

Since the format of fantasy sports is built upon the basis of statistical information, OFSP will have to ensure that contest in a pay-to-play format,

¹⁸ Id.
¹⁹ ¶ 1.3.3 of FIFS Charter for OFSP (March, 2020); Gurdeep Singh Sachar v. Union of India and Others Bombay High Court, Criminal PIL Stamp No. 22 of 2019 - “the amounts pooled in the escrow account is an ‘actionable claim’, as the same is to be distributed amongst the winning participating members as per the outcome of a game. But, as held hereinabove since the activities of the respondent No.3 do not amount to lottery, betting and gambling, the said actionable claim would fall under Entry 6 of the Schedule III under Section 7(2) of CGST Act. Therefore, this activity or transaction pertaining to such actionable claim can neither be considered as supply of goods nor supply of services, and is thus clearly exempted from levy of any GST.”
²⁰ ¶ 1.3.3 of FIFS Charter for OFSP (March, 2020)
²¹ ¶ 1.3.3 of FIFS Charter for OFSP (March, 2020).
relates to a minimum of one complete real-world sports match and any contest based on part or portion of a stand-alone real-world match is not allowed. Further, as per the recent amendment in the charter, OFSP can offer the contest based on real-world matches which are officially sanctioned by international, national or state sports federation or association. However, an amateur, university, college, high-school or other sports match (whether such match is officially sanctioned or not) where the participants are required to be under the age of eighteen (18) years are excluded from the purview of the real-world matches.

The Charter of OFSP also sets out the requirement of “skill predominant” for making any contests offered on an OFSP to be legal. In furtherance to its legality clause, the charter requires that the winning outcomes be based on relative knowledge and skill of the user, based on accurate statistical results and elements of players’ or athletes’ performances. Further, the operation of these platforms is geographically restricted in India, with restrictions as prescribed by respective state legislation.

Though, all reasonable precautions are taken by such self-regulatory bodies to avoid their Pay-to-Play Fantasy Sports as being termed as “gambling”; still, there were series of litigations claiming that these online contests are

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22 ¶ 1.3.7 FIFS Charter for OFSP (March, 2020); See also, William R. Eadington, Gambling And Society: Interdisciplinary Studies On The Subject Of Gambling SPRINGFIELD “These forms of fantasy sports resemble gambling, defined as “staking something of value on the outcome of an uncertain contingency”

23 ¶ 1.3.8 of FIFS Charter for OSFP (March, 2020)

24 ¶ 1.3.1 of FIFS Charter for OSFP (March, 2020)


26 See, (June 04, 2020, 6:57 PM) https://www.dream11.com/about-us/legality. See also, ¶ ¶ 1.3.25 and 1.3.26 of FIFS Charter for OSFP (March, 2020)
not illegal in any form. However, critics are also questioning the structure of the games as it promotes gambling style rules and rewards. Sports enthusiast might get attracted to such a format as it seems to be a safer alternative to traditional betting. At the same time, such activities might open flood gates for other online gambling activities.

**SKILL V. CHANCE DEBATE: THE TRADITIONAL VIEW**

The judicial decisions on gambling in common law are based on the premise that any act of gambling or betting should be discouraged in society. A contract related to gambling is assessed on three elements—consideration, prize and chance.

While prize and consideration do not raise any concerns, major litigation revolves around the fact whether a game is dependent upon the third element, i.e. “chance” in contradistinction with “skill”. This factor also distinguishes between gambling and trade. Gambling inherently contains a chance with no skill, while trade contains skill with no chance.

The element of chance has received the most scrutiny in determining whether a game would be considered as one leading to gambling. If the game is shown to be involving skill, it will be qualified as non-gambling; otherwise, it is labelled as gambling.

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In the context of Indian law, the debate on “skill” or “chance” originates from the Public Gambling Act, 1867 (PGA). The PGA prohibits an act of gambling in a public forum. Further, it makes the maintaining of a ‘common gaming house’ punishable. However, Section 12 of PGA carves out an exception on its applicability for a ‘game of mere skill’. Due to this legislative scheme of the PGA, the primary question which arises in most litigation is a dilemma around the interpretation of ‘game of skill’ and ‘game of chance’.

The regulation of Fantasy Sports in India is depended on the principle of “Functional Equivalence” wherein the laws which were regulating offline fantasy sports like “horse racing” are extended to online fantasy sports as well. The crucial statute governing sports betting in India at the Central level is PGA, enacted during the pre-internet era. Hence it seems to be an outdated regime to govern fantasy sports. Since the scope of these legislations is limited to games played in offline modes.

Under the Seventh Schedule of the Indian Constitution, the state governments are empowered to enact laws on “betting and gambling”.32

31 See, Section 3 and 4 of Public Gambling Act, 1867.
32 Entry 34 and 62 of List III. Few states have adopted the Central Legislations like Chhattisgarh; Dadra & Nagar Haveli; Haryana; HP; MP; Manipur; Punjab; UP; Uttarakhand. Others have enacted their own specific legislations like Andhra Pradesh Gaming Act, 1974; Arunachal Pradesh Gambling (Prohibition) Act, 2012; Bengal Public Gambling Act, 1867 (applicable in Bihar and Jharkhand); Delhi Public Gambling Act, 1955; The Goa, Daman and Diu Public Gambling Act, 1976; The Bombay Prevention Gambling , (Gujarat Amendment) Act, 1964; The Bombay Prevention Gambling , (Gujarat Amendment) Act, 1964; Karnataka Police Act, 1963; Kerala Gaming Act, 1960; Bombay Prevention of Gambling Act, 1887 (applicable in Maharashtra); The Meghalaya Prevention of Gambling Act, 1970; The Pondicherry Gaming Act, 1965; Rajasthan Public Gambling Ordinance, 1949; Tamil Nadu Gaming Act, 1930; Tripura Gambling Act, 1926; West Bengal Gambling And Prize Competitions Act, 1957.
However, until now, only Sikkim\textsuperscript{33} and Nagaland\textsuperscript{34} have laid down dedicated laws for the governance of Online Games. Some states in India follow much stricter rules for wagering contracts where the prohibition is made even if the dominant factor is a skill. For instance, in Assam, Orissa and Telangana, even if the game involving money, which would constitute a mixture of chance and skill will not be permitted to continue.\textsuperscript{35} Since there is no clarity on the applicability of PGA on online games, and it creates a significant lacuna in governing the online gaming and fantasy sports in India.

In \textit{State of Bombay v. R.M.D. Chamarbhaugwala},\textsuperscript{36} while observing the nature of prize competitions which would be qualified as gambling\textsuperscript{37} Supreme Court relied on “skill element” to distinguish it from gambling. It was held that “\textit{in order to avoid the stigma of gambling, a competition must depend to a substantial degree upon the exercise of skill. Therefore, a competition where the success is not dependent upon the substantial degree of skill, it will be recognised as gambling}.”\textsuperscript{38} However, in this case, the requirement of “skill” involved should be substantial. The courts have still not laid what element would construe to make a skill a “substantial” one. Further, with respect to forecast games, which can be more closely compared to Fantasy Sports, it was contended that the forecast of such events might not depend on chance. As in order to win, the player needs to accurately exercise knowledge and skill-based on certain statistics of past

\begin{itemize}
\item \textsuperscript{33} The Sikkim Online Gaming (Regulation) Act, 2008.- The objective of the regulations was to control, regulate and tax online games.
\item \textsuperscript{34} The Nagaland Online Games of Skill Act, 2017. Act provides for licensing and regulation of online games of skills in Nagaland
\item \textsuperscript{35} The Assam Game and Betting Act, 1970, The Orissa (Prevention of) Gambling Act, 1955; Telangana Gaming Act 1974.
\item \textsuperscript{36} State of Bombay v. R.M.D. Chamarbhaugwala 1957 SCR 874.
\item \textsuperscript{37} Section 2(d) of the Prize Competition Act, 1948
\item \textsuperscript{38} Supra note 34, at ¶ 17.
\end{itemize}
events. However, the court held that “it may be an expert statistician to form an idea of the result of an uncertain future event, but it is difficult to treat the invitation to the general public to participate in these competitions as an invitation to a game of skill. The ordinary common people who usually join in this competition can hardly be credited with such abundance of statistical skill as will enable them, by application of their skill, to attain success.” In its essence, the court though recognised the “skill” element as an essential condition for a game to not amount to gambling, but such skill whether possessed by all participants is also considered as a factor in determining the nature of the game is still unclear.

The court further goes on to state that the businesses which involve substantial skill do not constitute to be gambling activities. Thus, the businesses can seek protection under Article 19(1)(g) of the Indian Constitution. Keeping this background in mind, one can examine other games like rummy or horse racing as games involving substantial skill. Subsequently, the issue of “skill element” and its interface with gambling arose in State of Andhra Pradesh v. K. Satyanarayana, (Rummy Case), and Dr. K.R. Lakshmanan v. State of Tamil Nadu, (Horse Racing Case). However, these cases can be distinguished from R.M.D. Chamarbaugwala Case on the account that these cases were based on interpretation of phrase “mere skills” and “mere chance”, while the latter case was based on the “substantial degree of exercise of skill.”

In the Rummy case the Supreme Court, while assessing the card game “Rummy”, held that the game is not entirely a game of chance like the

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39 Supra note 34, at ¶ 20. 
40 Supra note 34, at ¶ 41. 
42 Dr. K.R. Lakshmanan v. State of Tamil Nadu AIR 1996 SC 1153.
“three-card” game.⁴³ The court, further held that “the game requires a certain amount of skill as the fall of the cards is memorised by the players, and the building up of rummy requires considerable skill in discarding or holding of the cards.”⁴⁴ Though the element of chance is in the form of distribution of cards and shuffling of the pack, however, the same cannot constitute the game of rummy as being a game of chance. Hence, the court held that rummy is “mainly and preponderantly a game of skill”. Success in the game not dependent upon chance, but on the skill demonstrated by the player during the game. Thus, concluding that, the skill predominance is an essential factor determining the results of the game.

Similarly, in the Horse Racing Case, the question relating to betting on horse racing arose as a game of skill or chance. The court, using Encyclopedia as external aid, observed that “horse racing is a systematic sport requiring participants to have full knowledge of the horse, jockey, trainer, owner, turf and the composition of the race.”⁴⁵ Thus, in order to gain success in horse racing, the bettors are required to demonstrate substantial skill while participating. The court further distinguished betting on horse racing from gambling. Gambling is purely based on chance. The success of gambling can be determined entirely or partly by lot or sheer luck. Though in the game of skills, the element of chance cannot be eliminated, however principally success is dependent upon the superior knowledge, training, attention, experience and adroitness of the player.⁴⁶ Thus, in evaluating whether the character of game is based on “Chance” or “Skill”, the dominant factor of

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⁴³ Like Flush, Brag etc.
⁴⁴ State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825 ¶12
⁴⁵ Dr. K.R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153 ¶ 23: The breed of the horse, upbringing, training and the past record of the racehorses are prominently published and circulated for the benefit of the prospective bettors.
⁴⁶ Supra note 43, at ¶ 3.
skill or chance needs to be taken into consideration. Where the game is purely based on chance, it is considered gambling. If the game is purely skill-based, it is then permitted by law. However, if a game is a mix of chance and skill, then the dominant factor test is taken into consideration.

In addition to this, the court also stated that the expression “mere skill” constitutes to mean a “substantial degree or preponderance of skill”. This brings us to the same interpretation as observed in *R.M.D Chamarbaugwala case*. Hence the issue, whether players participating in games should possess these skills or not makes it an essential factor to succeed in the game, as certain games require more persuasive skills to be demonstrated.

This substantial degree of skill test was latter applied in the matter of *Dominance Games Pvt. Ltd. v. State of Gujarat, (Poker Case)*, wherein the question before Gujarat High Court was whether Poker is a game based on Skill or Chance. The court relied on the test laid down in *R.M.D Chamarbaugwala Case* and *Rummy Case* and held that Poker does not involve a substantial degree of skill. The court further noted that the method in which Poker is played. It observed that there are two stages to a game of Poker. The first stage involves the distribution of cards, over which the better has no control. The second stage of the game, when the cards are opened, the complexion of game changes with every turn of the card and betting. It is in this second stage that the court observed and stated, “the skill involved is judging other players poker face with the strategy of inducing them to play and bet more, cannot be said to be a skill...inducing other with

47 Dominance Games Pvt. Ltd. v. State of Gujarat, 2 LNIND 2017 GUJ 3940
48 *Supra* note 34.
49 *Supra* note 39.
50 *See also*, D. Krishna Kumar v. State of A.P. 2003 Cri. L.J. 143 - game of rummy is to be treated as a game of skill only.
51 *Supra* note 45 at Page 56 -58.
poker face to bet would be a part of bluffing or deception, cannot be termed as skill as it is not a game of skill but it is a game of deceiving, bluffing and duping other players.” The court’s decision seems logical because if bluffing or deceiving would have been construed as skill, and this would have posed several questions to the offence of fraud or cheating. Thus, in order to apply the “substantial degree of skill” test, it is essential to examine is whether the player has control over the game or whether he can change the game to his advantage. If the answer to the question is in affirmative, then such a game will be a game of skill.

Some of the most popular games in India have been Poker, Rummy, Teen patti and other sports betting activities. Technology has introduced online versions of the same, making the accessibility and reach of these platforms easy. Games such as chess, which are determined by skill, are considered lawful. However, when it comes to games such as Poker, the courts seem to be in a dilemma to consider it a game of chance or skill. In Indian Poker Association & Ors. v. State of Karnataka, the court stated that “if the game of poker is played as a game of skill, the license is not contemplated.” When it comes to online versus offline games, the essential factor to take into consideration is the physical presence of the players. One can judge and utilise skills by being observant and being physically present in the game. However, the same may not be possible on an online version of the game. This would most definitely eliminate the dominance of skill which one could employ in the offline version.

52 Id.
54 Indian Poker Association & Ors. v. State of Karnataka Writ Petition Nos. 39167 to 39169 of 2013 decided on October 8, 2013.
SKILL V. CHANCE DEBATE RE-OPENED

From the outset, it seems that one can apply the Skill or Chance test to any such games. However, the bigger question being that can one put the traditional betting games such as horseracing, poker or rummy and fantasy sports on the same pedestal? If so, then why differential treatment be given to online fantasy sports by stating it as a game of chance and not skill. The games which fall under the purview of ‘the game of chance’ are concerned as acts of gambling and hence prohibited by statutes passed by the state. However, a game which involves a certain degree of skill will fall outside the ambit of gambling laws. Hence, creating a grey area for online fantasy sports platforms in India. The next question which arises is whether online fantasy sports is a game of skill or chance?

For a while, it was felt that issue revolving around the legality of fantasy sports with respect to its character (skill or chance) is resolved with the decisions passed by the Punjab and Haryana High Court, Bombay High Court, and Rajasthan High Court. In all instances, the High Courts have considered fantasy sports as a predominant skill game. However, in recent stay order by Supreme Court against the decision of Bombay High Court,

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55 Section 12, the Public Gambling Act 1867.
57 Gurdeep Singh Sachar v. Union of India and Others Bombay High Court, Criminal PIL Stamp No. 22 of 2019; See also, Surbhi Kejriwal and Ayush Nanda, Now that online fantasy sports have got a legal nod, July 29, 2019, Live Mint (June 04, 2020, 6:57 PM) https://www.livemint.com/opinion/online-views/opinion-now-that-online-fantasy-sports-have-got-a-legal-nod-1564420102735.html.
59 Kashish Bhatia and Shruti Baid, Legality of Online Fantasy Sports League Games in India – Recent Developments, May 20, 2020, (June 04, 2020, 6:57 PM) https://www.azbpartners.com/bank/online-fantasy-sports-
the debate on “Skill v. Chance” has been re-opened, and the matter is still to be heard and decided by the Supreme Court of India.

In Varun Gumber v. Union Territory of Chandigarh, where the P&H HC relying on the R.M.D. Charbaugwala case, held that “… mere skill' in context of this case would mean -(i) the competition where the success depends on a substantial degree of skill, and it will not fall into the category of gambling; (ii) despite being an element of chance, if the game is preponderantly a game of skill it would nevertheless be a game of mere skill.” Based on this principle, the court held that fantasy sports contests offered by Dream11 are a ‘game of skill’ as the users are required to apply “considerable skill, judgement and discretion while drafting their fantasy team.” Secondly, online users are required to study the rules of the game and the point system deployment by fantasy operators. This approach might seem to be a welcome move from the courts. However, the same is limited only to the Dream11 fantasy sports format only. There is still ambiguity whether the same test can be applied to other online fantasy sports platforms in India. Appeal from the instant case was preferred in the Supreme Court, but the same was dismissed. Hence, for the time being, this judgment is the final authority on the validity of Fantasy Sports format of Dream11.

Later, the legality of Dream11 fantasy sports was challenged in the Bombay High Court, in a Criminal PIL filed by Mr Gurdeep Singh Sachar. Here

league-games-in-india-recent-legal-developments/.  
60 Supra note 54.  
61 Supra note 34.  
62 Supra note 54 at ¶ 18.  
63 Supra note 54 at ¶ 19.  
64 Supra note 54 at ¶ 19; (Point system includes anticipated statistics for skills such as batting average, ruls, economy rate, striker rate etc.)  
66 Gurdeep Singh Sachar v. Union of India and Others Bombay High
the petitioner has questioned the legality of fantasy sports on the definition of the term “betting” and “gambling” as defined under the Section 65B(15) of Finance Act, 1994. The Bombay High Court, relying on the precedent and acknowledging the decision of Varun Gumber Case, applied the test of “game of chance” or “game of skill” and held that it is in line with the decision of P&H HC. The court stressed upon the fact that the result of the fantasy game contest is not dependent upon the winning or losing of any team in the real-world game on any given day. In line with this requirement, even the Fantasy Sports Associations have, under their charter, restricted the result based on any single event or day.

Again, fantasy sports’ legality was brought to question in Chandresh Sankhla v. State of Rajasthan. However, by this time, the appeal against the Bombay HC decision was also dismissed. Thus, the Rajasthan HC applied the previous judgment as examined above to interpret the pari materia provisions in Rajasthan Public Gambling Ordinance, 1949 and held in favour of Dream11 as being a “game of skill”. The court considered the subject matter no more a res integra as the various prior High Court decisions and consequent dismissal of the special leave petition by Supreme Court. In the instant case, the court also relied on the order allowing Union of India to file a review petition in Bombay High Court, in the Gurdeep Sigh Sachar Case, wherein SC restricted the scope of the review only to the issue of GST and not to revisit the issue of gambling. Recently, State of Maharashtra preferred an appeal against the decision of Gurdeep Singh Case. The same is now admitted and pending in the Supreme Court.

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*Court, Criminal PIL Stamp No. 22 of 2019:* PIL involved the question of legality of fantasy sports and also on evasion of Goods and Service Tax.

67 Supra note 54.

68 See, ¶ 1.3.7 of FIFS Charter for OFSP

69 Chandresh Sankhla v. State of Rajasthan 2020 SCCOnline Raj 263

70 SLP (Criminal) Diary No.35191/2019

71 Supra note 57 (Kashish and Shruti)
Thus, what the Raj. HC relied on as “no more res integra” is sub judice and the debate is re-opened again.

Though, the position of law in India with respect to fantasy sports (online or offline) seems reasonable and in line with the public policy of the country. However, there are certain studies conducted in other jurisdictions which cast doubt on account of public policy due to its ‘quasi gambling’ nature. Arguably, the concern is about the consumers, such a minors and college students. In raising their concerns, studies equate fantasy sports with gambling and argue on the harmful social cost of gambling. It is suggested that, as the effect of gambling, due to materialistic desires, a player in online Fantasy sports is not able to monitor his spending, and an online mode, this lack of monitoring is higher than offline mode. Adding to these, critics also argue the deteriorating health and mental conditions and loss of productivity at the workplace.

Most studies which highlight the negative impact are related to daily fantasy sports, wherein the winning is dependent upon the single event or a day’s event. It is an established position in India, that fantasy sports, in order to avoid the nature of gambling must be based upon the “skill” and in addition to skill component, as highlighted by Bom. HC, daily fantasy

75 Supra note 26 (Stuhldreher et al)
76 Supra note 26 (Walker and Barnett)
sports is not being recognised in India.\textsuperscript{77} It cannot be denied that the legislation matching to the public policy of the country is a little outdated. The economic and technological development is interpreted along with a 150-year old British law.

Under the common law of England, bets were legally enforceable, however with the enactment of Gaming Act, 1845 gaming and wagering were declared as null and void. There were multiple revisions in their gambling enactments in the last two centuries, and finally, by repealing all enactments, Gambling Act, 2005 was enacted providing enforceability to gambling-related contracts.\textsuperscript{78} This change restored the common law position prior to 1845.\textsuperscript{79} It seems that the effect of this change is broadly to restore the common law, which was broad that bets were legally enforceable. Under Gambling Act, 2005, gambling is now permitted under a licensing regime and a licensing authority is also constituted.\textsuperscript{80} Under its licensing principles, the UK Law has distinctly recognised the general public policy concerns and has addressed the same. The Licensing principles discourage gambling leading to crime and disorder, the place and manner of conducting the gambling should open and fair, and most importantly protecting the interest of children and a vulnerable person from being exploited.\textsuperscript{81} This law also takes into consideration the online gaming by regulating it through the provisions relating to “remote gambling”.\textsuperscript{82} With the licensing regime, the

\begin{itemize}
\item \textsuperscript{77} Supra note 64; See also, ¶ 1.3.7 of FIFS Charter for OFSP
\item \textsuperscript{78} Section 335(1) of the Gambling Act, 2005 (UK).
\item \textsuperscript{80} Section 2 of the Gambling Act, 2005 (UK).
\item \textsuperscript{81} Section 1 of Public Gambling Act, 2005 (UK)
\item \textsuperscript{82} Section 4 of the Gambling Act, 2005 (UK) - (1) In this Act “remote gambling” means gambling in which persons participate by the use of remote communication. (2) In this Act “remote communication” means communication using - (a) the internet; (b) telephone; (c) television; (d) radio, or (e) any other kind of electronic or other technology for facilitating communication.
\end{itemize}
UK has allowed both “game of chance” and “game of skill”. However, the legislative scheme maintains that games of “mere skill” do not fall under the preview of gambling. Whether a game is a game of skill or chance, the question will be determined on the facts and circumstances of each case. Hence, there is a possibility that online fantasy sports which satisfy the game of skill test may not be governed by PGA and can continue to operate legally throughout India.

CONCLUSION

Fantasy sports is here to stay. It promotes social interactions and at the same time, brings economic incentives to various stakeholders. The authors believe that the same should not be restricted; rather it should be regulated or licensed. If a game or rummy and betting on horse racing can fall under the purview of games of skill, why should online fantasy sports be looked from a different lens? Holding the wagering or betting of horse racing as a game of skill clearly shows the state’s leaning towards the use of such games as an economic activity. It contributes to the social-economic well-being of society.

Similarly, the online fantasy sports in India also generate public revenue. Hence, one can notice the mobility of self-regulated gaming industries which govern fantasy sports in India. There is a scope of innovation and

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83 Section 3 of the Gambling Act, 2005 (UK) - In this Act “gambling” means (a)gaming (within the meaning of section 6); Section 6 defines "gaming" and "game of chance" as - "gaming" means playing a game of chance for a prize; and "game of chance" (a) includes - (i) a game that involves both an element of chance and an element of skill; (ii) a game that involves an element of chance that can be eliminated by superlative skill; and (iii) a game that is presented as involving an element of chance, but (b) does not include a sport.

technological advancements in the online gaming platform, and thus the measures should be directed towards orderly development of Fantasy Sports market. Every game is tailored made to suit one’s fantasy. Hence, applying the traditional “game of skill or chance” test will not be the right approach.

Secondly, self-regulation becomes an essential measure in times when ambiguity exists in the legal regime. It becomes a useful tool for governing sectors which are somewhat at an early stage. This not only helps in understanding the need of the stakeholders but also helps in promoting new business ideas and innovations.

Thirdly, the authors also believe that the Central Government may pass legislation under its residuary legislative powers as enshrined under Article 248 of the Indian Constitution.

For now, the regulation on fantasy sports still seems to be a grey area for Indian Legislators. However, looking at the global trend and growing online presence, India might as well shift to robust regime to govern fantasy sports as seen in the UK. The courts, too, need to shift gears from the traditional approach of wagering contracts and apply test which might cater to the online fantasy sports. It is time to take useful measures to improve the Fantasy Sports industry in India, and not leave it to “Chance”.

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Sports and Games, including Athletics, have been one of the favourite hobbies of rations, young and old. Globalization and the need for entertainment, has contributed in growth of diverse formats of a game, in the form of Leagues, Tournaments and expanded the business prospects therein.

Consequently, the activities associated with Sports have grown multi-fold, spanning from a transcendental paradigm to one of Economics, Business, Profits, and Entertainment.

Unlike, other businesses, sports industry require the cooperation of its competing teams. Cooperation and Integrity hold dearer to any other competing interest in the case of businesses in Sports. The level of cooperation by the players determines the success of a sporting event or a game, including the Olympics, depends upon the level of cooperation by the players. Moreover, as such, it deserves to be recognized as a separate industry.

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Media coverage and exposure to even the midget edition of sports and games is high and, on the rise, owing to most popular dailies having a dedicated Sports column. This effectively increases the sports business with a simultaneous increment of tax income from sports. For instance, being one of the world’s richest Sports Bodies in the World, ‘The Board of Cricket Control of India’, (hereinafter, “BCCI”) has made a remittance of INR 2,50,00,00,000/- as its payment for Advance Tax, for the revenues earned in 2019-2020.³

SCORE AND EARN: IMPLICATIONS UNDER THE INCOME TAX ACT, 1961

Tax implications are a burden that can never be absolved. Tax may be said to be the *sine qua non* of income earned or deemed to be earned unless expressly excluded. In India, the constitutional structure paves the way for the scheme of taxation. The seventh schedule divides the subjects into

three lists. The Union alone has the power to make laws on the entries under List 1, List 2 specifies the subjects on which the States can make laws and finally, List 3 specifies the entries on which, both the Union and the States can make laws. Entry 82 of List I makes the Union competent to enact a law for taxing any income other than agricultural income. As such Sports Businesses and associated Income is a subject matter that the Union Government is competent to regulate through the imposition of taxes.

The Income Tax Act, 1961 (hereinafter referred to as the Act) enacted by the parliament is the law that regulates incomes of businesses in sports. While the broad scheme of the legislation, the sources of Income have been categorized under 5 heads, namely:

- Income from Salary
- Income from House Property
- Income from Business or Profession
- Capital gains

Income from other sources

In the administration of taxation for businesses engaged in sports, the first step must involve the determination of the relevant head under which income earned may be categorized and after that based on standard and statutory deductions as provided under the Income Tax Act, 1961 the taxable income is determined thereof. The tax slab determined annually by the relevant Finance Act would determine the tax payable.

Certain categories of income are exempted from the purview of taxation under the Act, which would be dealt with in the last leg of this paper. Section 116 of the Act provides for the constitution of authorities under the Act,

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4 Indian Const. art. 246.
including the creation of the Central Board for Direct Taxes\textsuperscript{5} (\textit{hereinafter}, “the Board”). According to Section 119 of the Act the Board is empowered with the power to, “issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act.”\textsuperscript{6} In exercise of such powers, the Board has issued specific orders, circulars etc. that deal on the taxation of federations and sports associations.

Keeping in mind the broad perspective, and towards ensuring an oriented approach in dealing with Income from sports activities, the researchers of this paper will deal with the treatment afforded to the income from following activities in the field of sports:

- \textit{Sportspersons and their match fees}
- \textit{Sportspersons and the royalty fees from advertisements}
- \textit{Income from sports academies and training centers}
- \textit{Income from ticketing activities of sport events}

\textbf{(a) Sports Persons and their Match Fees}

Match fee refers to an amount of compensation a sports person receives for playing one match or series of matches. It is pertinent to note that under the Income Tax Act, 1961 there exists differential treatment towards resident and non-resident sports persons. The match fees for a Resident sports person would qualify as his income under the head of “profit from business or profession as per section 28 of the Act,\textsuperscript{7} whereas the match fees in the case of Non-Resident players will be treated under the special provision of section 115BBA. Pursuant to section 115BBA, any income accrued by way of participation in India in any game or sport, from advertisement or contribution to any newspapers, magazines or journal of any articles shall

\begin{itemize}
  \item Income Tax Act 1961 § 119.
\end{itemize}
be taxed. With the Indian Premier League and Indian Super League taking the limelight in sporting activities, the earnings by sports persons both the Resident and Non-Resident players are dealt therewith accordingly.

Furthermore, Section 194E of the Act provides for tax deduction at source, whereby any income payable to non-resident under Section 115BBA, shall 10% of the income tax shall be deducted at the time of payment. As per the provision non-resident sportsperson includes an athlete, who is not a citizen of India or a non-resident sports association or institution. Accordingly, Franchise Owners such as Chennai Super Kings, Kolkata Knight Riders, Chennaiyin FC, Goa FC are bound to retain 10% of the payments made thereof to their foreign players as TDS.

An aspect to remember and ponder on taxation of foreign players is that the Double Tax Avoidance Agreements executed between India and their respective countries also come into the play and have an impact on the taxation. However, this aspect will be covered by the authors in the last leg of the paper.

With regards to the fees payable to a Resident sports person, Section 194J provides that, any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of fees for professional services” shall have to deduct tax at source. The explanation clause of this section allows the Central Board of Direct Taxes (CBDT) to notify services which would qualify as “professional services” under this section and by way of this power, the CBDT has notified that the services

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8 Income Tax Act 1961 § 115BBA.
9 Income Tax Act 1961 § 194E.
10 Income Tax Act 1961 § 194J.
of sportspersons, coaches and umpires would qualify as “professional services” and liable for TDS.¹¹

In a country like India, where sports are adorned the status of religion, it is but necessary to note that there is a special status for the Sports in the Act, as there is provision for the central government to exempt any international sporting event being held in India from being taxed, provided they meet the conditions stipulated in Section 10(39), in accordance of which the government is empowered thereof. The conditions for such exemption are as follows:

- Approved by the international body regulating the international sport relating to such an event.
- Has participation by more than two countries.
- Is notified by the Central Government in the Official Gazette for the purposes of this clause.¹²

In a recent judgment, the Supreme Court of India was tasked with determining whether certain payments made by the Pakistan-India-Sri Lanka Joint Management Committee to the ICC would come within the ambit of section 194E and liable to have tax deducted at source. The Court, after referring to section 115BBA, held that the payment by the Joint Committee qualified as a payment made under it, and would thus be liable to have tax deducted at source by the Committee.¹³ While the matter in hand dealt with the payment made by a Committee to the ICC, it is reasonable to ascertain that the ratio would in most certainty apply to a payment made to the players.

¹³ Pilcom v. C.I.T., Civil Appeal 5749 of 2012 SC (Decided on April 29, 2020)
(b). Sports Persons and Royalty-Fee From Advertisements

As in the case of sports, tax too has its way of exerting pressure. Section 9 of the Act, a deeming provision extends the ambit of tax to income by way of royalty as well as the income by way of fees for technical services.\(^\text{14}\) Thus any royalty paid to a sportsperson for advertising in India, whether a resident or a non-resident would be deemed to be income which has accrued and arisen in India and would thus be liable for taxation in India.

However, it leads us to the query, whether this income such income earned by way of Royalties is treated as income from ‘profession’ or as ‘income from other sources.’ This distinction becomes overarching, as the classification, entails for deductions specific to such category. For instance, Section 80RR allows any individual resident in India, who is an author, playwright, artist (musician, actor or sportsman) to claim deductions on any income derived by him in the exercise of his profession,\(^\text{15}\) at the following rates:

- **sixty per cent of such income for an assessment year beginning on the 1st day of April, 2001.**
- **forty-five per cent of such income for an assessment year beginning on the 1st day of April, 2002.**
- **thirty per cent of such income for an assessment year beginning on the 1st day of April, 2003.**
- **fifteen per cent of such income for an assessment year beginning on the 1st day of April, 2004.**

\(^{15}\) Income Tax Act 1961 § 80RR.
In an interesting case wherein the assessee, Mr. Sachin Tendulkar, the living God of Cricket. On a lighter note, it may be assured again that Tax Statutes leave no qualms, even in taxing the divinity. The question before the Tribunal was as to whether the income which Mr. Tendulkar earned from his advertisement endorsements could be treated as income derived from his profession as an artist so as to allow him to claim deduction under section 80RR of the Act or not. As such, the issue in the case was whether the income of the assessee could be treated as income derived by him in the exercise of his profession or not. In answering the question in the assessee’s favour, the tribunal held that “the assessee, while appearing in advertisements and commercials, has to face the lights and camera. As a model, the assessee brings to his work a degree of imagination, creativity and skill to arrange elements in a manner that would affect human senses and emotions and to have an aesthetic value…..we are of the considered opinion that the income received by the assessee from modelling and appearing in T.V. commercials and similar activities can be termed as income derived from the profession of an artist“ The tribunal also held that the sportsmen can have more than one profession and thus any sportsperson who endorses products can treat the income as income derived from his profession.16

(c). Income from Sports Academy and Training Centers

According to Section 11 r/w sections 12A and 12AA of the Act Sports Academies and Training Centers are permitted to register themselves as charitable trusts in order to have their income exempted from taxation. However, it is pertinent to note that every academy cannot claim such a benefit. The Supreme Court has laid down the test for determining the registration of an organization as a charitable trust in the following words, “The test which has, therefore, to be applied is whether the object which is said

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to be non-charitable is a main or primary object of the trust or institution or it is ancillary or incidental to the dominant or primary object which is charitable.”

If the main object of the institution is held to be non-charitable, then the institution will not be allowed to claim any exemption on its income, and the same would become taxable under section 28 of the Act as Income arising out of business or profession. The Income Tax Appellate Tribunal was tasked with applying this test to determine whether the Mumbai Cricket Association (MCA) was liable to have its registration under section 12A set aside for having engaged in commercial or non-charitable activities. The facts of the case were that the MCA entered into an agreement with a company for developing a world class indoor training academy (ICA) at one of MCA’s grounds. Under the terms of the agreement, the company would construct the facility and utilize the same for 17 years and then hand them over to MCA. The company was required to pay MCA a consideration of INR750 million for the same. MCA contended that the company would undertake the entire management of the ICA and as such there was no commercial activity of its own. However, the Tribunal rejected this argument and held that, as per the agreement, the managing committee of the ICA was always going to be under the control of MCA. Thus even if the operation of ICA was being done by the company, its real control vested with MCA alone. The Tribunal thus proceeded to cancel the registration of MCA, and their income was held to be taxable.

In addition to the above, Section 35AC of the Act allows the central government to allow for expenditures made by way of "payment of any sum to a public sector company or a local authority or to an association or institution approved by the National Committee for carrying out any eligible project or scheme" to be treated as a deduction under the Act.\textsuperscript{20} Under this section, the government can allow for expenditure made on the creation of any sports training facility or ground etc. to be a valid deduction as they did in the case of expenditure incurred on a sports facility in Hyderabad.\textsuperscript{21} However, any such income generated by these facilities would be taxable as the income from business and profession, unless such facility is registered as a charitable trust under the Act.

\section*{(d). Income From Ticketing Activities of Sport Events}

In India the major cricket grounds are managed by different cricket associations, for example, the Wankhade Stadium in Mumbai is managed by the Mumbai Cricket Association, while the Karnataka State Cricket Association manages the M Chinnaswamy Stadium. In the case Indian Premier League, the tournament tickets are sold by the BCCI and the different franchisee owners, and a share of the revenue generated is paid to the different cricket associations in accordance with their agreements.

So far, the BCCI has managed to claim exemptions from being taxed as it is treated as a charitable trust under Section 11 of the Act,\textsuperscript{22} and in a plea before the ITAT, Chandigarh has stated that the challenge to its registration is pending before the Bombay High Court.\textsuperscript{22} However, despite all submissions the Income Tax Appellate Tribunal proceeded to cancel

\begin{itemize}
\item \textsuperscript{20} Income Tax Act 1961 § 35AC.
\item \textsuperscript{21} Income Tax Department, Notification number S.O. 552 (E), 2/7/1998
\item \textsuperscript{22} Punjab Cricket Association v. Assistant Commissioner of Income Tax, [2019] 109 taxmann.com 219.
\end{itemize}
the registration of the Punjab Cricket Association as a charitable trust for generating revenue from the IPL. In coming to its decision, the Tribunal observed that,

“it is apparent that the assessee, herein, is involved in commercial activity in a systemic and regular manner not only by offering its Stadium and other services for conduct of IPL matches but by actively involving in the conduct of matches and exploiting its rights commercially in an arrangement arrived at with the BCCI. Even there is no denial or rebuttal by the appellant to the contention that the IPL is purely a large scale commercial venture involving huge stakes, hefty investments by the franchisees, auction of players for huge amounts, exploiting to the maximum the popularity of the game and the love and craze of the people in India for the cricket matches. From the discussion made above and considering the stand of the BCCI and further from analysis of the Tripartite Agreement, it is clearly revealed that the assessee/appellant is systematically involved in the conduct of IPL matches. It is not a simple case of offering of its stadium on rent to BCCI for conduct of the matches. The assessee association not only being the member of the BCCI which is the AOP of the assessee along with other members, but also, is individually involved in a systematic and regular manner in commercial exploitation of the popularity of cricket matches and its infrastructure.”

The Central Board of Direct Taxes had also issued a press note withdrawing the tax exemptions given to Saurashtra Cricket Association, Baroda Cricket Association, Kerala Cricket Association and Maharashtra Cricket Association for engaging in commercial activities.

23 Id.
Saurashtra Cricket Association, along with other associations, challenged this decision, and both the Income Tax Tribunal and the Income Tax Appellate Tribunal decided in the Association’s favour and set aside the withdrawal. In doing so, it took a different approach from the one taken by the ITAT Punjab. It held that

“the difficulty for the case of the revenue before us, however, is that these matches are not being organized by the local cricket associations. We are told that the matches are being organized by the Board of Cricket Control of India, but then, if we are to accept this claim and invoke the proviso to Section 2(15) for this reason, it will amount to a situation in which proviso to Section 2(15) is being invoked on account of activities of an entity other than the assessee—something which law does not permit.”

In light of the above, it will be interesting to see the approach that the Bombay High Court takes and whether it cancels the registration of the BCCI, as thus far it is not being taxed for the income generated by it through sale of tickets in the IPL or in other events. As such, Income earned by way of tickets sold by the franchise owners, then the same would be treated as their income from profession or business and be liable for tax under section 28 of the Act.

**LEARNING THE ROPES: IMPLICATIONS UNDER THE GOODS & SERVICE TAX LAW**

With the Constitution (One Hundred and First Amendment) Act, 2016, national uniform legislation on the areas of taxation for goods and services has been introduced. This new national Goods and Service Tax regime

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created a far-reaching impact on all businesses, including those operating in the field of sports in India, such as the sale of sporting equipment, player contracts, tickets for sporting events, franchising fees, promotional fees, broadcasting fees, training in sports etc.

The Central Goods and Services Tax Act, 2017 (hereinafter referred to as “the Act”) prescribes that the tax is to be levied at the time of supply of the goods or services. To avoid ambiguity, the Act describes what constitutes supply under Section 7 of the Act and defines ‘Goods’ and ‘Services’ “Goods” is defined under section 2(52) of the Act to mean, “..every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply” It is pertinent to note that all sporting equipment such as cricket bats, cricket balls, pads, Football, Shin-Guards, shoes, Racquets etc. are goods. The GST regime entails a negative list for taxation, and thereby unless specifically excluded are amenable to the tax regime.

On the other hand, “Services” are defined under section 2(102) of the Act to mean, “anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged” Services such as those provided by players, umpires and coaches would be covered under this definition. They are taxable unless excluded from the negative list for taxation.

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27 The Indian Constitution (One Hundred and First Amendment) Act, 2016.
28 Central Goods and Services Act 2017 § 2(52).
29 Central Goods and Services Act 2017 § 2(102).
The terms “Goods”, “Services” and “Supply” oft had been a bone of contention. For instance, the Authority of Advance Ruling, Punjab decided an interesting question of whether the supply of complimentary tickets of an IPL game without any consideration would attract levy of GST or not. A ‘ticket’ qualified as a ‘good’, however, the question was whether in case of complimentary tickets, there was a valid “supply” under the Act, for there to be a tax liability. The Applicant argued that GST would not apply to supply without consideration and pointed out that in the earlier indirect tax regime, the distribution of complimentary tickets did not attract liability. The Authority while rejecting the argument of the Applicant referred to section 7(1)(a) read with section 2(31)(b) to state that supply pre-conditions a consideration having monetary value or forbearance. The Authority held that this would cover the supply of complimentary tickets as the act would qualify as forbearance by tolerating persons who are receiving the services provided by the applicant without paying any money. Thus franchises handing out complimentary tickets would also be required to pay GST.

Apart from the simple supply of goods and services, the concept of mixed and composite supply is provided under the Act. ‘Composite supply’ is defined under section 2(30) to mean, “a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or

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30 Central Goods and Services Act 2017 § 7(1)(a) defines supply to include, “all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business”

31 Central Goods and Services Act 2017 § 2(31) defines consideration to mean, “the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person.”


33 Central Goods and Services Act 2017 § 8.
both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply”\textsuperscript{34} An example of this would be the services offered by a player under the contract to his team. His services would not be limited to playing a match, but would also envisage other activities such as promotion of the team etc., and these additional services would be supplied by the player in conjunction with his primary service, i.e., of actually playing the sport.

Mixed supply is defined under section 2(74) to mean, “two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a cosupply”\textsuperscript{35} For example, the sale of a cricket kit, which would include different goods such as cricket bats, balls, helmet, pads etc. capable of being sold individually or bundled in the normal course of business. A supply of a cricket kit would not qualify as a composite supply, because there was no primary good amongst the various goods which are bundled and sold together.

The method of levying tax on mixed and composite supply of goods is provided under Section 8 of the Act. For composite supply, the tax will be levied as per the applicable rate on the principal good/service. Thus, in the example of the player’s contract above the principal service would be playing the sport and taxable accordingly. In the case of mixed supply, the tax is levied as per the highest applicable tax rate from amongst the goods. So, if in the cricket kit, the applicable tax rate for cricket bats is 12%, whereas on the gloves it is 18%, then tax will be levied as per the higher rate, i.e. 18%.

\textsuperscript{34} Central Goods and Services Act 2017 § 2(30).
\textsuperscript{35} Central Goods and Services Act 2017 § 2(174).
(a). Applicable Rate of Taxation

Sports goods and Sports services are not taxed uniformly at a fixed rate. The GST rates for different sporting goods are provided in Chapter 95 of the Harmonized System Nomenclature for GST in India which provides the taxation rate for sporting goods and toys and Chapter 42 covering articles of leather. The rates range between 12-28%, which is a sharp rise from the rates applicable under the earlier regime. Against this, the sports goods manufacturers petitioned for a reduction of the GST rates. Nevertheless, the GST council had refused to revise the rates. Currently, the taxing rate for different goods is as given below:

<table>
<thead>
<tr>
<th>HSN Code</th>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>4203</td>
<td>Gloves specially designed for use in sports</td>
<td>12%</td>
</tr>
<tr>
<td>9504</td>
<td>Playing cards, chess board, carom board and other board games, like ludo, etc. [other than Video game consoles and Machines]</td>
<td>12%</td>
</tr>
<tr>
<td>9506</td>
<td>Sports goods other than articles and equipments for general physical exercise</td>
<td>12%</td>
</tr>
<tr>
<td>9507</td>
<td>Fishing rods, fishing hooks, and other line fishing tackle; fish landing nets, butterfly nets and similar nets; decoy “birds” (other than those of heading 9208) and similar hunting or shooting requisites</td>
<td>12%</td>
</tr>
<tr>
<td>9506</td>
<td>Swimming pools and padding pools</td>
<td>18%</td>
</tr>
</tbody>
</table>


Apart from sporting goods, there are a variety of sports-related services which are covered under the GST regime, and which are identified with a Services Accounting Code. They are enumerated in the table given below:

<table>
<thead>
<tr>
<th>SAC Code</th>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
</table>
| 9985     | Services by way of sponsorship of sporting events organised:  
(a) by a national sports federation, or its affiliated federations, where the participating teams or individuals represent any district, State, zone or Country.  
(b) by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympic Committee of India or Special Olympics Bharat.  
(c) by the Central Civil Services Cultural and Sports Board.  
(d) as part of national games, by the Indian Olympic Association; or  
(e) under the Panchayat Yuva Kreeda Aur Khel Abhiyaan Scheme                                                                                                                                  | Nil  |

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<table>
<thead>
<tr>
<th>9996</th>
<th>Services provided to a recognised sports body by-</th>
<th>Nil</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) an individual as a player, referee, umpire, coach, or team manager for participation in a sporting event organised by a recognised sport body; (b) another recognised sports body</td>
<td></td>
</tr>
<tr>
<td>9996</td>
<td>Services by way of training or coaching in recreational activities relating to: (a) arts or culture, or (b) sports by charitable entities registered under section 12AA of the Income-tax Act.</td>
<td>Nil</td>
</tr>
<tr>
<td>9996</td>
<td>Services by way of right to admission to, - circus, dance, or theatrical performance including drama or ballet; award function, concert, pageant, musical performance or any sporting event other than a recognised sporting event; recognised sporting event; where the consideration for admission is not more than Rs 250 per person in (i), (ii) and (iii) above.</td>
<td>Nil</td>
</tr>
<tr>
<td>9996</td>
<td>Services by way of admission to entertainment events or access to amusement facilities including exhibition of cinematograph films, theme parks, water parks, joy rides, merry-go-rounds, go-carting, casinos, race-course, ballet, any sporting event such as IPL and the like;</td>
<td>28%</td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
<td>Rate</td>
</tr>
<tr>
<td>--------</td>
<td>------------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>998895</td>
<td>Sports goods manufacturing services</td>
<td>18%</td>
</tr>
<tr>
<td>999292</td>
<td>Sports and recreation education services</td>
<td>18%</td>
</tr>
<tr>
<td>995415</td>
<td>Indoor sports or recreation installations (ice rinks, gymnasia, indoor courts, general-purpose halls, boat sheds, boxing rings, etc.)</td>
<td>18%</td>
</tr>
<tr>
<td>999651</td>
<td>Sports and recreational sports event promotion and organization services</td>
<td>18%</td>
</tr>
<tr>
<td>999652</td>
<td>Sports and recreational sports facility operation services</td>
<td>18%</td>
</tr>
<tr>
<td>999659</td>
<td>Other sports and recreational sports services</td>
<td>18%</td>
</tr>
<tr>
<td>999661</td>
<td>Services of athletes</td>
<td>18%</td>
</tr>
<tr>
<td>999662</td>
<td>Support services related to sports and recreation</td>
<td>18%</td>
</tr>
<tr>
<td>995428</td>
<td>General construction services for outdoor sports and recreational facilities</td>
<td>18%</td>
</tr>
</tbody>
</table>

It is pertinent to note that the aforesaid lists are merely illustrative, and there exists other sports related goods and services which are allotted their own codes.

**b). Should Sports Businesses undertake registration under GST?**

The Act warrants the supplier to collect the tax on behalf of the Government and deposit the same with the Government. To facilitate this, registration of any business entity under the GST Law implies obtaining a unique number from the concerned tax authorities for the purpose of collecting tax on behalf of the government and to avail Input tax credit for the taxes on his inward supplies. Without registration, a person cannot collect the GST or claim any input tax credit of tax paid by him.³⁹

Chapter VI of the Act provides for mandatory and voluntary registration of companies and other businesses. Under this chapter, it is mandatory for the following persons to register:

- **Businesses engaged in the supply of goods or services or both, having an aggregate turnover of Rs. 20 lakhs (Rs. 10 lakhs for business is in the States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Puducherry, Sikkim, Telangana, Tripura, and Uttarakhand);**
- **Every person who is registered under an earlier law (i.e., Excise, VAT, Service Tax etc.);**
- **When a business which is registered has been transferred to someone/demerged, the transferee shall take registration with effect from the date of transfer;**
- **Businesses engaged in inter-state supply of goods;**
- **Casual taxable person;**
- **Non-resident taxable person;**
- **Agent of a supplier;**
- **Input Service distributor;**
- **Person liable to pay tax under the reverse charge mechanism.**

The first four headings are self-explanatory, and if a sports company, etc. qualifies under any of them, they would have to mandatorily register under the Act. The remaining headings are elucidated below:

A **casual taxable person** is defined under section 2(20) of the act to mean, “a person who occasionally undertakes transactions involving supply of goods or services or both in the course or furtherance of business, whether as principal, agent or in any other capacity, in a State or a Union territory where he has no fixed place of business.”

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40 Central Goods and Services Act 2017 § 22.
41 Central Goods and Services Act 2017 § 2(20).
out of Rajasthan was to supply his goods to Pune or Mumbai where he did not have any office or factory, then he would be treated as a casual taxable person.

A **non-resident taxable person** is defined under section 2(77) of the act to mean, “any person who occasionally undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India.”\(^\text{42}\)

An example of this would be a foreign coach who has come to India as a coach for a tournament like the ISL or IPL.

**Input Service Distributor** is defined under section 2(61) to mean, “an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office.”\(^\text{43}\)

To understand this concept, let us take the example of a company manufacturing bat, this company has two factories, one in the state of Maharashtra and another in the state of Gujarat. Now this company’s head office is in Delhi, and the head office engages the services of an advertisement company to market the bats being made in Maharashtra and Gujarat. In this case since there is no direct link between the factories and the advertisement agency, the head office will be registered as an input service distributor and it will collect the input tax credit from the agency and then distribute the benefit of the same to the factories.

**Reverse charge** is defined under section 2(98) of the Act to mean, “the

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\(^{42}\) Central Goods and Services Act 2017 § 2(77).

\(^{43}\) Central Goods and Services Act 2017 § 2(61).
liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of section 9, or under sub-section (3) or sub-section (4) of section 5 of the Integrated Goods and Services Tax Act.”44 Section 9(3) of the Act refers to the supply of those goods or services which are specified by the government45, and section 9(4) refers to the supply of any goods or services by a person who is not registered under the Act.46 Sponsorship services are one example of services specified under section 9(3).47. Thus the IPL teams which get sponsorships from corporates pay the GST under the reverse charge mechanism and need to register under the Act mandatorily. For an illustration of reverse charge under Section 9(4), we can take the example of company manufacturing bats. In our case, a company is supplying wood to the manufacturer, and this supplier is not registered under the Act, then the GST will be paid as per the reverse charge mechanism by the manufacturer.

Section 122 of the Act provides the penalty for a person who are required to register but do not do so.48 The penalty is Rs. 10,000 or amount of tax evaded whichever is higher.

(c). Benefits that Entail on Registration

Registration under GST Law has its perks and benefits, of which the foremost is the avail of Input Tax Credit. This is a concept unique to the Act and is a method developed to do away with the cascading effect of taxation. The Act defines “input tax” under section 2(62) to mean, “the

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44 Central Goods and Services Act 2017 § 2(98)
45 Central Goods and Services Act 2017 § 9(3).
46 Central Goods and Services Act 2017 § 9(4)
47 Services under Reverse Charge as approved by GST Council, GST COUNCIL (May 15, 2020, 04:02 pm) http://gstcouncil.gov.in/sites/default/files/gst%20rates/list-of-services-under-reverse-charge-2.pdf
48 Central Goods and Services Act 2017 § 122.
central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—

- the integrated goods and services tax charged on import of goods;
- the tax payable under the provisions of sub-sections (3) and (4) of section 9;
- the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
- the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
- the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act”

Section 2(63) of the Act defines “input tax credit” to mean, “the credit of input tax.” However, in order to avail an input tax credit, the following pre-conditions are to be met therein:

- Possession of a valid tax invoice (of purchase) or debit note issued by registered dealer
- Receipt of the goods/services
- Tax charged on your purchases has been deposited/paid to the government by the supplier in cash or has been subject to input tax credit
- GST returns have been filed by the Supplier, and such supplier is not in default

The rationale of these requirements is to ensure that the government has received the tax the consumer paid for goods and services before it allows you to credit the tax that you have collected. Given below is an illustration of the concept:

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49 Central Goods and Services Act 2017 § 2(62).
50 Central Goods and Services Act 2017 § 2(63).
51 Central Goods and Services Act 2017 § 16.
An example of a cricket bat manufacturer further clarifies this concept of ‘Input tax credit’ in a sports business. As per the GST regime, a tax is levied on the supply of goods and services, accordingly, a manufacturer pays tax on the received raw materials and collects tax on the bats sold. This tax amount received on sale is treated as input tax under the Act and can be set off against the tax paid to avoid paying tax twice.

Moreover, there are also certain goods and services on which no input tax credit can be availed, and these are enumerated in the following list:

- motor vehicles and other conveyances
- food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery
- Works contract services when supplied for construction of an immovable property
- goods or services or both received by a taxable person for construction of an immovable property
- GST Paid on invoices where service provider opting for composition levy.
- Goods or services or both received by a non-resident
- Goods or services or both used for personal consumption
- Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples\(^\text{52}\)

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\(^{52}\) Central Goods and Services Act 2017 § 17.
It is reasonable to ascertain that an event manager who organizes IPL cannot set off the tax credit received from the ticket sales against the tax output spent on procuring popcorn and other similar foods and beverages to sell at a match. Similarly, a sports club cannot set off the tax credit received on from the club membership fees against the tax output spent on availing services for maintenance of gym equipment, etc.

**PLANNING OF TAXES: LONG SHOT AND SURE SHOT**

While evasion of taxes is a crime, planning of taxes, allows you to run between wickets. This section will deal with the applicability of Double taxation Avoidance Agreements (DTAA) and the over-extensive use of the idea of registration of sports facilities as charitable trusts for claiming exemption under the Income Tax Act, 1961 (hereinafter referred to as the Act).

(a). *Double Tax Avoidance Agreements and Tax Reliefs*

India hosts several international sporting events, and similarly, Indians participate in several sporting events held abroad. In this respect, the question of double taxation comes into the picture, and the double tax avoidance agreements (DTAAs) executed between India and other countries gain significance.

A DTAA is a tax treaty entered into between two or more countries to avoid taxing the same income twice. They apply when a taxpayer is a resident of one country but is earning his income in another country; the tax rates and jurisdiction etc. are agreed under the DTAAAs.

All the Model Tax Conventions also follow the same principle that the income of sportspersons will be taxed at source. The Income Tax Department had

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issued a circular in 2000 laying down the guidelines for taxing the income of sportsmen, in which it clarified that, “The income earned by non-resident sportsmen, who are not citizens of India or the income earned by non-resident sports association or institutions is required to be determined in accordance with the provisions of section 115BBA of the Income-tax Act, 1961. In the case of the sportsmen, this would include the income by way of participation in India in any game or sport, from advertisement or contribution to any newspapers, magazines or journal of any articles relating to sport or game in India. The tax should be deducted at source under section 194E from such payments. The provisions of section 115BBA would be applicable to the guarantee money receivable by the non-resident sports association. The payment by way of guarantee money to non-resident sport associations needs to be considered in terms of the Article on “Other income” or on “Income not expressly mentioned” of the relevant DTAA.”

An example of the scheme of taxation of such income under different DTAA’s is as follows:

<table>
<thead>
<tr>
<th>Country</th>
<th>Taxation Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.K.</td>
<td>Taxable in India, as per article 23.3</td>
</tr>
<tr>
<td>U.S.A</td>
<td>Taxable in India, as per article 23.3</td>
</tr>
<tr>
<td>Japan</td>
<td>Taxable in India, as per article 22.3</td>
</tr>
<tr>
<td>Australia</td>
<td>Taxable in India, as per article XXII (2)</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Taxable in India, as per article 22</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>Taxable where the sports association/institutions are resident, as per article 22.¹</td>
</tr>
</tbody>
</table>

(b). Registration as a Charitable Trust

Section 12 of the Act provides that, “any voluntary contributions received by a trust created wholly for charitable or religious purposes or by an institution established wholly for such purposes (not being contributions made with a specific direction that they shall form part of the corpus of the trust or institution) shall for the purposes of section 11 be deemed to be income derived
from property held under trust wholly for charitable or religious purposes and the provisions of that section and section 13 shall apply accordingly”

Section 12A provides the conditions for applicability of exemptions under section 11 and 12, and section 12AA provides for the procedure for registration as a charitable trust

Section 11 of the Act exempts the aforementioned income from being taxed. Furthermore, services provided by a charitable trust which is registered under 12AA will be exempted from the liability under the Central Goods and Services Act as well.

Now section 2(15) of the Act defines “charitable purpose” to include, “relief of the poor, education, medical relief, [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest,] and the advancement of any other object of general public utility

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business”

The question which arises is as to whether activities of sports associations and clubs come within the ambit of ‘general public utility’ or not. The Income Tax Department had issued a circular clarifying that promotion of sports and games can be a charitable purpose.

55 Income Tax Act 1961 § 12A.
57 Income Tax Act 1961 § 12AA.
In a landmark case of ITAT Pune, it was observed that, “The Standing Counsel submitted that sports and games were not of any utility because they were not a necessity. I am not in inclined to accept this argument. In my view, utility first of all, means usefulness and not necessity. Secondly, it would be too narrow a view to take. For any community or society in general, sports and sportsmanship are definitely useful and are of great value. For these reasons I am of the view that the object of the assessee i.e., promotion of sports, games, gymnastics and sportsmanship must be said to be an object of general and public utility i.e., a charitable purpose within the meaning of Sec. 2(15)”

Over the years there have been numerous cases wherein the registration of several cricket associations has been revoked by the authorities for engaging in commercial activity. One such case was that of the Tamil Nadu Cricket Association, whose registration had been revoked for purportedly engaging in commercial activity by receiving subsidies from BCCI, providing its stadiums for conducting IPL matches, income from ticket sales, advertisements and subscriptions. The Madras High Court concluded that these activities were incidental to the main charitable purpose of the Association and not sufficient to revoke its registration. It held that, “We do not think that by the volume of receipt one can draw the inference that the activity is commercial. The Income Tax Appellate Tribunal’s view that it is an entertainment and hence offended Section 2(15) of the Act does not appear to be correct and the same is based on its own impression on free ticket, payment of entertainment tax and presence of cheer group and given the irrelevant consideration. These considerations are not germane in considering the question as to whether the activities are genuine or carried on in accordance with the objects of the Association. We can only say that the Income Tax Appellate Tribunal rested its decision on consideration which are not relevant for considering the test specified under Section 12AA

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(3) to impose commercial character to the activity of the Association. In the circumstances, we agree with the assessee that the Revenue has not made out any ground to cancel the registration under Section 12AA (3) of the Act.”

This ratio was also followed by the Delhi bench of the Income Tax Appellate Tribunal to uphold the registration of the Delhi and District Cricket Association as well as the All India Football Federation, as the commercial activities of sponsorship, ticket fees etc. were incidental to the charitable objectives of the trusts. The Pune Bench of the Tribunal also came to a similar conclusion with regards to the Maharashtra Cricket Association to hold that, “the nature of receipt is such that it is intrinsically linked to the charitable activities of assessee carried on by the assessee and hence, the same cannot be held to be taxable in the hands of assessee.”

An interesting shift was made in the case of the Chandigarh Lawn Tennis Association by the Chandigarh Bench of the Tribunal. Here the Tribunal was tasked with interpreting the second proviso to section 2(15) of the Act which provides that the first proviso of the section would not apply when the income generated from commercial activities was less than Rs. 10 lakh. In interpreting the effect of this proviso, the Tribunal held that, “proper construction will be that the institution carrying out the object of advancement of general public utility which involve the incidental or ancillary activity in the nature of trade, commerce or business and generating income therefrom, the income to such an extent as is limited by the second proviso to section 2(15) should be taken as exempt being treated as income from charitable purposes as per the relevant provisions of sections 2(15), section 10, section 11, section

61 Tamil Nadu Cricket Association v. Director of Income Tax (Exemptions) and Ors., [2014] 360 ITR 633 (Mad).
62 DDIT (E) v. All India Football Federation, 2015 (43) ITR (Trib) 656 (Delhi) and Delhi and District Cricket Association v. DIT (E), (2015) 168 TTJ (Delhi) 425.
12 or section 13, as the case may be and wherever applied. The other income which is not from the commercial activity, such as, by way of voluntary donations, contributions, grants, or nominal registration fee etc. or otherwise will remain to be from charitable purposes and eligible for exemption under the relevant provisions. However, the income from activity in the nature of trade, commerce or business over the above limit prescribed from time to time as per the second proviso to section 2(15), should be treated as income from the business activity and liable to be included in the total income.”

This decision was heavily relied on by the bench in its decision on the exemption granted to Punjab Cricket Association. In this case, the Tribunal departed from the earlier decisions of the other Tribunals and held that the BCCI was nothing more than an association of persons comprising of the various state cricket associations, it refused to allow the defense that the commercial activities pertaining to the IPL were conducted by BCCI and not by the Punjab Cricket Association. It held that, “what cannot be done directly, that cannot be done indirectly also. If an institution claiming charitable status being constituted for the advancement of other objects of public utility, as per the provisions of law, is barred from involving in any commerce or business, it cannot do so indirectly also by forming a partnership firm or an AOP or a society with some other persons and indulge in commercial activity. Any contrary construction of such provisions of law in this respect would defeat the very purpose of its enactment.” It further held that even if the argument of incidental activities of the Associations was accepted, then the decision in the Lawn Tennis Association would come into the picture and the income over and above Rs. 10 lakh would be taxable as business income. In light of the aforementioned decisions, it has to be seen that the view taken by the Chandigarh Bench of the Tribunal is an exception to

64 Chandigarh Lawn Tennis Association v. Income Tax Officer, (Exemptions), Ward, Chandigarh, [2018] 95 taxmann.com 308 (Chandigarh - Trib).
the rule, and until now the majority of the courts have refused to interfere with the registration afforded to the sports associations. It remains to be seen as to whether the Punjab Association case will be overruled or if it will be a new beginning in the field of sports and taxation. Till now the sports associations have been largely successful with their tax planning by showing their income earned under sponsorship, ticket revenue etc. as incidental to their charitable purpose, however, the two decisions of the Chandigarh bench of the Tribunal can potentially put a spanner in the works of the associations.

(c). Crossing Goal Lines: To set the Ball Rolling

The researchers in this paper have attempted an overview of the tax implications in the field of sports in India, by making a critical appraisal of the direct as well as indirect taxation regime in sports businesses, while the indirect tax regime has been revamped with the introduction of the Goods and Service Tax Act, a similar revamp of the direct tax regime is well around the corner. Whilst it may be argued that just as the Kelkar Committee Report submitted 15 years ago, the 2008 draft of a direct tax code which never saw the light of day, it is but to wait and watch. The current government also set up a committee to work on the code, and a report was also submitted in 2019 to the government, however, this report has not been made public yet. Considering recent events, the Direct Tax Code remains a long way away, and the Income Tax Act will continue to govern the direct tax regime in the country. In this article we have seen the different provisions of the Income Tax Act, 1961 and the Central Goods and Services Act, 2017 which will apply to different sports-related activities, we have also seen the possible deductions and exemptions which are available to the assesses under the Acts, under both these Acts, if the sports associations can successfully register themselves as a charitable trust, then they can claim exemptions under both the Acts, however in light of the recent decisions of the Chandigarh Bench of the Income Tax Appellate Tribunal, this may become much more difficult in the future.
ABUSE OF DOMINANCE AND MONEY POWER IN THE RELIGION OF THE WORLD – FOOTBALL

Arijeet Bhattacharjee\textsuperscript{1} and Kavanya Surolia\textsuperscript{2}

INTRODUCTION

Since ancient times sports has played a very absorbing role in the sphere of life. Sports has always been a significant activity which humans have relished. Sports form an integral part of everyone’s lives which makes it a good topic of discussion. One of the most celebrated sports in human history is football. The beautiful game has always attracted massive popularity due to its simplistic nature. It formally evolved itself towards the end of the 19\textsuperscript{th} century when in England the sport’s first formal association (Football Association England) was formed which also became its first governing body.\textsuperscript{3} The game of football evolved a lot over the period and it slowly kept on growing until it reached the stage that it is at, as of today. All of it initially started in the year of 1938 with the introduction of Football on television, with the FA Cup Final of that year becoming the first football event to be screened on television.\textsuperscript{4} This provided a significant boost to the viewership of football as the global people could watch the game from their own

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\textsuperscript{3} History of Football – The Origins (May 6, 2020, 11:41AM),
https://www.fifa.com/about-fifa/who-we-are/the-game/.

\textsuperscript{4} Football and Television: A Natural Partnership (May 6, 2020, 11:41AM),
homes. This resulted in the evolution of football which eventually became a matter of big money surrounded by brand endorsements, sponsorship and investments. Football originally had only the entertainment aspect, as people played football mostly for leisure. But as football grew, it changed a lot, and towards the end of the 20th century, football spread rapidly throughout the world. People now took up football as their profession. The entire economy of football transfers developed, and vast amounts of money started being involved. All these changes brought football to what it is today, that is, the most-watched sport in the world. Football virtually became a religion for people, with the following football daily and it became an integral part of their lives. The sport attracted huge investments by clubs, their owners and their sponsors for participating in the transfer market and buying established players as well as young prospects into their squads. This concept of transfers of players between clubs gained a lot of popularity, and it slowly became one of the main aspects of the sport. A lot of clubs started spending a lot of money on players, and this called for some kind of rules governing these transfers. Owing to which, the Union of European Football Associations (hereinafter “UEFA”), introduced the Financial Fair-Play Rules in 2010 (hereinafter “FFP”), for governing and safeguarding the interests of clubs in the field of transfers. This field also transformed a lot with clubs today splashing the cash on young prospects. This came to a point where clubs started misusing their funds and influence to get all the best players in their teams and perform well. As this is wrong, the FFP rules were required and still need a lot of work. As clubs spent so much on these young players, it also affected the lives of these young players, which sometimes spoiled their careers. These aspects of financial regulations related to transfers, to this day, remains a new sphere of football

which can be improved to a great extent to ensure fair-play in the sport and to avoid the abuse of dominance by big guns of the game.

Thus, the focus is on providing a basic understanding of the rules regarding the football transfer market by understanding the history of the transfer market, its evolution. Moreover, elucidate upon the FFP Regulations. Researchers have tried to find out how football has evolved along with the evolution of transfer markets and player contracts, what are the current regulations related to player contracts, what are the FFP rules and how do they work, have there been any recent breaches of the FFP regulations and if yes, what are those if there have been any other recent developments in this field and finally what measures can be taken to improve the scenario of abuse of dominance.

PROFESSIONALIZATION OF THE GAME

The earliest traces of the formal game of football can be seen in 12th century England. This rudimentary form of the game had very less difference from the set of rugby, with the players carrying the ball to its target by any means necessary. There were no formal rules and players used brute force to get the goals - number of players in each team; the period of each game; and other rules were not decided at this stage. These formal rules were for the first time formulated with the establishment of The Football Association, England, in 1863, which was the first association for football in the world.6 Thus, began the evolution of sport in terms of the rules and regulations of the technical aspects of it. The first football clubs came up in the form of teams consisting of former school students, but the first professional football club was the English club - Notts County Football Club which was established

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in 1862⁷ and exists today too. As all these changes took place, the concept of the competition came into the picture. With the commercialisation of tickets for the matches, the clubs had the incentive to win the matches and earn more money. The increased income of clubs now allowed them to start paying players to play for them. This system slowly matured into the system of transfers that we see today. The first football league was played in 1888 in England with 12 clubs participating in it.⁸ However, the first cup competition of football was the Football Association Challenge Cup in 1871.⁹ In 1883 the first international tournament was held. As we can see, football until now had majorly been a British sport. However, the sport gradually spread to other European nations and South American nations. As this spread took place, The Fédération Internationale de Football Association (FIFA) was established in 1904, which was the first international association of the sport.¹⁰ Football was recognized as an official sport of the Olympics in 1908,¹¹ which remained the most prestigious international football event until the dawn of the FIFA World Cup in 1930.¹² Other domestic leagues

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were also developed during the time, with the English Football League being established in 1888. These leagues also expanded into separate divisions as more and more teams started participating. People started investing in football and stadiums began coming up. The most remarkable of the first stadiums to come up was the Maracanã Stadium in Rio de Janeiro, Brazil, which had a capacity of 2,00,000 people. The passion for the game amongst the fans also developed a lot over this time. The first Champions League was played in 1992,\textsuperscript{13} which is considered today as the biggest club football competition in the world. Earlier, very few national football teams existed.

Nevertheless, this changed as football started becoming more and more famous. Today FIFA has 211 nation-associations under it which are divided into six confederations.\textsuperscript{14} This was how the game was professionalized and brought to the position and stature as it stands today.

The other aspect of the evolution of football is the economic side of the game, which relates to player contracts, sponsorships and mainly, the arena of player transfers. Player Contracts have developed a lot throughout the years. It was in the year 1885 when the concept of Professionalism was first legalised in Football by the Football Association.\textsuperscript{15} The main aim was to stop players from moving club to club and instead have made the system stable by having them signed for a particular club before the start of the season. Soon after this, the first-ever professional league was set up in the year 1888, and this changed everything. A new rule was imposed in the 1893-1894 season which restricted a player from joining another club until his existing club provided the permission. Even after completion

\textsuperscript{13} See, About UEFA Champions League (May 7, 2020, 03:43 PM) \url{https://www.uefa.com/uefachampionsleague/about/}.

\textsuperscript{14} See Associations, (May 7, 2020, 03:43 PM) \url{https://www.fifa.com/associations/}.

\textsuperscript{15} See, (May 7, 2020, 03:43 PM) \url{http://www.thefa.com/about-football-association/what-we-do/history}.
of Player Contract, they were tied with the same club and were neither played nor paid, thus stuck in an adverse situation. Thus, the clubs realised that they could make a profit out of this situation by demanding money as a consolation fee for permitting the player to join any other club. This thus started the Transfer system. Throughout more than 100 years, various regulations were tried and tested to limit the transfer fee of players and thus to regulate the transfer window. Still, most of them failed as clubs always found a loophole in the regulations. The transfer system was changed altogether in the year 1995 with the ‘Bosman Ruling’16 in which the European Court of Justice held that a player should be allowed to move for free at the end of their contract. This has played a significant role in shaping the way transfers take place in the modern era. Another significant change took place in 2002, when UEFA introduced the concept of the ‘Transfer Window’, which allowed clubs to deal matters relating to transfer in a select period of the window only, and not before or after that. Much business nowadays usually takes place on the Transfer deadline day. Any deal which is agreed upon outside the transfer window is made official on the first day of the next window, and the player movement takes place after that only. A recent significant development which took place in transfer history is the introduction of Financial Fair Play by UEFA in the year 2010. The purpose was to limit the amount clubs spent on players and thus to make sure that the competition is not killed off in the beautiful game.

**FINANCIAL FAIR PLAY: A SAFEGUARD FOR COMPETITION?**

Football a game meant for entertainment is undoubtedly becoming more and more lucrative for the rich clubs only. Rich owners look towards their

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16 Union des Associations Européennes de Football v. Jean-Marc Bosman, Case C-415/93, European Court of Justice, 1995.
clubs as a business model and seek for-profit multiplication. Thus they invest more and more so that the club return more and more revenue by winning competitions. These rich businessmen have hampered the competitive spirit of the game and have turned it into a mere business avenue. The ladder used is Money Power which is undoubtedly dominating the game on its own. One of the prime examples being of Paris Saint Germain. The Parisian club has undoubtedly injected much money into the transfer market in recent times and has undoubtedly killed off the competition, especially in the French domestic league. The club was taken over by Qatari giants – ‘Qatar Sports Investments’ in 2011,\(^\text{17}\) and since then the Parisian club has won the domestic competition 6 out of 8 times and all thanks to the substantial financial aid received by them. All these activities kill the competitive nature of the game with these big clubs creating a monopoly in the market and procuring the best players with lucrative offers and bagging all the gold for themselves. Another prime example of this situation was the case of Manchester City F.C. in 2008. The club had been struggling in the domestic competition for quite some time and had finished the 2007-2008 season in the ninth position. In 2008, it was taken over by Sheikh Mansour bin Zayed al-Nahyan, who belonged to the ruling dynasty of Abu Dhabi. He injected £1.2 billion into the club’s funds, which consequently took them to the position of the Premier League (The English Domestic League) champions in 2012.\(^\text{18}\) This is a clear abuse of monetary power by the club, which allowed them to spend exorbitantly on world-class players and get to the top. Manchester City, after the takeover, has won the league three


times and have performed well in the champions league scenario too. Such activities by football clubs called for a change in the system of transfers and the regulations related to it. After due delegations and recommendations, UEFA came up with the Financial Fair-Play Regulations (FFP) in 2010 to curb such activities by the clubs and to promote fair-play and healthy competition in the game. The FFP rules have had a long history of transformation, which have evolved a lot to regularize the football market.

The entire story of transformation in the transfer system in football began with the ‘Bosman Ruling’ of the European Court of Justice in 1995. In this case, Bosman was a player who played for the team Liège in Belgium. He wanted a move to the club Dunkerque of France. His contract had ended, but the regulations of that time compelled him to stay at Liège until the other team paid the transfer fee for him. It was held by the ECJ that this was a restriction on the movement of workers in the European Union and that players should be allowed to move to other clubs for free at the end of their contracts. This judgement revolutionized the player market as clubs now resorted to selling their players before their contracts ended, for more profits instead of selling them for free. The players also can now use this rule as leverage to demand more salaries and wages by threatening the clubs to run down their contracts and reduce their value. This compels clubs to offer these players newer, more lucrative contracts to retain them in their teams. This ruling paved the way for the modern transfer system, which was a good thing. However, it also provided the basis for the misuse of money and spoiling of competition in the sport, as the values of players kept getting inflated and clubs with more money were able to buy players from other clubs who wanted to earn this money instead of letting them go for free.

Union des Associations Européennes de Football v. Jean-Marc Bosman, Case C-415/93, European Court of Justice, 1995.
After this ruling there were a lot of deliberations regarding the regulation of transfers and the ‘FIFA Regulations on the Status and Transfer of Players’ was established. This informal agreement laid down certain specific rules regarding transfers and player contracts which reformed the market. Articles 18(2) and 18(3) talked about the length of the player contracts and when another club can contact a player. Article 13 and states about how the transfer of a player can take place only by mutual agreement between the player and both the clubs. Moreover, if any other case, there must be ‘just cause’ for the transfer of the player without mutual agreement, under Article 14. Many other such provisions provided rules and regulations for player contracts and transfers in the player market. This agreement also enclosed the sanctions which players and clubs might have to pay in case of breach of the rules.

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20 Article 18(2) of RSTP: Special provisions relating to contracts between professionals and clubs - ‘The minimum length of a contract shall be from its effective date until the end of the season, while the maximum length of a contract shall be five years. Contracts of any other length shall only be permitted if consistent with national laws. Players under the age of 18 may not sign a professional contract for a term longer than three years. Any clause referring to a longer period shall not be recognised.’

21 Article 18(3) of RSTP: Special provisions relating to contracts between professionals and clubs - A club intending to conclude a contract with a professional must inform the player’s current club in writing before entering into negotiations with him. A professional shall only be free to conclude a contract with another club if his contract with his present club has expired or is due to expire within six months. Any breach of this provision shall be subject to appropriate sanctions.

22 Article 13 of RSTP: Respect of contract - A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.

23 Article 14 of RSTP: Terminating a contract with just cause - A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.
This brought about a significant change in the transfer system as it
became organized and the parties to the contracts now had a fear of
sanctions. However, even after these regulations, the issue of the spoiling
of competition still prevailed in the football scene. As players became
bound by their contracts, their value increased in the market, and only
a few elite clubs could attract these players due to their monetary power.
These clubs did not allow other, rather smaller clubs to get in the main
scene as all the best talents were attracted to such lucrative contract offers,
hampering competition to a great extent. This led to the formation of the
UEFA Financial Fair play Regulations.

The UEFA’s Financial Fair Play Regulations were launched in 2010 with
the primary aim to make sure that clubs spend rationally and in a more
disciplined way, and to protect long-term viability and sustainability of
Club Football in Europe. UEFA also kept a vision to make sure that the
clubs avoid spending more than what they received as revenue so that Clubs
remain financially stable and credible and do not fall into debt traps.

a). Break-Even Rule

FFP’s central principle is that clubs should spend as per their income,
i.e. the clubs should stay within their means. This rule is also called the
‘Break-Even’ rule. The Break-Even rule is an effort to make sure that clubs

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24 Article 2 of UEFA Club License and Financial Fair Play Regulations:
Objectives: To introduce more discipline and rationality in club football
finances. Also, to protect the long-term viability and sustainability of
European club football.

25 Article 2 of UEFA Club License and Financial Fair Play Regulations:
Objectives: To improve the economic and financial capability of the clubs,
increasing their transparency and credibility. Also to place the necessary
importance on the protection of creditors and to ensure that clubs settle their
liabilities with employees, social/tax authorities and other clubs punctually.

26 Article 58 to 64 of UEFA Club License and Financial Fair Play
Regulations.
at the end of the day balance their books out. The Break-Even rule was introduced as a requirement for clubs in the year 2013. This rule states that the clubs should not spend more than what they earn. The clubs’ revenues and expenditure are assessed based on three years. The body which keeps this rule in check is the Club Financial Control Body (CFCB) which was set up in 2012 by UEFA to keep clubs on track with the FFP rules and to impose sanctions in cases of breach. The break-even rule is explained in Article 60 of the Regulations as “the difference between relevant income and relevant expenses” which need to be balanced. The clubs need to spend only as much as they earn and not more than that. The expenditure must be equal to their income in the three-year given period. However, under this rule, all revenues and expenses are not taken into account. The income head includes factors like ticket sales, broadcasting rights, sponsorship deals and player transfers. The significant chunk of expenditures taken into account by UEFA include signings and salaries. However, other expenses related to training, infrastructure, youth sector, investment in social avenues are not taken into consideration as expenditures. This promotes the youth development sector of the clubs as they would resort to invest in their homegrown talents as these expenses would not be calculated under the break-even rule. Under this rule, UEFA has allowed that the clubs can spend up to €5million more than what they have earned in the assessment period. However, this limit can also be increased if the money is being directly injected by the club owner or a related party. This limit on investment injection by owners was €45m up until the season of 2014/15 after which it was reduced to €30m. This is the entire synopsis of the break-even rule which is the crux of the FFP regulations given by UEFA in its UEFA Club License and Financial Fair Play Regulations. Non-compliance with the FFP rules also attracts sanctions by the UEFA, which include warnings, point deductions, fines, restriction on the number of players. These FFP rules have been revolutionary in the field of transfers in football as they have regularized the transfer scenario in its entirety. However, still,
these rules can be bettered as in the recent times, there have been instances
of breaches of these rules, and in these cases, UEFA has been rather lenient
in the view of the researchers.

Since the inception of these regulations, many clubs have faced the wrath
of it for breaching its Financial rules, the most notable offenders being
Manchester City and Paris Saint Germain. Manchester City was found
guilty of violating the FFP regulations after it posted combined losses of
almost £149m and thus was fined for £49m. Their squad was reduced to
21 members for the upcoming seasons in European competition.\textsuperscript{27} Paris
Saint Germain was also punished in the same year for a breach in the terms
prescribed, PSG was fined for €60m, and the squad was limited up to 21
players for the upcoming European seasons.\textsuperscript{28} However, the weakness of
UEFA and its FFP can be seen when it entered into negotiations with both
Manchester City and PSG to ease of their bans and thus City was paid
back £33m,\textsuperscript{29} and PSG was relaxed up to the amount of €40m.\textsuperscript{30} This is
the arena of the FFP regulations which need to be worked upon as such

\textsuperscript{27} See, Manchester City Fined and Squad Capped for FFP Breach, BBC
sport/football/27445475.

\textsuperscript{28} Lawrence Ostlere, PSG Win Appeal to Shut Down UEFA’s Investigation
into Alleged FFP Breach After CAS Sides with the club, March 19, 2019 (May 07,
2020, 11:07 PM) https://www.independent.co.uk/sport/football/european/
psg-ffp-appeal-uefa-paris-saint-germain-decision-upheld-cas-a8830166.
html.

\textsuperscript{29} James Robson, UEFA Refund Manchester City after Controversial
Financial Fairplay Sanctions, Manchester Evening News, April 21, 2017,
(May 07, 2020, 11:07 PM) https://www.manchestereveningnews.co.uk/

\textsuperscript{30} Lawrence Ostlere, PSG Win Appeal to Shut Down UEFA’s Investigation
Into Alleged FFP Breach after Cas Sides with the Club, Independent, March 19,
2019, (May 07, 2020, 11:07 PM) https://www.independent.co.uk/sport/
football/european/psg-ffp-appeal-uefa-paris-saint-germain-decision-
upheld-cas-a8830166.html.
lenient actions by the UEFA might lead to a loss in authority and repeated breaches of the regulations in the future.

**EFFECT OF BIG MONEY TRANSFERS ON YOUNGSTERS**

Having a Big Price-Tag means massive media and Fans attention, and that means more pressure. Rich Clubs often use their tremendous spending capabilities to scout and lure away young talents who have the potential of becoming big, and this more often than not plays adversely on the youngsters’ mind. There have been various such instances where big clubs lured away different young talents who just were not able to deliver. This may be because they were exposed to a higher expectation level before it was expected, and this has often led to the destruction of their career. Many Young prospects have become prey to this, one of the examples being that of Jack Rodwell. One player who was hyped to become a footballing great shortly but was never able to live up to those expectations, who just at the age of 21 joined the Premier league mammoths Manchester City for a staggering £12m.⁴¹

Another example is that of Robson De Souza known as ‘Robinho’, who was only 19 when he moved to the ‘Galacticos’ Real Madrid and was about to touch the peaks of his career. However, this could not happen when after only three years due to his greed for money, he chose to move to Manchester City for a staggering £32.5m. This transfer was done on the same day Manchester City was taken over by Sheikh Mansour bin Zayed al-Nahyan, who belonged to the ruling dynasty of Abu Dhabi, who injected much money into the club making it a European powerhouse in terms

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⁴¹
of Financial Capacity. He was never able to live up to his price tag and often had problems with the management, which was the beginning of his decline. After failing at Manchester City, he moved to various random clubs throughout his career. All these examples prove how Big Money transfers often impede the growth of young talents.

Not only are young talents preyed by greed for money, but also some established players often destroy their careers due to it. The prime example being of Oscar dos Santos Emboaba Júnior who during the prime of his footballing career, at the age of just 25 years old, decided to move to the Chinese Super League from The English Premier League which is a considerable degradation in quality standards. Oscar moved for £60m in which he sacrificed quality football and put money above his game. He is often considered to be way too good for the Chinese football league.

The fact that the break-even calculation of the FFP rules does not include expenses on youth academy growth as an item under the estimates of the break-even rule as an expenditure. This was done by UEFA to promote clubs to invest in their youth academies instead of looking for other youth prospects and acquiring them for lots of money. Young players are usually not that experienced in managing their careers, and in the influence of agents, they move to big clubs for bankable offers. This more often than not spoils their careers as they now have to live up to the big price tag. This needs to be stopped, and young players should concentrate more on improving their game instead of Big attractive offers from big clubs. These

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clubs also need to be regulated to a more significant extent to prevent them from indulging in such activities.

(a). Recent Developments

Two cases have currently occupied the world of Financial Fair Play and the transfer window. The first being of AC Milan who has been handed a ban from playing in European Competitions for the upcoming 2019-20 season.\(^{34}\) AC Milan has been given the ban for breaching the Financial Fair play’s Break-Even by failing to comply with its regulation between the years 2015 and 2018. Milan could have been banned for two years, but yet again UEFA has shown the softer side and has negotiated to only a one-year ban.

The second incident is of Chelsea who was handed a two consecutive transfer window ban for breaching Article 18bis\(^{35}\) which talks about third party influence twice and also for violating Article 19\(^{36}\) which talks about protection to minors 29 times.\(^{37}\) Chelsea's ban has been halved after their successful appeal at the Court of Arbitration for Sports.

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\(^{35}\) Article 18bis of RSTP: Third-Party Influence on clubs- 1. No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams. 2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.

\(^{36}\) Article 19 of RSTP: Protection of Minors- International transfers of players are only permitted if the player is over the age of 18.

These two instances show that the football authority has now begun to take cases related to transfer protocol breaches seriously. Authority has decided to give harsh and exemplary punishment to the offenders to make a strong statement that, no more mockery of the spirit of the game will be further tolerated.

Also, in a more recent case, Manchester City has been found guilty of committing “serious breaches” of the FFP regulations and has been handed a two-season ban from UEFA Champions League and fined €30m, the club had overstated its sponsorship revenue, in the accounts and information submitted in 2012 and 2016. Although, Manchester City has denied any wrongdoing and has appealed against the decision to the Court of Arbitration for Sports. This incident shows that UEFAs governing body is now taking the matters related to FFP seriously.

Chinese Superleague has recently implemented New salary caps in a bid to make the league more sustainable as it is expected to attract new investors and also act as a driving force for Chinese players to work hard and get moves to play abroad which will ultimately benefit the Chinese national team.

CONCLUSION AND SUGGESTIONS

The UEFA FFP rules and the FIFA RSTP regulations have come a long way in paving the pathway for a proper and organized method of transfers and other related aspects like player contracts. These regulations were required because the entire system of transfers, without these regulations, would go to an extent where every big club would spend big money to attract the best players and best young talents, to secure the silverware. This would be very

wrong as it would kill the competitive spirit of the game and only a few big clubs would be able to win the significant leagues and tournaments. The clubs would not trust their homegrown academy talents and would instead prefer the easy way out by splashing the cash and getting the gold.

There have been instances like this in the recent past where clubs found loopholes to the rules laid down and got what they wanted without attracting any penalty. One of these was when Paris Saint Germain virtually signed two big-money transfers in a single season. In the 2017/18 season, PSG sealed a deal to buy Neymar Jr. from F.C. Barcelona for a staggering total of €222m.\(^\text{39}\) In the same season, they wished to sign Kylian Mbappe from A.S. Monaco. But they were restrained by the financial fair-play rules as they would have broken the break-even rule if they did so. So, to make this a possibility, they virtually paid no amount to buy Mbappe in the same season and instead got him on loan with an option to buy at the end of the season. After the loan period finished, PSG completed the transfer of Kylian Mbappe from A.S. Monaco for a total amount of €145m, with various other bonuses added to it.\(^\text{40}\) This was a severe breach of the spirit of the game as PSG purchased two great talents for vast amounts of money virtually in the same year without attracting any sanctions.

A lot of such modern-day examples can be seen in which vibrant clubs spend much money to buy the best young talents in the world. This can


be seen in the cases of the purchase of Kylian Mbappe by PSG from A.S. Monaco, the purchase of Ousmane Dembele by F.C. Barcelona from Borussia Dortmund, and the most recent signing of the Portuguese 19 year old Joao Felix by Atletico Madrid from Benfica. These big clubs invest vast amounts of money on these young prospects as they perform well at such a young age, which shows significant room for improvement and proves to be a good investment in the long run. However, this, in most of the cases hampers the growth of the young talents and also, in the process spoils the spirit of the beautiful game.

To curb such violations of the essential nature and spirit of football, the researchers have come up with a few suggestions which might help in controlling these foul activities and improving the business aspect of the sport healthily.

(a). The Strict Appliance of Rules and Sanctions by the Associations

The rules and regulations that have been carefully laid down by the various football associations in the world must be followed in a relatively strict manner. The sanctions that are imposed on teams for breaching the laws must be harsher and more definite. As in the cases discussed earlier in the research paper, the authorities have been quite lenient to the clubs breaching the rules. In the circumstances of the fines imposed on PSG and Manchester City for breach of FFP regulations, it was seen that UEFA had later negotiated with the clubs and had reduced their penalties to a significant extent. Even in the case of the ban on A.C. Milan from participating in European competitions, UEFA negotiated with the club and reduced the ban from two years to just one year. This should not be done, and the rules should be applied in a relatively strict manner so that the clubs have a fear of sanctions and resist from doing so in the future. Harsh punishments act as a deterrent for other clubs to break the laws.

(b). Agent Regularization
Agents play a considerable role in deciding the future and the careers of players as they are the ones that negotiate and deal with all the related paperwork. These agents often, for their benefit, try to lure players to big-money transfers. Young players, who do not have much experience, fall trap to these offers and end up signing for the big clubs which pay more money and, in the process, sacrifice regular football and talent growth. Another prevalent practice followed by quite some of the agents in the practice of ‘Tapping up’ players is to sign for a club without the knowledge of the club with which plays is currently assigned.41 This is a way to attract players in the wrong way. The agents should be regularized, and FIFA and the other associations should set up proper laws relating to the business of Agents. A body can be set up to look into the matters regarding agents in order to ensure competition in the game.

(c). Domestic rules regarding fair-play

The Financial Fair-play regulations are regulations set by UEFA, which is the governing body only for the European competitions. Due to this, the sanctions that they impose can only ban the clubs from participation in European competitions for a specified period. Such similar rules should be brought in and/or made strict even in the domestic league scenario so that clubs have more of fear before indulging in these activities.

(d). Salary Caps

Salary caps are a relatively well-known concept. In this concept, there is a fixed percentage of the income that the clubs can allot to the player wages. If such an amount is fixed, then the clubs would have to think twice

before reckless spending because even if they can afford the transfer fee of the players, they would have to keep an eye on managing the wages of all the players in the team under the fixed cap. This would promote healthy competition and growth of the youth academies of the clubs.

(e). Keeping a Check on Unfair Practices which Boost Revenue

Activities like increased ticket pricing and expensive sponsorship deals boost the revenues of the clubs, which makes it easier for them to achieve the break-even calculations. One such act was the example of PSG when they received sponsorship from ‘Qatar Tourist Authority’ which is in a general sense was ultimately associated with ‘Qatar Sports Initiative’ which owns the club. This was a way to bring in revenue in an unfair manner and balance the break-even calculations. These acts should be regulated and investigated by the authorities, and strict action should be taken.

Many clubs in this manner have abused their stature, and their monetary strength to attain monopoly in the player transfer market, and ultimately in the competitions also. As these activities keep happening, the competitiveness of the sport dies slowly and the abuse of the dominance by select giants in the scene takes place which spoils the entire essence of the beautiful game. These activities allow only a few big guns to get the best teams, the best players and in turn the silverware too. These acts also hamper the growth of the young players and spoil their careers in the long run. The existing regulations have controlled such instances to a comprehensive manner, but there still is room for a lot of improvement as brazen disregards of the rules have been showcased time and again by many clubs. These need to be reformed and improved to safeguard the integrity of the institutions and to protect the game and its credibility. Football truly is a religion in today’s world, and to keep the game entertaining and to keep the dreams of the players alive, reform is required.

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AN INSIGHT ON THE MENACE OF DRUG ABUSE IN SPORTS: WITH SPECIAL EMPHASIS ON SPORTSMEN OF NORTH EAST INDIA

Prakreetish Sarma¹* & Neil Madhav Goswami²**

A BRIEF HISTORY OF DOPING AND THE ROLE OF WATCHDOG BODIES

When we talk about sports, the very first vision which comes in front of us is the enormous amount of benefits encircling it. Still, there is a negative string which is associated with this activity, and that is an abuse of drugs by the performers. It dates back to the Greek Olympics, where athletes were seen indulging in enhancing their performance by using natural materials such as brandy, wine creations and ate hallucinogenic mushrooms and sesame seeds to enhance performance. As time passed the abuse related to drugs did not die down, rather synthetic forms of it came up in the forefront.³ The Ban on such Drug Abuse is not only to maintain the sanctity attached to it, but it has been advocated by Stakeholders such as WADA (World Anti- Doping Agency) that health of the sportsmen are at peril and such abuse could lead to fatal health or even death. There is a Code laid down by WADA in this regard.⁴ The first instance of drug testing was

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observed in the year 1966 in the European Championships, and exactly after two years the International Olympic Committee (IOC) took a leap forward and started drug tests at both the summer and winter Olympics. Moreover, as the menace of Anabolic steroids were on an all-time high a decade later that is in the year, 1976 IOC came up with its version of documented prohibited substances list. France became the first country to set the temperament towards anti-doping, and in the year 1963 became the first country to have its anti-doping legislation. However, such steps were restricted per se.5

People from the North-Eastern part of India are Historically meat-eaters, and due to heavy landslides and other environmental catastrophes which are prevalent due to hilly and rough terrain, people are dependent on meat consumption. However, this is where the problem lies. Because several hundred substances or chemicals substances are used to treat animals, these include antimicrobial agents, such as in the case of Pig which is a popular meat in the North-Eastern part of India. When a human being consumes the meat, likely, it could very much lead to the accumulation of drugs in the body, and this can also be seen in the case of milk intake as these chemicals or drugs used to protect, treat animals could remain in the tissues of these animals. Thus we can rightly deduce that even sportspeople who form a part of the population do consume such food items, and most of the tribal populations are staunch meat-eaters. Furthermore, at times the sportsmen who might be accused of drug abuse charges could plead innocence on such grounds.6

There were concentrated efforts on the parts of a few councils and countries
to do away with menace generated by drug abuse in sports, but as there was no uniformity or proper legislation or law dealing with the issue, there was a grey area engulfed with the issue. Hence this opened the floodgates for a watchdog at the International level and hence the World Anti-Doping Agency (WADA) was established in 1999. All the stakeholders came together to witness the First World Conference on Doping in Sports in Lausanne, Switzerland which came to be known as the Lausanne Declaration on Doping in Sport. Moreover, this conference laid the foundation for the first independent international anti-doping agency was formed with the common cause to fight against doping in sports.7

WADA undertakes a wide array of activities to act as a Global Guardian to promote the idea of drug-free scenario in sports. Some of the measures include having a documented code in itself, and it has devised six international standards in itself some of which include testing: laboratories, Therapeutic Use Exemptions, the protection of privacy and personal information and code compliances by Signatories. WADA has taken the onus to achieve the goal of drug-free sport, and for which it has taken steps such as constituting Court of Arbitration for Sport (CAS). Which involves non-analytical use such measures devised to bring about advances in issues related to the dispute in sports. Such as providing measures such as alternate dispute resolution or providing a safety valve with a three-time test it all boiled down towards betterment in sports.8

India came up with its version of a regulatory body to prevent and keep a check upon issues related to Drug Abuse, and this led to the formation of

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8 Id.
the National Anti-Doping Agency (NADA). NADA, just like WADA, has proper mandates and compliances such as the list of banned substances. Apart from that, they too have a relaxation in the form of Therapeutic Use Exemptions. Which allows athletes to use banned substances under WADA's banned substance list for a genuine medical reason. Apart from that, athletes are accorded their due share of rights and responsibilities. Athletes are granted with rights in doping control centre such as providing interpreters, someone to accompany them; there is a special provision for modifications to standard sample collection procedures for disabled athletes. Flexible provisions are provided in case of in and out of competition sample rules, and utmost care is taken by the authorities while collecting and identifying samples. Sample both in the form of Blood and Urine could be collected in compliance with WADA's mandate.

Thus the concentrated efforts taken by NADA is somewhat similar to WADA, as NADA attempts to establish a drug-free sports environment in the nation with both cautious and flexible method to work in the best interest of sports and athletes per se. Even after such efforts, we see that there are multiple cases of Drug Abuse by Athletes. There is a dilemma attached with drug abuse cases in sports where former President of Federation of Sports Medicine Mr P.S.M Chandran went onto say that doping is not an easy ball game. Many factors engulf it, such as taking of steroid, the dosage. Everyone involved with it such as doctors, coaches all have a role to play in it, and when a player pleads ignorance or lack of knowledge, he is to be believed. The problem is related to the North-Eastern part of India where facilities and exposure are comparatively less as compared to other parts of India. Although, this part of the country, produces some of the finest sportsmen due to lack of know-how and lack of adequate know-how the

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10 Id.
athletes are at a loss out and fall prey mostly due to lack of knowledge, sportsman such as Sanjita Chanu who is a two-time commonwealth championship has faced similar charges.\(^\text{11}\)

**ADDRESSING THE GREY AREAS AND THE ROAD AHEAD**

In *Andrea Raducan v. International Olympic Committee (IOC)*,\(^\text{12}\) the CAS handled one of its most controversial cases to date. Andrea Raducan was a gold-medal-winning gymnast in both the team and the all-around competition for the Romanian national team. While competing for the all-around title, after winning the team gold medal, Raducan complained to the team doctor that she was not feeling well. The doctor gave her a Nurofen Cold and Flu tablet, which she took in his presence on two different occasions. After winning the all-around title, she was sent to supply a urine sample in accordance with Olympic Doping Control. The tablets she received were found to violate the doping rules, and the CAS ruled in favour of the IOC decision, stripping the medals that she received, and testing positive for the banned substance. The court stated, “The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Miss Raducan with the commitment of the Olympic Movement to the drug-free sport, the Anti-Doping Code must be enforced without compromise.”\(^\text{13}\)

Drug tests in today’s day and age go beyond mere testing of whether

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the athlete is on drugs. As they also encompass the identification of recreational drugs, birth control drugs and others as the list of prohibited substances published by the World Anti-Doping Agency (WADA) as well as the National Anti-Doping Agency (NADA) keeps on growing at an unprecedented rate. In the case of Peruvian footballer, Paulo Guerrero, the striker ran the risk of missing out on perhaps one of the highlights of a footballer’s career, the FIFA 2018 WC. Due to the confusion around his participation, which stemmed from a failed drug test where Guerrero was found guilty of consuming a prohibited substance while ingesting cocoa tea. Because both Raducan and Guerrero were playing at a professional level for quite a few years, it is therefore quite reasonable for both the athletes under the question to be quintessentially aware of their nutrition. However, there has often been a tendency to sacrifice the player to protect the sanctity of the sport. There is no blanket ban on using dietary supplements or nutrients. However, there have been several instances of nutritional supplements containing prohibited substances but are not declared by the manufacturer. WADA does not accept this as an adequate defence, and hence the onus is on the athletes to choose their supplements.\textsuperscript{14}

There has been a rise in teams in football and other sports appointing nutritionists who are assigned with ensuring that such cases do not happen. However, the same cannot be said for athletes everywhere, especially in Northeast where athletes do not have a tailor-made or supervised nutrition program. This, in turn, leaves them susceptible to testing positive for substances which they might have consumed without knowing the composition of their diet. This is a trend which starts at the grass-root level itself in India as young and upcoming athletes are not aware of the

importance of diet and nutrition as part of their training. Therefore when they become part of a professional set up, they are faced with the dilemma of almost every aspect of their diet and nutrition, affecting their on-field performance and eligibility. The first edition of the Khelo India Games, 2018 for fewer than 17 athletes saw 12 doping failures, which included five gold medalists. The situation, however, did not improve, with the latest edition of the Games bearing similar results when it came to tests as participants across multiple sports tested positive.

Northeast is home to a host of upcoming athletes including the likes of Hima Das who have gone on to show their abilities at the pinnacle of world sports. The region has the potential to become one of the sports capitals of India, yet it is marred by the lack of a holistic approach when it comes to sports at the grass-root level. Therefore it is necessary to ensure that the coaches at the grass-root level who are the first point of contact for young players are made aware of the relevant anti-doping provisions. It is also necessary to take into account the unique geographical position of Northeast India and the cultural practices which exist in the region. Young and upcoming athletes often use traditional remedies and medicines made from the various medicinal herbs in the area which might contain traces of substances which are banned by the WADA. While the National Anti-Doping Agency does list research on this arena on its website, however, there is a lack of research on what effect these traditional remedies and medicinal herbs might have on the performance and physical conditions of a player. The most important question of all, whether their composition contains any of the substances from the ever-growing list. Therefore, there is a need to groom athletes at the grass-root level which will go on to ensure

that when they make the transition from playing a sport at the district level to the national and the international level, they are well equipped to embrace the changes in lifestyle and habits that come with them whilst they also have an inbuilt awareness of their consumption habits.

The Khelo India Games were one of the first instances where tests were conducted on youth level players, and the results show that doping has engulfed even the youth. When it comes to doping tests in India, the National Anti-Doping Agency has a well-structured mechanism which consists of an Anti-Doping Appeal Panel and Anti-Doping Disciplinary Panel which is responsible for enforcing the National Anti-Doping Rules. As the nationally appointed watchdog, NADA is also entrusted with executing the ‘Awareness and Outreach Program’ of the WADA which is aimed at educating athletes, coaches on the nuances of doping and its consequences. There is a need to develop a systematic strategy which ensures that all national sports federations supervise the regional and district federations and create awareness by not only involving coaches and supporting staff but also extending it to parents and other stakeholders. Moreover, to ensure the efficiency of these programs, the medium through which message, if conveyed, has to be of extensive focus. This can be done by having region-based instruction videos which ensure that there is a uniformity in the source of information and the data used while involving successful sportspersons from the region, which could be used to convey the messages better. Moreover, the National and World Anti-Doping Code along with other relevant cases and NADA rulings should be translated into significant languages which can be further translated into the various languages of Northeast such as Assamese, Khasi among others.

Another traditional aspect of WADA policy is that, despite a few references to athletes’ support staff within the WADA Code, the central focus of WADA policy remains almost unremittingly on the individual drug-using
This was true even in the case of Raducan, who became the focus of the investigation and later the sanctions. Given this situation, it is perhaps not surprising that, notwithstanding the ever closer control of athletes’ behaviour, and limited success which WADA policy may have had in terms of catching and punishing individual drug-using athletes. It is clear that the anti-doping controls established by WADA have had very little success in breaking up the complex, highly organised and institutionalised networks of relationships which characterise the use of drugs not only on the national level but, increasingly, on an international and global scale too.17

There have been several instances where complicated networks of doping have been unearthed where coaches, physicians and pharmaceutical companies have all been involved in these networks. Sandro Donati, who has worked extensively on fighting corruption and the use of drugs in sports has revealed that the illicit use of drugs is not something which can be understood as the action of individual drug-using athletes. There are very complex and extensive networks of people involved in fostering and concealing the use of drugs in sport.18 A recent, indication of the complexities of the networks in which drug-using athletes are involved came to light following the Mitchell inquiry into the use of anabolic steroids in Major League Baseball. In this context, the Signature Compounding Pharmacy in Orlando, Florida, was found to be at the centre of an extensive network which generated substantial funds by selling performance-enhancing drugs. This network, it was revealed, involved not only athletes but also well-organised groups of pharmacy workers and physicians who were involved in a complicated method of selling performance-enhancing

16 Ivan Waddington & Andy Smith, An Introduction to Drugs in Sport: Addicted to Winning, 211 (Routledge, 2009)
17 Id.
18 Id.
substances illegally over the internet.\textsuperscript{19} Although sports physicians are often seen as experts who play a front-line role in the fight against ‘drug abuse’ in sport, a closer examination of the development of sports medicine over the last fifty years suggests that the relationship between sports medicine and the use of drugs is somewhat more complicated. In this regard, it has been argued that the growing involvement of sports physicians in the search for record-breaking and competition-winning performances, especially since 1945, has increasingly involved them not merely in the search for improved diets or training methods, but also the development and use of performance-enhancing drugs and techniques. The other side of sports medicine of which have subsequently come to be defined as forms of cheating.\textsuperscript{20} There is a need for the International Federation for Sports Medicine and other National Medical Organisations to draft a policy regulating the practice of doctors and physicians involved in sports and coming up with necessary sanctions for doctors and physicians who fail to uphold the sanctity of sports.

There is considerable variation in the use of drugs by athletes across various sports. For instance, in some sports, the use of performance-enhancing drugs is widespread; as we have seen, this is the case in cycling, where the most widely used drugs are Erythropoietin (EPO), anabolic steroids and amphetamines. In sports such as archery and shooting, those who do use performance-enhancing drugs are not likely to use those drugs favoured by endurance athletes but are much more likely to use beta-blockers.\textsuperscript{21} Given this variation in the use of drugs, what needs to be considered is that instead of having a single anti-doping policy, the possibility of a sports specific approach to understanding the pattern of drug use across sports

\textsuperscript{19} Id p. 212.
\textsuperscript{20} Id, p. 99.
\textsuperscript{21} Id, p.232.
while also recognising the network and practices that are involved. This, in turn, can lay the foundation for the sport-specific anti-doping policy.

It might be objected that such a policy would establish a new – and, it might be argued, a dangerous – principle of anti-doping policy. The principle that athletes in different sports might be treated differently with anti-doping controls. Such a view is, however, mistaken. The principle that athletes in various sports might be subject to different controls is not new, for it was a well-established principle in the anti-doping regulations of the IOC and this has been carried over into WADA regulations. For instance, the prohibited list of 2008 published by the WADA contains a list of substances banned in particular sports. Even alcohol is featured on the list for sports such as automobile racing, motocross etc. but it does not feature on the general list of banned substances. Development of a sport-specific policy must not be equated with a diminishing of anti-doping policies but rather having sanctions in one sport which do not necessarily apply to the other. Unless sanctions are appropriate, there are fewer chances that they will be effective.

ISSUES OF ETHICS IN SPORTS: THE NEED FOR DRAWING A FINE LINE

There can be no denial of the fact that every Profession or work requires some amount of Ethics which helps in upholding the sanctity attached to that field and similar is the case in sports. There are specific rules or decorum that is requisite. However, when it comes to finding out the veracity in matters of charges such as Doping in Sports, the means and the method of test is also a debatable issue. As can be observed in the Krabbe case, where

22 Id.
fingers were being raised against the rules of the German Federation when it had carried out it is out of competition test, and a similar fate was seen in the case of Atlanta Olympics, where the question was raised in respect of clenbuterol in the weightlifter’s case and Bromantan in the case of Russian swimmers. These incidents indicate towards the very fact that Ethics and maintenance of fair play are not only limited to the participating Athletes, but it very well includes the Organising bodies, Policymakers as well.

Most of such issues related to the infringement of Ethics in various forms such as Substance Abuse are tried in appropriate forums. Tribunals such as CAS and there are many such as Sir Nicholas Browne- Wilkinson, who had in the Landmark case, had gone on to say that Sports shall be better served if people did not challenge the decision of the regulatory bodies. Yes, it is very much right that the decision-makers are competent, but it is very much possible that they too could have an error in their Judgment. Hence an athlete should be given a right to appeal till the last of appeal gets exhausted.

One cannot deny a simple fact that sanctions sometimes become necessary to act as a deterrent. Those substances which are said to be more adverse to the health of the athlete is said to attract more penalty such as the use of Anabolic steroids and prohibited techniques such as Blood Doping and use of EPO. Moreover, as rightly observed, in the instant case, some amount of penalties are a pre-requisite to remove cheating from sports.

One of the most important questions to be tackled is the loss of reputation

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24 CAS Arbitartion (Atlanta) No 003-4
26 Edwards v. BAF and IAAF(1997) Eu LR 721 (CHD)
it is often seen that more money is often spent by the bodies while conducting tests rather than conducting awareness programs or educating the athletes which shall help them in deciphering between right and wrong and Drawing the Line.27

THE QUESTION OF CRIMINALISING DOPING IN SPORTS

In recent years, there has been a rise in the push for criminalisation of doping in sports. With countries increasingly pondering upon the feasibility of and the necessity to criminalise the act of doping. WADA and its affiliated NADAs do not have broad legislative or police powers and have no jurisdiction outside of sport. Anti-doping agencies must follow local laws and coordinate with police forces and other agencies for some investigative work. National laws against doping, however, mean that athletes are treated differently depending on their nationality. As a non-governmental entity, WADA cannot ensure national laws are consistent or fairly applied. Enforcement may be uneven given differences in police purview, judicial processes, and varying requirements for evidence.28

In general, criminal law involvement in fighting doping in sport may be performed in two ways. The first one is about using existing general criminal laws; in other words, some actions related to doping in sport may be treated as crimes under various criminal legislation. For example, criminal codes, drug and therapeutic goods statutes, customs legislation. The latter considers specific anti-doping laws enacted by states that

criminalise doping as it is understood in WADC. For example, Austria, China, Cyprus, Denmark, Greece, Hungary, Iceland, Luxembourg, Mexico, New Zealand, Norway, Portugal, Romania, San Marino, Serbia, Spain and Sweden criminalise trafficking of WADC Prohibited Substances and Methods.²⁹

Kenya, which is a constant contender in track events, was declared non-compliant to the World Anti-Doping Code. As a result, they ran the risk of being excluded from the Rio 2016 Olympics. In response to this, Kenya passed anti-doping legislation to be WADA compliant. The Kenyan anti-doping law is, therefore, an urgent attempt by the government to restore confidence in its athletes and meet WADA standards. It outlines plans for an independent agency with broad investigative powers and new minimum jail terms for suspected dopers. Under the new laws, Athletes found guilty of using banned substances will now face a minimum fine of 100,000 Kenyan shillings (£672) and a possible jail term. Medical personnel found to be supplying or colluding with athletes and coaches will be liable for a fine of at least 3,000,000 shillings (£20,189), and a possible three-year jail term. The law also led to the establishment of a tribunal to arbitrate doping cases and the hiring of anti-doping compliance officers.³⁰

Although no legislation in the United Kingdom explicitly criminalises doping, multiple legislations make many of the offences. For instance, the Misuse of Drugs Act, 1971, deals with a host of substances which feature on


the WADA banned list that is not either licensed as prescription medicines (where the Medicines Act 1968 applies) or recognised as food additives or over-the-counter drugs (like ephedrine). For example, synthetic anabolic steroids are controlled as Class C substances under the Misuse of Drugs Act 1971.\(^{31}\)

India has often featured high up on the global list of dope offenders, and therefore the question of criminalising doping in India has been raised from time to time. The Justice MukulMudgal Committee, under whose supervision the draft ‘National Anti-Doping Legislation 2018 was drafted contains various nuances which show that there is a strong possibility of doping becoming a criminal offence shortly. Articles 13(2) and (3) of the bill recommend jail terms for those involved in supplying banned drugs to athletes. In addition to this, the draft has numerous provisions which stand out; it has a provision which states that any person who fails to comply with the duty of this act shall be fined, which may extend to Rs.20,000 for the first offence. If the offence is repeated, it may extend to Rs.2 lakh for each offence. According to the draft, “any person who indulges in supply of prohibited substance to an athlete on a regular basis for commercial purposes shall be guilty of the offence of trafficking and shall be punished with simple imprisonment which may extend to one year and shall also be liable for a fine which may extend to Rs.10 lakh.” The draft adds: “Any person who is part of an organised crime syndicate shall be punished with simple imprisonment which may extend to four years and shall also be liable for a fine which may extend to Rs.10 lakh.

Moreover, the draft has called for the formation of an Ethics Commission, which will have three members to deal with doping offences. As per this, any attempt to indulge in the supply of prohibited substances to an athlete or having links to an ‘organised crime syndicate involved in doping will attract a jail term of up to four years or result in imposition of a hefty fine of Rs. 10 lakh. Moreover, the National Anti-Doping Agency (NADA), can refer the matter to the Central Bureau of Investigation (CBI) if it has a suspicion that an organised doping syndicate is involved in the supply of prohibited substances to sportspersons. However, the draft of which has been distributed by NADA among the stakeholders to get their suggestions has generated much heat between the ministry and the IOA over some of the clauses. The IOA has raised serious objections to the presence of Union Sports Minister and the other ministry officials in the proposed ‘Governing Body and the ‘Executive Committee to be constituted by the. According to the IOA, the current draft contains overreaching direct government authority in the establishment and functioning of the NADA. The IOA has also objected to NADA constituting the Anti-Doping Disciplinary Panel (ADAP) and Anti-Doping Appeals Panel (ADAP) which is the “clear case of conflict of interest in the current ways of functioning.”

Although criminalisation in other countries has proven effective in ensuring that it is not only the athlete who bears the brunt of his/her action, the support staff and all other guilty parties are held accountable. There is a need to work out the various nuances of the draft legislation because

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there is an urgent need to regulate the practices of not only the individual athletes but all other stakeholders. Otherwise, criminalisation of doping would not suffice in ensuring free and fair sport. At the same time, false implication, sabotage and other factors need to be taken into account as the stakes increase with criminalisation and therefore affect the prospects of an athlete’s career, especially in India, which lacks awareness about doping even among elite athletes. For example, the recent case of young Indian cricketer Prithvi Shaw who was banned after testing positive for a banned substance commonly found in cough syrups. Therefore, finding a way to balance the severity of the anti-doping laws, both in the context of proving and sanctioning, with the proper use of human rights/due process of law/natural justice principles that are typical for criminal law seems to be a challenge. It is essential to ensure that the two systems of law (criminal and disciplinary law and procedure) can interact not only effectively but in a fair manner.34

CONCLUSION

Doping has become one of the biggest challenges in sports in recent years. With India aiming to become one of the global superpowers in sports, there has to be a significant improvement in how sportspersons perform in anti-doping tests. The lack of exposure to the ethics of sports and other relevant information is one of the biggest challenges that the region of Northeast and its upcoming athletes are facing. The region continues to produce a host of young and promising sportspersons, and therefore there is a need to ensure that the potential does not go to waste. As seen in the case of Raducan and Guerrero, the stakes are too high, and even though both were athletes who were well aware of the consequences of testing positive, they could not overcome it, leading to a fall from grace. Anti-doping has predominantly about the detection of doping in sports and resultant

34 Supra note 27 at 127.
punishment rather than prevention. The lack of a holistic approach to sports has to be overcome in order to address issues relating to both performance and ethics. Lack of infrastructure, proper nutrition coupled with lack of awareness leave athletes in the dark about their own body and health. An increase in pressure has led to athletes altering not only their physical capabilities but also their mental health to sustain pressure and survive cut-throat competition which makes them dependent on these drugs. Mental health of athletes is another arena that needs adequate policy review. There is a need to review the policies from time to time to ensure that they are appropriate. This can improve efficiency, especially in countries like India where there is much regional disparity which needs to be addressed at the earliest. Athletes in India are on the cusp of a new horizon with regards to doping with the prospect of doping being criminalised shortly. Therefore, there is a need to understand the overarching problems and also take into account regional disparities so that new policies and legislations answer age-old questions while also taking into account the challenges of the future.

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An Insight on the menace of drug abuse in Sports: with special emphasis on sportsmen of North East India
CASTER SEMENYA, DUTEE CHAND AND THE QUESTION OF SEX IN SPORT: A CRITIQUE OF THE DISCOURSE ON HYPERANDROGENISM/DSD IN FEMALE ATHLETES

Palash Srivastav* and Harshi Misra**

INTRODUCTION

“It is not just about the right to compete in sport. It is about the right to be human.”

Caster Semenya, South African Track Athlete

With these memorable words, Caster Semenya had summarised what she and several other athletes were fighting for in various social and legal arenas. The International Athletics Associations Federation (hereinafter ‘IAAF’) has, for the last two decades, sought to regulate the number of testosterone female athletes’ bodies are legitimately “allowed” to produce. Any female athlete who breaches the prescribed threshold on account of intersex conditions is a “biological male” per the IAAF, despite how

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4 Sex of an individual can be characterized as gonadal, chromosomal, genital, genetic, hormonal and phenotypic. Intersex persons are those persons who have variations in their sexual characteristics. Such individuals are also referred to as individuals with differences in sexual development.
the affected athlete herself identifies. IAAF’s attempts at regulating and medicalising the female body have been widely criticised by scientists, medical professionals, policymakers, and bioethicists. Prominent athletes, such as Dutee Chand of India and Caster Semenya of South Africa, have come out and challenged IAAF’s discriminatory regulations in court.

Recently, the Court of Arbitration for Sport (hereinafter ‘CAS’) upheld the validity of regulations prescribed by the IAAF that seek to regulate the amount of circulating testosterone present in the bloodstream of female athletes. With these regulations coming into force from May 2019, the debate on the necessity of such regulations, their impact on female athletes, and the role of courts and self-governing bodies (hereinafter ‘SBGs’) in sport to protect and respect human rights of athletes has once again occupied centre stage. While the IAAF and a motley of athletes and scientists have come out in support of such regulations, some very persuasive arguments have been made by their opponents critiquing the substantive content of these regulations, and the very requirement of sex-testing in sport.

This paper seeks to analyse the IAAF Eligibility Regulations for the Female Classification (Athletes with Differences of Sexual Development) (hereinafter ‘2019 Regulations) from two major perspectives – it critiques the science behind the regulations, and it looks at their interface with human rights. A succinct summary of sex-testing provides the context of the critique in sport and the issues it has historically raised. A brief summation of the rulings of CAS in Dutee Chand v. AFI & IAAF and Mokgadi Caster Semenya & ASA v.IAAF is made to explain the issues. This paper seeks to unravel the

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6 Dutee Chand v. Athletics Federation of India & The International
myth that testosterone is a “male” hormone, thereby destabilising the very premise of all such regulations.

Given the contested science which forms the basis of these regulations, and given that female athletes with elevated levels of endogenous testosterone do not enjoy a significant performance advantage over other female athletes, the 2019 Regulations need to abolish expeditiously. Similarly, given their disproportionate impact on women’s physical and mental health, and their tension with the promise of non-discrimination codified in international human rights law and Constitutions of SBGs alike, it is argued that the 2019 Regulations are not a reasonable, necessary and proportionate means of ensuring fairness in women’s sport; in fact, they militate against this objective. Ms. Semenya’s challenge to the validity of 2019 Regulations before the Swiss Federal Supreme Court (hereinafter ‘Swiss Court’) has allowed for a review of the CAS ruling on the grounds of “public order”, which encompasses human rights. The Swiss court should utilise this opportunity to strike down the 2019 Regulations, and deal a definitive blow to all forms of sex-testing in sport, and an outdated practise whose time has come.

**AN OVERVIEW OF THE EXISTING LAW ON SEX-TESTING IN SPORT**

Ever since female participation has been allowed in the sport, the boundary of who qualifies as female has been strictly policed by SBGs such as the IAAF. The alleged objective behind this regulation is that women constitute a ‘protected class’ in sport and to ensure fair competition, men masquerading as women and women with biological advantages similar

Association of Athletics Federations CAS 2014/A/3759 (Court of Arbitration for Sport 2019) [hereinafter Dutee Chand].
to those enjoyed by men need to be excluded from women’s sporting events. A peculiar aspect of sex-testing that comes forward from a closer historical examination which qualifies as a man/woman changes based on benchmark being applied. This section broadly seeks to lay down the practices and methods adopted by SBGs over the years to ascertain the sex of the participating athletes and to explain the current position of law on determining femininity in sport.

(a.) Brief History of Sex - Testing in Sport:

The policing of the boundaries of sex in sport has taken three broad forms – a physical examination of the genitalia of the athletes, chromosomal testing of the athletes and most recently, monitoring the endogenous levels of testosterone naturally produced by the athlete. All these tests have been criticised for lagging behind best medical practices, and for lacking scientific merit. Physical examinations date back to the 1936 Berlin Olympics and involved naked parades in front of medical professionals. Though mostly reduced to visual inspections, in cases where the genitalia of the female athlete appeared ‘anomalous’, a gynaecological examination of the athlete could also be conducted. This method of ascertaining the sex of female athletes was heavily criticised as it violated the dignity and privacy of the female athlete.

7 The problem with sex testing in sports, YouTube Vox June 29, 2019 (May 08, 2020, 12:11 AM) https://www.youtube.com/watch?v=MiCftTLUzCI.
10 Id., at 209.
11 Supra note 6, at 57.
12 Supra note 7, at 210.
Visual examination of female athletes and forming an opinion about their femininity was bound to be influenced by what the examiner felt was ‘feminine’, and allowed for the introduction of subjective views of the examiner in an allegedly neutral process. Moreover, any athlete who could not clear the test was bound to undergo severe emotional trauma and social stigmatisation. A prominent case which tolled the death knell for physical examination of female athletes was that of Ewa Klobukowska, a Polish sprinter who failed her physical test and was resultantly disqualified from professional sport.  

She later went on to have a child. By now, the problems with physical examination were apparent as was its unscientific nature.

The Barr Body Test/Analysis (hereinafter ‘Chromatin test’), which tested the chromosomes of the athletes to determine their sex, was introduced in 1967 by the IAAF as an allegedly neutral, scientific way to determine the sex of an athlete. The test was introduced at the peak of the Cold War, under the pretext of disallowing “hypermasculine” female athletes from the Eastern Bloc from participation. The test was less invasive in the sense that it only required a buccal smear to be taken from the athlete, which was later tested for chromosomes. Though definitely a superior test as opposed to visual inspections, chromatin test had severe limitations of its own. Chromatin test could not account for genetic anomalies which conferred no competitive advantage on the athlete. Thus, it categorised individuals with a 46 XXY genotype with male characteristics as female, even though these athletes had always identified as men. Similarly, athletes with female anatomies but genetic abnormalities could be characterised as a male under this test.

13  Supra note 7, at 211.
14  Supra note 7, at 211.
15  Supra note 6, at 57.
16  Supra note 6, at 61.
A prominent case which highlighted the problems with sex-testing using the chromatin test was that of Maria Jose Martinez Patino, a Spanish athlete was disqualified for three years from track events as she failed the test at the World University Games.\textsuperscript{17} After the test, Ms. Patino's sex became a subject of public speculation and caused her significant loss and trauma.\textsuperscript{18} Ms. Patino fought the determination of the IAAF, successfully arguing that she suffered from Complete Androgen Insensitivity Syndrome (hereinafter 'CAIS')\textsuperscript{19} and therefore derived no competitive advantage from her genetic composition.

This challenge to the test triggered yet another debate in public about the efficacy and the need for sex-testing in sport. The IAAF organised symposiums on the issue of sex-testing and the techniques employed for the same. The overwhelming consensus at the symposiums was that the purpose of sex-testing was only to identify and disbar male athletes masquerading as female athletes.\textsuperscript{20} If an athlete both legally and psychosocially identified as female all her life, then she should not be subjected to such sex-testing.\textsuperscript{21} Though the IAAF did not pay much heed to these symposiums, it did away with blanket sex testing of female athletes, only allowing for an on-site determination of the sex of the athlete by a medical expert on a case-by-case basis. By 1999, sex testing using the chromatin test was entirely done away with.\textsuperscript{22}

In 2006, the IAAF introduced its “Policy on Gender Verification” (hereinafter...
'Policy’) which barred mandatory sex-testing. However, it provided for the steps to be taken in cases of “gender ambiguity”. Suspicion about the sex of an athlete could easily be raised under the Policy, triggering an investigation into the gender of the athlete by an investigating authority. This often led to witch-hunts and whisper campaigns against exceptional female athletes. A now-infamous incident of sex-testing from this era was one involving Caster Semenya, a South African athlete who was investigated by the IAAF soon after her participation in African Junior Championships of 2009. An IAAF official publicly admitted that Ms. Semenya was being investigated under the Policy, causing a severe breach of Ms. Semenya’s privacy.

Soon after the incident, Ms. Semenya was allowed to compete in international events. However, the fiasco alerted the IAAF that it required a consistent policy to handle all cases of “hyperandrogenism”. In 2011, the IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (hereinafter ‘2011 Regulations’) were introduced that prescribed a threshold of 10 nmol/L of testosterone for female athletes. These regulations were successfully challenged before the CAS in Dutee Chand. The 2011 Regulations were followed up by the 2019 Regulations, and a challenge to their validity was dismissed in Caster Semenya.

Both the 2011 and 2019 Regulations explicitly state that they do not intend to test the gender of the athlete, but only her testosterone levels. Mostly

23 Supra note 7, at 215.
24 Supra note 7, at 215.
25 Caster Semenya, at ¶74.
26 Hyperandrogenism is a medical condition wherein females produce testosterone in the “male” range.
27 Eligibility Regulations for the Female Classification (Athletes with Differences of Sexual Development), Section 1.1(e) (2019) [hereinafter 2019 Regulations].
similar to the 2011 Regulations, the major differences between the 2011 and 2019 Regulations are that – (a) while the 2011 Regulations applied to all athletics events, the 2019 Regulations only apply to international competitions run between 400 metres – 1 mile (both inclusive); (b) while the 2011 Regulations prescribed the threshold of acceptable testosterone in female athletes at 10 nmol/L, the 2019 Regulations prescribe a threshold of 5 nmol/L; and (c) while the 2011 Regulations applied to all athletes with hyperandrogenism, the 2019 Regulations shall only to athletes with Differences in Sexual Development (hereinafter ‘DSD’), meaning thereby that hyperandrogenism caused due to any reason other than an intersex disorder would not be covered by the 2019 Regulations.28

Under the 2019 Regulations, the athlete has to have one of the DSDs mentioned in clause 2.2(a)(i), have testosterone levels of over 5 nmol/L, and have “sufficient androgen sensitivity” to have a “material androgenising effect” to qualify as a “relevant athlete” to which the regulations apply.29 An assessment of material androgenising effect is a highly subjective exercise,30 with female athletes with a deep voice, hirsutism, or athletic musculature often being considered to be “androgenised”.31 If the athlete herself declares her condition to the IAAF, or if the IAAF Medical Manager has “reasonable grounds” to believe that an athlete suffers from elevated levels of endogenous testosterone, investigation under the 2019 Regulations can be initiated. An interesting aspect of both of these regulations is that they have mostly been used to disqualify athletes from the Global South.32

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28 Section 2.2(a)(i) of 2019 Regulations.
29 Section 2.2(a) of 2019 Regulations.
30 Katrina Karkazis and Morgan Carpenter, Impossible “Choices”: The Inherent Harm of Regulating Women’s Testosterone in Sport, 15 BIOETHICAL INQUIRY 579, 582 (2018).
31 Stephane Bermon et al., Serum Androgen Levels in Elite Female Athletes, 99 J. CLIN. ENDOCRINOL. METAB. 4328, 4332 (2014).
32 Supra note 5.
(b). Dutee Chand and Caster Semenya Rulings: A Brief Summary

Dutee Chand was an Indian athlete who was disqualified by the Athletics Federation of India (hereinafter ‘AFI’) after doubts were raised regarding her sex by other athletes and by the Asian Athletics Association. Chand challenged the decision of the AFI, as well as the 2011 Regulations, before the CAS. Throughout arguments, the IAAF and its witnesses had argued that men and those with testosterone levels comparable to men enjoy a performance advantage of 10-12% over similarly placed female athletes.\(^{33}\) However, the CAS observed that from anecdotal evidence, it had been averred by doctors that at best a hyperandrogenic female athlete enjoys an advantage of only 3% over her counterparts.\(^{34}\) While suspending the 2011 Regulations for two years, CAS observed that there is no evidence available of the extent of an advantage enjoyed by female athletes with elevated levels of endogenous testosterone over other athletes. Thus it cannot be said that the 2011 Regulations are reasonable, necessary and proportional to the goal of protecting fairness and integrity in women’s sport.\(^{35}\) In this period of two years, IAAF could file new medical evidence on the degree of the advantage of women with elevated endogenous levels of testosterone have over other women. If the IAAF could not file any new evidence within this period, the 2011 Regulations shall be declared void.

After that, IAAF commissioned a study which positively correlated levels of athletic performance and levels of endogenous testosterone and made it the bedrock of the 2019 Regulations.\(^{36}\) Scientists and medical professionals

\(^{33}\) Dutee Chand, at ¶522.

\(^{34}\) Dutee Chand, at ¶522.

\(^{35}\) Dutee Chand, at ¶522.

associated with the IAAF also published their studies of how endogenous testosterone positively affected athletic performance. The IAAF allowed for the 2011 Regulations to lapse and published the 2019 Regulations, which were brought into force from 08 November 2018. Caster Semenya challenged the validity of these regulations before the CAS, and their application stayed till a final decision was reached in the matter.

BG17, the study on which IAAF relied primarily in defence of its 2019 Regulations, is a highly reviled study in academic circles. Even with all of its methodological flaws (discussed in detail in the next section), it could at best be used to show that testosterone was one of many biological and endocrinal factors which contributed to an alleged 1.8%-2.8% performance advantage enjoyed by hyperandrogenic athletes. Relying on BG17, CAS went on to hold that “determinative” advantage is enjoyed by an athlete who suffers from DSD. In this case, CAS goes astray of its ruling in Dutee Chand, which had stressed on the presence of a quantifiable unfair advantage to the athlete while suspending the operation of 2011 Regulations. Here, despite lack of any such advantage being demonstrated, 2019 Regulations are upheld by the CAS. Lack of quantifiable unfair advantage notwithstanding, CAS upheld the 2019 Regulations as a necessary, reasonable and proportionate means of securing integrity in female athletics and to treat females as a “protected class” in sport.

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38 Supra note 34, at 5.
39 Caster Semenya, at ¶538.
40 Dutee Chand, at ¶528.
41 Caster Semenya, at ¶626.
The 2019 Regulations have come into force with effect from May 8, 2019. While the application of the 2019 Regulations to Ms. Semenya was temporarily suspended by a super-provisional order of the Swiss Court during the pendency of her appeal against the CAS decision, a single judge bench of the court has recently suspended this order, asserting that neither the alleged violation of principle of non-discrimination nor of “public order” (encompassing a right to personality and human dignity) appears “with high probability to be well-founded” (emphasis their own). If this order is a portent of further developments in this case, then the possibility of Semenya winning on appeal seems weak.

The Swiss Court has stated its position that it is not going to review the science backing the 2019 Regulations, taking the CAS’s treatment of the same as authoritative. Of the 210 appeals from the CAS to the Swiss Court, only ten have been fully upheld. Most of these appeals succeeded on the question of jurisdiction, which is a question the Swiss Court is keen to examine in the present case. If this appeal fails, Ms Semenya might still have legal recourse available through an appeal to the European Court of Human Rights, but such appeals take long, and the said court issues

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43 Press Release, Swiss Federal Supreme Court, The DSD Regulations are, for the time being, again applicable to Caster Semenya, 3 (July 30, 2019) [hereinafter Press Release].

44 Id., at 2.

45 Press Release, supra note 41

temporary orders only in exceptional cases. Ms. Semenya in all likelihood would want to avoid such an outcome, and thus would want the Swiss Court ruling in her favour so that she can start competing in her choice of events as soon as possible.

SCIENTIFIC INTEGRITY AND THE 2019 REGULATIONS

The 2019 Regulations were brought in ostensibly based on robust and credible science. However, the studies on which the regulations are based have been heavily criticised and various legitimate questions have been raised about their independence. This section critiques the most prominent studies backing the 2019 Regulations on the ground that they do not satisfy the requirement of rigour expected of scientific studies. In the alternative, it is argued that even if the contested findings of these studies are assumed to be accurate, they do not satisfy the test of a quantifiable unfair advantage as laid down in Dutee Chand and thus do not support the stated rationale of 2019 Regulations.

(a). Methodological Errors in the Studies Relied Upon by the IAAF:

BG17, the study most prominently relied on by the IAAF to support the 2019 Regulations, asserted that females with the highest concentration of free testosterone (fT) experience advantage of 1.8%-4.5% in athletics events. It is interesting to note that hammer throw, the event in which the highest advantage (4.53%) was experienced by female athletes, has not been restricted by the IAAF. Instead, events in which female athletes with elevated levels of endogenous testosterone experienced an advantage between 1.7%-2.7% have been restricted. Even if it is assumed that athletes

47 Id.
48 Supra note 34, at 5.
with DSD actually experience the entirety of this advantage on account of elevated levels of testosterone, it is not uncommon to experience similar or more significant advantages on account of access to professional training, proper nutrition or even adequate sleep.49

Professor Roger Pielke, a renowned sports policy expert, has succinctly pointed out the grave methodological flaws of BG17 and has called for the retraction of the paper.50 He pointed out that the data on which BG17 relies has not been subjected to peer-review. He requested the data from IAAF to independently corroborate its findings and was supplied a sub-set of the original data.51 On the basis of the data supplied to him, he observed that BG17 suffered from the problem of “duplicated athletes, duplicated times and phantom times”.52 He also highlighted the fact that problematic data formed 17%-33% of values used in BG17.53 In his cross-examination during the hearings in Caster Semenya, Dr. Bermon admitted that he exaggerated his findings in BG17.54 Given that BG17 was funded by IAAF among others, IAAF should not have been allowed to place reliance on BG17 in defence of its regulations.55 Given that BG17 was the primary piece of evidence in IAAF’s kitty, doubts relating to its scientific merit and the credibility of its results deal a significant blow to the case for the validity of the 2019 Regulations.

After heavy criticism of BG17 by various scientists, policymakers

51 Id., at 3.
52 Supra note 48, at 4.
53 Supra note 48, at 4.
54 Caster Semenya, at ¶349.
55 Supra note 48, at 8.
and bioethicists, BHKE18 was published to qualifiedly admit to some methodological errors committed in BG17, while asserting that the conclusion from the study, which is that endogenous testosterone is positively correlated with athletic performance, continued to hold.\(^{56}\) BHKE18 revised the athletic advantage enjoyed by female athletes with elevated levels of endogenous testosterone to around 2.3% on an average.\(^{57}\) It is to be noted that this advantage is not high enough to qualify as an unfair competitive advantage mandating regulation by the IAAF. While a lot of the studies linking higher testosterone levels and athletic performance are quick to point out the fact that athletes with DSD are overrepresented at the elite levels of athletic performance, they often ignore the fact that women with CAIS are also overrepresented in the top echelons of athletic performance, and there is a high likelihood of overlap between the two populations. The argument being made is that even if these women “suffer” from high levels of testosterone production, more often than not, their bodies are unable to process this testosterone.

The link between endogenous testosterone levels and athletic performance has been highly contested, and it has not been borne out even in studies conducted by medical professionals associated with the IAAF. Thus, a study led by Professor Eklund, a proponent of the 2019 Regulations, and others finds that testosterone levels between female athletes and female non-athletes remain the same and that no correlation could be found between serum testosterone and athletic performance.\(^{58}\) A study by Dr Bermon found the testosterone levels between female athletes and non-

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56 Stephane Bermon et al., *Serum androgen levels are positively correlated with athletic performance and competition results in elite female athletes*, Br. J. Sports Med. 1 (2018) [hereinafter BHKE18].

57 Id.

athletes to be in the same range.\textsuperscript{59} In his study, after removing athletes with DSD and athletes who were doping, Dr Bermon still found 9 females with testosterone levels above 3 nmol/L (considered to be the upper range of testosterone levels in females) and 3 women with testosterone levels above 10 nmol/L.\textsuperscript{60} These studies allow us to ferret out two crucial inferences – if the testosterone levels of female athletes and non-athletes is in the same range, some factor other than testosterone levels is likely to account for the sporting excellence of female athletes, and; there is a great deal of variation in the female levels of testosterone, and it is unwieldy to try to define an “ideal” range of testosterone for females.

(b). Problematic Connection Drawn Between Testosterone and Masculinity:

Testosterone, a biological fact, has often been uncritically associated with masculinity, a social construct. Even in its judgment in \textit{Caster Semenya}, the CAS holds that testosterone is a “male” hormone.\textsuperscript{61} However, testosterone is a hormone linked with competition (and not masculinity) and is produced in both males and females. Given the overlap in testosterone levels of men and women, it is imprudent to divide male and female categories in sport based on the hormone.

Professor Healy in his study on 454 male and 239 female athletes found that 16.5% male athletes at elite levels had ‘low’ levels of testosterone, whereas 13.7% female athletes at elite levels had high levels of testosterone, with a complete overlap existing between the testosterone values of male and female athletes.\textsuperscript{62} Professor Healy posits that athletic performance is affected not by testosterone but by lean body mass (\textit{hereinafter} ‘LBM’), and

\textsuperscript{59} \textit{Supra} note 54, at 4333.
\textsuperscript{60} \textit{Supra} note 54, at 4333.
\textsuperscript{61} \textit{Caster Semenya}, at ¶520.
\textsuperscript{62} M.L. Healy \textit{et al.}, \textit{Endocrine profiles in 693 elite athletes in the post-competition setting} 81 \textit{Clinical Endocrinology} 294, 294 (2014).
female athletes have 85% of LBM of male athletes thereby accounting for the differences in their performance.\(^6^3\) In fairness, however, the Healy study begs the question – what causes to men have higher LBM than women? The study has also been persuasively criticised for its methodology,\(^6^4\) and only limited reliance should be placed on the conclusions it draws.

It can thus be argued with reasonable certainty that testosterone is not a good determinant of “maleness,” and the science that has been employed in support of the 2019 Regulations is either seriously methodologically flawed or does not demonstrate an unfair competitive advantage enjoyed by female athletes with elevated endogenous testosterone levels over other female athletes.

**HUMAN RIGHTS SCRUTINY OF THE 2019 REGULATIONS**

Soon after the *Caster Semenya* decision, United Nations Human Rights Council (*hereinafter* ‘UNHRC’) issued a statement asserting that regulations that discriminate against female athletes on the basis of their endogenous levels of testosterone are in contravention of International Human Rights Law (*hereinafter* ‘IHRL’) and called upon states to ensure that the regulations developed by SBGs operating within their territory were in accordance with IHRL.\(^6^5\) The World Medical Association (*hereinafter* ‘WMA’) has also publicly spoken out against the 2019 Regulations, calling on medical professionals to not enforce the regulations.\(^6^6\) Global outrage has thus emerged which sees the 2019 Regulations and the *Caster Semenya*

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63 *Id.*, at 298.
64 *Caster Semenya*, at ¶456.
66 *Supra* note 5.
decision as an affront to human rights of athletes such as Ms. Semenya.

The 2019 Regulations, apart from being based on questionable science, also violate various human rights of the affected athletes. A recurrent problem with the application of IHRL to regulations developed by non-state actors such as IAAF has been their ability to wriggle out of such obligations citing their independence from state machinery, and the special margin of deference allowed to them on account of their regulatory function. The CAS primarily deals with commercial disputes in sports and thus is either unwilling to or inept at applying IHRL to sensitive situations where human rights of the athletes may be implicated. A persuasive critique of the Caster Semenya judgment points out that CAS is a private arbitration court and therefore not liable to consider issues of public policy as a matter of law. This section aims to develop a critique of the 2019 Regulations because they violate the athlete’s right against discrimination and to be treated fairly in sport, and that the regulations are not reasonable, necessary and proportionate to the goal of protecting fairness and integrity in women’s sport.

(a). Right Against Discrimination in IHRL and The Case of Affected Athletes

The 2019 Regulations have been criticised because they unduly discriminate against female athletes with elevated levels of endogenous testosterone. The argument that has been made in both Dutee Chand and Caster Semenya

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67 Caster Semenya, at ¶74.
68 Caster Semenya, at ¶551.
is two-fold – (a) that the regulations are discriminatory because they only apply to women and not to men; and (b) that the regulations are discriminatory because even within women, they only apply to a specific subset of the population based on a biological trait. The IAAF has defended the regulations from the argument (a) stating that the regulations exist to police the divide between male and female, and given that there is no “super male” category in sport, these regulations need not be applied to men. This argument suffers from two obvious fallacies – first, sex-determined levels of testosterone is a fragile concept, and; second, even assuming that it is possible to scientifically distil the “correct” male and female categories of testosterone which show zero overlaps, male athletes with extremely high levels of testosterone would, following IAAF’s reasoning, experience an ‘insuperable’ advantage over other male athletes. IAAF’s defence to the argument (b), endorsed by CAS in Caster Semenya, is that female athlete are a protected class, and such discrimination is reasonable, necessary and proportionate to the goal of ensuring fairness in women’s athletics.

Non-discrimination is a minimum core obligation of all States under Art. 2 of the International Covenant on Civil and Political Rights (hereinafter ‘ICCPR’). This means that the obligation must be immediately implemented by the States without any reservations to the same. The right to non-discrimination under the ICCPR can be enforced vertically (against state authorities) in all cases, and horizontally (against non-state actors) in some cases. Monaco, the country where IAAF is headquartered, is a signatory to the ICCPR, having ratified the same in 1997. It is the duty of the State of Monaco to ensure that IAAF does not implement and enforce regulations

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71 Dutee Chand, at ¶213.
that unduly discriminate against a section of the athlete population, a position further buttressed by the statement of UNHRC discussed above.

The 2019 Regulations impair the right of female athletes to participate in sport on an equal basis with male athletes because of their testosterone levels, and the same may constitute “discrimination against women” as per Article 1 of Convention on the Elimination of All Forms of Discrimination against Women (hereinafter ‘CEDAW’). CEDAW also imposes a duty on Monaco to eliminate any discrimination against women being practised by any “person, organisation or enterprise” operating within the territory of Monaco.\textsuperscript{73} Article 13(c) of CEDAW explicitly recognises the right of female athletes to participate in recreational activities, such as sports, on an equal basis with men. A similar commitment to non-discrimination, albeit on the grounds of “race, colour, descent or national or ethnic origin” can be found in International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ‘CERD’).\textsuperscript{74} As has been observed, such regulations disproportionately target female athletes from the Global South,\textsuperscript{75} in violation of the aforementioned provisions of CERD and CEDAW.

(b). The Human Right to Non-Discrimination in IAAF and IOC Constitutions

The IAAF is recognised by the International Olympic Committee (hereinafter ‘IOC’) as an “International Sports Federation” to regulate the sport of athletics.\textsuperscript{76} Membership of the “Olympics Movement” requires the

\textsuperscript{73} Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 2(e).
\textsuperscript{75} Supra note 5.
\textsuperscript{76} IAAF Constitution, art. 1.3.
IAAF to comply with the Olympic Charter, which recognises the practice of sport as a human right. Olympic Charter asserts that every individual must have the “possibility of practicing sport without discrimination of any kind”, in the spirit of “friendship, solidarity and fair play”. The Charter also bars discrimination of any kind based on sex. The Olympic Charter is the higher ranking rule when compared to the 2019 Regulations, and thus in case of any conflict between them, the regulations must make way for the Charter. It appears that the Olympic Charter considers fair play and non-discrimination as corresponding values, and on the face of it, does not allow for any derogation from these principles.

Recently, IAAF replaced its old Constitution (hereinafter ‘2017 Constitution’) with a new Constitution (hereinafter ‘2019 Constitution’). The non-discrimination clause in the 2019 Constitution is somewhat vaguely worded, as opposed to the more explicit definition given under the 2017 Constitution. Article 4(4) of the 2017 Constitution of the IAAF provided that it was an objective of the IAAF to ensure that “no gender, race, religious, political or another kind of unfair discrimination exists” (emphasis mine) or “is allowed to develop in Athletics”. The 2019 Constitution substantially rewords this promise of non-discrimination. Whereas the 2017 Constitution prohibited “unfair discrimination”, the 2019 Constitution bars “unlawful discrimination”. While unfairness has a broader orbit in as much, it can include extra-legal considerations within its fold, and unlawfulness has a narrower realm being focused solely on legal concerns. Another implication of the new phrasing is that no matter how
discriminatory the regulations, they will be allowed to stand with impunity as long as a court such as the CAS does not declare them “unlawful”. Given CAS’s ineptitude in dealing with human rights issues, it is highly likely that even regulations which are patently discriminatory and violative of IHRL norms will prevail for long durations.

(c). Reasonableness, Necessity and Proportionality of the 2019 Regulations

IAAF, during arguments in both Dutee Chand and Caster Semenya, had argued that a majority of female athletes were in favour of the regulations in question. Though heavily contested by the litigating athletes,\(^82\) even if it is assumed to be true this position of the IAAF ought not to add any weight to the plea on the validity of the regulations. As the regulator of the sport of athletics, it is the IAAF’s duty to formulate regulations based on credible science and not on majoritarian positions.\(^83\) Just like racial minorities should not be disbarred from competing directly because the majority finds it just so to do, sexual minorities should also not be disbarred based on whims of the majority.

During the stage of the arguments, Ms. Semenya explained how taking medication to reduce her testosterone levels made her feel dizzy and caused emotional trauma to her,\(^84\) claiming that she was used as a guinea pig by the IAAF.\(^85\) Proponents of the 2019 Regulations were quick to point out the decline in Ms. Semenya’s performance shortly after she started taking medication as indirect evidence of a correlation between testosterone levels and athletic performance. However, there is no evidence linking the drop

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82  Dutee Chand, at ¶355.
84  Caster Semenya, at ¶78.
85  Caster Semenya, at ¶83.
in her performance to decreased testosterone levels in her body. It is highly likely that her performance suffered not due to her reduced testosterone levels, but because of the side effects of the drugs, she was made to take as a pre-condition for participation.

Medical professionals have consistently argued that higher testosterone levels in females is typically not a health risk, and in most cases does not have to be treated.\textsuperscript{86} On the contrary, the high doses of contraceptive medication that female athletes are made to ingest to control their testosterone levels put such athletes at an increased risk of internal clots, such as lung clots, which can prove fatal in some instances.\textsuperscript{87} The WMA has also called for a ban on non-prescriptive usage of contraceptives, arguing that this interferes with the biological cycles of women.\textsuperscript{88} The harm that the athlete subjected to, to maintain an illusory level playing field is disproportionate to any legitimate aim such regulations seek to achieve.

To take the argument made above to its logical conclusion, many bioethicists and other experts argue that even if endogenously produced testosterone confers some substantial competitive advantage on some women, it would be unfair to bar them from competing solely on those


grounds. In sport, the genetic variation which confers a unique physical advantage on athletes is the norm, and not the exception. Michael Phelps, the most successful Olympics athlete of all time, was suspected of suffering from Marfan syndrome, a biological condition which gives one extremely long limbs crucial for success in swimming. Eero Antero Mantyranta, an accomplished Finnish cross-country skier, suffered from hereditary polycythaemia which allows him to produce significantly more red blood cells than the average human being, conferring on him significant endurance benefits.

Elite athletes are genetic outliers, and it is logically absurd to celebrate genetic variations of one kind while demonising those of another type for no principled reason. Athleticism is often at loggerheads with stereotypical notions of femininity, as success in athletics requires traits generally considered to be masculine. It is only because athletes like Dutee Chand and Caster Semenya do not fit into the stereotypical notions of femininity that they are lampooned as “biological males”. Even if their natural levels of testosterone confer a performance advantage, it is unethical to curtail

92 Supra note 88, at 665.
94 Supra note 86, at 7.
95 Caster Semenya, at ¶285.
their participation for that reason as the sport is about celebrating the genetic outlier, and because these women have not cheated. Simply put, it is unfair to ask women to alter their natural biology as a pre-condition for participation artificially.96

From the above-going discussion, it thus appears that the 2019 Regulations are not reasonable, necessary and proportionate to the aim of protection of fairness in women’s sport. The regulations violate the promise of non-discrimination contained in IHRL and the constitutional documents of bodies governing the international sport. Anti-discrimination and fairness are twin values of IHRL shared by sports law and governance, and the 2019 Regulations fall foul of both values.

CONCLUSION

This paper sought to critique the 2019 Regulations of the IAAF on two principal grounds – (a) that they are based on contested science, and; (b) that they violate human rights of the athletes on whom it applies. Even if we take the science behind the 2019 Regulations on face value, it does not demonstrate an unfair competitive advantage which necessitates the regulation of athletes with elevated endogenous testosterone levels. Non-discrimination and fairness are two corresponding values in sport, and the commitment against discrimination is also a non-derogable fundamental right under IHRL. The 2019 Regulations violate the promise of equal access to sporting opportunities and are not a reasonable, necessary and proportionate means to ensure fairness in women’s sport. Given the emotional trauma, social stigmatisation, and physical suffering that female athletes are subjected to account of these regulations, these regulations must be immediately abolished. Ms. Semenya’s appeal against the decision

96 Supra note 91, at 1.
of the CAS to the Swiss Federal Tribunal must consider the full extent of the effect of the 2019 Regulations on women’s lives, and it must also grapple with their sexist, stereotypical basis. This paper vehemently argues against the 2019 Regulations and hopes that the Swiss Court strikes them down.

The history of sex-testing in sport from the early 20th century to the present day demonstrates that these measures are unnecessary and antithetical to the spirit of fairness in sport. Given increased media scrutiny of athletes’ lives and performances, it is next to impossible in the present day and age for a male athlete to masquerade as a female athlete. In her best performances, Ms. Semenya is at best 2% faster than her competitors, which is a figure quite less than the projected 10-12% advantage enjoyed by male athletes over female athletes. Testosterone is only one unit in a complex neuroendocrine system responsible for athletic performance, and it is an impossible task to indisputably distil the performance advantage that can solely be attributed to testosterone.

With IHRL gaining prominence the world over and being applied in multiple settings, there is no reason why sports disputes should be immune to adjudication based on human rights claims of affected parties. The IAAF Regulations interfere with women’s human right to non-discrimination. Even the consultation process which preceded the drafting of the 2019 Regulations did not involve intersex populations in a meaningful manner, even though the regulations are specifically targeted at them. It is imperative that the IAAF and other SBGs be monitored in their practices through IHRL standards and norms, and courts such as CAS which are often courts of last resort for athletes be proactive in identifying and adjudicating on the human rights issues involved.

It is now high time that we do away with the practice of sex-testing altogether, which has indiscriminately targeted female athletes from the Global South often because of their sporting success, and their refutation of stereotypical
notions of femininity. Any regulations which govern the ability of athletes to participate meaningfully in sport must be based on the best available science, and not on prejudices cloaked as science. Inclusiveness, solidarity, fair play and spirit of friendship are fundamental values of sport, and their import cannot be fully realised till the day SBGs enforce discriminatory practices such as sex-testing.

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ARBITRATION AND SPORTS LAW:
SCRUTINISING THE DISPUTE
RESOLUTION PROCESS

Vaibhav Singh\textsuperscript{1} and Saurabh Tiwari\textsuperscript{2}

INTRODUCTION

Given that the Sports industry is evaluated to represent somewhere in the range of 3-6 per cent of world trade, it should not be a surprise that it is a significant source of legal disputes. These disputes would require special attention and a medium which provides hassle-free solutions. Arbitration has been hailed as a strategy for alternative dispute resolution capable of releasing the weights on an over-burden court system while offering a speedier, more affordable field in which to solve differences. In the course of the last two decades, employers in a wide range of enterprises have turned to arbitration to settle disputes about everything from salaries to sexual misconduct to wrongful discharge. Although not the first to jump on the arbitration bandwagon, proficient athletic teams have been among the most apparent employers of this type of dispute resolutions. Some would contend that this blending has delivered splendid results.\textsuperscript{3} Arbitration is speedy, moderately private, and sets no legal precedent perfect for both the owners and players in an industry where drawn-out and exceptionally public fights in court can pulverise reputations and devastate firmly scheduled athletic seasons. Others point to sports arbitration’s failures, counting the baseball strike, the NBA lockout, and the Sprewell episode in which a basketball player attacked a coach. However, the authors have primarily focused

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upon those concepts and ideas which will help in materialising and maximising the potential of arbitration as a sports dispute mechanism. The concepts of Collective Bargaining Agreement and final-offer arbitration have been discussed extensively to showcase the effectiveness with which they have helped in eliminating certain anomalies in the field of sports. Need for consolidation of different disparate authorities and the role of courts have been demonstrated through various case laws. Finally, specific suggestions have been provided, which can help in enhancing the real value of arbitration and culminate into one of the purest platforms for resolving sports disputes with ease. Thus, the following research article will encompass the real blue facets of the arbitration being used as a mechanism to resolve sports-related disputes while explaining why it is the need of the hour.

**COLLECTIVE BARGAINING AGREEMENT AND ARBITRATION CLAUSE**

Being a sportsperson has consistently been an extreme occupation. People expect them to be on top of their game at whatever point they venture on the field alongside the additional weight of performing for their respective teams. Additionally, the players need appropriate inclusion and help with any legitimate legal disputes which might emerge. These disputes can incorporate the differences between the association and the players, the controlling authority and the players, etc. The customary methodology towards solving such disputes can be a dreary one, particularly for a sportsperson who is already loaded with the weight of performing on the field. To diminish this quandary, arbitration provisions can be found in Collective Bargaining Agreements to handle the detours which result in mishaps.
Collective Bargaining Agreement (hereinafter CBA), with regards to professional sports, is the agreement reached between a specific league’s players and the proprietors of that particular league. These agreements, for the most part, contain an Arbitration clause which manages injury and non-injury complaints and compensation arbitration. Sports such as basketball, baseball, football and professional hockey have significantly used these agreements in making a harmonious connection between the players and the league proprietors. The striking element of most CBAs is that the complaint, contract or compensation questions are settled with binding arbitration. The expression “baseball arbitration” has its inception from a new strategy wherein the compensation or salary disputes of the baseball players were settled through the technique of arbitration. The arbitration which happens as indicated by the CBA, more often than not requires the gatherings to submit to the referee a sum which speaks to the last, best offer. It is significant for the gatherings to present proposals which speak to a high amount since the arbitrator needs to pick one of the submitted figures.

Sports groups, for example, National Basketball Association (NBA), National Football League (NFL), and Major League Baseball (MLB) which have gained popularity across the world have depended vigorously upon CBAs to guarantee a smooth situation for the players. For example, the CBAs between the MLB Players Association and the Major League Clubs give the parties the chance to request the American Arbitration Association’s help to pick an arbitrator if either party cannot consent to an arbitrator (most recent by January 1 of any year of the agreement).[^4] This kind of arbitration may look like labour arbitration; however, in such arbitrations, the arbitrator is not permitted to provide solutions or give his

[^4]: Id.
The CBA just requires the last, best offer from either party. On certain occasions, such a system produces surprising outcomes. However, the conventional idea of such a usual methodology induces the members to bargain in accordance with some essential honesty, consequently bringing about higher settlements. With regards to the CBA among NBA and the players association, complaint or grievance issues are determined by an arbitrator. At the same time, a chosen few articles inside the CBA is controlled by a system arbitrator. Issues such as income, salary cap and minimum team salary are under the domain of Arbitration under CBA. Be that as it may, some disciplinary bearings coordinated by the NBA Commissioner are authoritative upon the players subject to final determination done by the system arbitrator. Similarly, in case of CBA between NFL Players Association and the league accommodates arbitration if there should be an occurrence of salary disputes and whether an injury which kept a player from playing was sustained because of play. In this way, it is evident that the Arbitration clause in the CBAs has affected the manners by which disputes are being settled in the significant Sports leagues around the globe.

If we take a gander at the Indian situation, CBAs are yet to wind up as being prevalent. For example, in the Indian Premier League (IPL), there is an auction system which ought to be supplanted with an exhaustive draft system. There is a need to acquire the CBAs to evacuate the artificially imposed wage ceiling on the uncapped players, i.e. the ones who are yet

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6 Id.
to make their debut for their national teams. Besides, different games in India have scarcely received or even taken a gander at including CBAs to the contract regime. Therefore, it is high time to bring in CBAs across the different sports leagues which are popular in India so that the associations are compelled to arrive at an agreement which will benefit players at every professional level based on their experience as well as seniority. The sports culture in India has, in any case not demonstrated productive for other games apart from cricket. Acquiring CBAs would, in any event, give the athletes the chance of having appropriate compensation, better answers for injury grievances and simultaneously. This would push them not to experience the monotonous method built up by the law in India to resolve sports-related disputes.

**ANSWER TO CURB MONOPOLY EXERCISED IN SPORTS**

Monopoly has become a common issue in the field of sports and tends to overpower the true spirit of sportsmanship. It comes into existence when an organisation is given the responsibility of handling a particular area of sport. To overcome this, the concept of “final offer” can be used as it provides a viable solution while ousting the monopoly in existence. Final Offer or ‘Pendulum Arbitration’ is an interest arbitration in which the arbitrator chooses one of the parties’ proposals on the disputed issues. This is different from the traditional interest arbitration in which both the parties present evidence and documents while the arbitrator acts as a fact-finder to render an award. For instance, in collective labour bargaining, a trade union may demand an increase of up to 10% while the management

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may offer an increase of 5%. In such a case, the arbitrator will have to choose between 5-10%. This type of arbitration has been successfully implemented in disputes about baseball and since then has found its way into other sports with a relatively higher settlement ratio as compared to the traditional methods.⁹

The classic case of monopoly exercised by a particular organisation resulting in misuse of power is by the BCCI in India. In all these years, we have seen how the BCCI has gotten a patent over cricket. It has uncontrollably managed the game and at the same time directed it as and when it considered fit. This unbreakable, solid syndication has prompted a ton of one-sided choices in the field of cricket which has affected the sportsmen playing the game and the game in general. BCCI has the power from picking players and umpires for the national group, planning the fundamental guidelines and guidelines for the game to precluding players which may impacts his or her vocation to the degree that he or on she may need to quit playing it.¹⁰ It assembles arenas, screens the working of cricket institutes, underpins the state associations and affiliations, outlines annuity plans and supports consumptions of coaches, mentors and others. It additionally sends or loans the telecast and broadcast rights and even gathers the confirmation expenses for the spot where the matches are led.

Taking a gander at all the forces and capacities that the BCCI has and that there is no restriction to its choices, decentralisation of intensity is of principal significance now. There are no means or endeavours made by the legislature to end this restraining infrastructure. The capacities which

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¹⁰ Manvi Bhandari, Arbitration in Sport Dispute Resolution in India 1 IJRESM 483 (2018).
are performed by the BCCI are open capacities despite the fact that it is a private entity. One such case of BCCI’s syndication which we have found in the past is when ICL that is the Indian Cricket League would have been presented as an open door for all the cricket fans to feature their ability. A cricket competition named ICL was begun by Essel Sports Private Ltd (ESPL) which included both Indian and foreign players. The BCCI did not bolster this competition and utilised its capacity and impact and advised the different state organisations to blacklist the same. BCCI despite having sufficient funds to accommodate such a competition would not make it work and restricted players from partaking in ICL. It likewise constrained the board individuals to make severe move against their separate players associated with the ICL. Because of all these exacting standards of the BCCI, absence of support and assets, the ICL was sidelined. A petition was filed against the BCCI in the Delhi High Court as it was undermining the players to not participate in the otherwise their license would be in question, and they will not be allowed to partake in the worldwide matches. To stop the ICL, the BCCI even out-contracted cricket arena which was under the state government. These practices were likewise challenged in the court. The court decided in favour of ICL and offered notification to BCCI, state cricket affiliations and corporate supporters against ending legitimate contracts of players joining the ICL.

It is at this juncture where the concept of final-offer arbitration can be used to tackle the problem of monopoly being exercised by BCCI. At the point when such a resolution is executed wherein the BCCI needs to experience

13 Id at 8.
arbitration and not make choices as indicated by its impulses and likes, it would cut down the monopoly significantly. An outsider inclusion would acquire decency and would not give one a chance to overwhelm over the other.

**CONSOLIDATING DIFFERENT AUTHORITIES**

International sports law and the mechanism governing the general process constitutes a complex structure of institutions and governing bodies at the national and international level. The complex structure comprises of national sports organisations and governing institutions, International Olympic Committee (IOC) and their national constituents, i.e. the National Olympic Committees (NOC’s), International Sports Federations (IF’s) and the different judicial authorities involved as the Court of Arbitration for Sports (CAS), International Council of Arbitration for Sports (ICAS), national courts and tribunals, national arbitral tribunals, and other international and regional authorities (in the case of the European Union). They are all captains in their particular arena and play by their own rules. However, if we want sports to transcend national boundaries and have an internationally uniform system, we need to address this hiatus between the operational authorities in this arena. The challenge that comes up is the consolidation of these authorities in a more coherent and most importantly, uniform process.

It is essential to clarify that the authors here are not advocating let alone expecting instant uniformity and coherence. In the absence of supranational law and an international sovereign, the expectation of uniform international laws has a limited scope. An initial step in the direction to promote uniformity in this field would be to reconcile and give a uniform anvil for testing the similarly placed cases and scenarios. Further, harmonise and reconcile the procedures and the rules of different sanctioning authorities and most importantly defining the arena in which each performs, i.e. demarcating their spheres of authority.
Dispute resolution in this complex structure is pluralistic and constitutes of overlapping Venn diagrams. In the following section, the authors would highlight the hiatus and the problem created by the plurality within the complex framework with the help of case laws-

**Foschi Case**\(^{14}\)- Jessica Foschi was subject to the authority of the United States Swimming Inc. (USS- a corporation which regulates the conduct and administration of swimming and swimming events in New York and throughout the United States of America). The USS is a member of the USOC, which is a corporation established by federal law, incorporated in 1950 by an act of Congress. It is also the ultimate body concerning the USA's representation in the Olympic Games. USOC also performs drug testing on behalf of the USS. In 1995 post the national competitions Foschi’s urine samples tested positive for the anabolic steroid mastertone. The USS panel hearing the issue accepted the evidence and affirmed doping but at the same time declared that Foschi had “no knowledge of how the banned substance entered her body.” Later the appeals body affirmed the determination of the USS panel and imposed limited sanctions on Jessica Foschi which included two-year probation and a warning that any subsequent event of doping would result in a complete ban. After this, the USS imposed an outright ban on Jessica, for the competition, but reversed itself by reinstating the earlier limited sanctions.

However, she was allowed to participate in the qualifiers for the Olympics, where the question of her eligibility was vexed when she failed to qualify for the team. Foschi filed a demand for arbitration in the American Arbitration Association (AAA) under the Ted Stevens Olympic and Amateur Sports Act, 1978.\(^{15}\) She challenged the sanctions remaining on her and most


importantly challenged the threat of life ban, which was looming on her career in case she is ever again found engaged in doping. The arbitral tribunal ruled in favour of Foschi, rescinding all the sanctions against her and rejected the strict liability rule of FINA (Federation Internationale de Natation Amateur, the international federation whose anti-doping rules govern the USS). The tribunal found that the sanctions were arbitrary, capricious and violated the fundamental fairness. The panel noted that the USS did not contest Foshi’s apparent innocence of the circumstances under which the controlled substance entered her body and hence to ignore her apparent innocence would not be in the interest of justice.

The arbitral tribunal further acknowledged that rejecting the strict liability rule of FINA left emptiness in both USS and FINA rules. However, it clarified that there was no authority for imposing such penalty (as in this case) on the athletes as per the existing rules, even though the same looks like an excellent compromise. AAA while coming to this conclusion, also relied on the advisory opinion given in a similar comparable case of Australian swimmer Samantha Riley. The Foschi case may be another case of conflict between the national tribunal and International Federation but serves the purpose of reflecting the plurality existing in the International Sports Law and the disputes which the pluralistic regime entails.

**Nagra Case**\(^{16}\) Yet another example of how the pluralist regime can frustrate the entire dispute resolution and the aim of timely justice. The case of a Canadian Athlete Pradeep Singh Nagra, who wore a beard because of the religious intricacies, and the rules and regulations of CABA (Canadian Amateur Boxing Association) and IABA

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(International Amateur Boxing Association) both required the boxers to be cleanly shaven. Fearing his disqualification, Mr Nagra ‘apparently’ avoided the established administrative process and proceeded directly to the Canadian Courts. After two rounds of litigation and considerable time, and amongst the pressure of further suits by the World Sikh Organization the court ruled in favour of Nagra and declared the IABA and CABA regulations to be violative of Canadian Human Rights law. Although, the decision is fair and justified, but the focal point of the case is that the well-established mechanism of dispute resolution within the organisation was purposely avoided. Any branch of law exhorts, if not, mandates the exhaustion of administrative and organisational remedies before going to the court. In the present case, there was a strong probability that the rule might have been waived off by the IABA or CABA, saving much time for the athlete while at the same time building the confidence of the athletes in the administrative procedure.

Pistorius v. IAAF\textsuperscript{17} - This case dealt with the scenario of a disabled athlete competing with other able-bodied athletes. Mr Pistorious had been an amputee since 11 months of age and had been using prosthetic legs to compete internationally in 100, 200, 400-meter sprint events. The appeal was made against Decision No. 2008/01 of the IAAF Council dated January 14 2008, which held that the use of prosthetic legs ‘cheetah’ gave Pistorious and edge over the other able body athletes and was in violation of the IAAF amended competition rule 144.2(e). For a matter of record, the rule 144.2(e) stated that;

“For the purposes of this Rule, the following shall be considered assistance, and are therefore not allowed”

\textsuperscript{17} Pistorious v. IAAF, CAS A/1480 (2008).
(e) Use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device

At the German Sport University in Cologne, a biochemical study was conducted on the instruction of IAAF, to determine if Oscar’s prosthetic legs gave him an advantage over other able-bodied athletes. It is pertinent to note here that the basic notions of procedural justice were also disregarded as Dr Robert Gailey (a scientist who was nominated by Pistorius to participate in the Cologne testing) as he was allowed to participate only as an observer and was allowed no input in the process. However, the cologne tests and the subsequent sanctions of IAAF were successfully challenged on the ground that there was no evidence to prove the fact that the use of a particular prosthetic gave Oscar an edge over the non-users. Further, the fact that Oscar was consuming the same amount of oxygen at the sub-maximal sprinting speeds as other able-bodied runners provided the force to Oscar’s above argument.

CAS held that there was no evidence to show the alleged advantage as per Rule 144.2(e) and that there were “glaring due process flaws in the process” which had resulted in the IAAF council’s decision of ban on Oscar from IAAF sanctioned events. CAS further held that when the case related to the eligibility of an athlete to participate, then it was mandatory that convincing scientific evidence is to be provided to prove that the athlete gained a ‘net competitive advantage’ over other athletes. CAS also commented on the standard of proof needed in such similarly placed matters.
**Dutee Chand v. AFI & IAAF**\(^{18}\)- The case related to the challenge to the validity of IAAF Regulation governing eligibility of Females with Hyperandrogenism to compete in women’s competition (hereinafter Hyperandrogenism regulations) by a 19 year old Indian athlete Dutee Chand. Dutee was suspended from participating in any national or international athletic events by AFI (Athletic Federation of India) and SAI (Sports Authority of India) because the naturally occurring hormones in her body were found to be above the prescribed limit under the IAAF Hyperandrogenism Regulation. An application for arbitration was made before the CAS, and it was observed by the tribunal that CAS had jurisdiction to hear the case because both IAAF and AFI had submitted to the jurisdiction of CAS.\(^{19}\) The claimant argued that she had not done any external doping, and the hormones are occurring inside her body and are a part of her body. Furthermore, experts have had their reservation concerning the effects of the hormone reduction medical processes on the body of the athlete, and no conclusive evidence exists to delineate the effects of such forced reduction on the body.

Ms. Chand submitted before the tribunal that “*Athletes are not prohibited from competing in sport because they possess other natural genetic advantages — for example height, lung capacity, foot size or visual acuity above a certain limit. On the contrary, athletes who achieve sporting success are usually those who fall outside normal parameters.*” Going by the logic given by IAAF under the Hyperandrogenism regulations the basketball players having bigger hand size should be prohibited from participating in the games because this would not be fair with the other players as they will be naturally having better control over the ball. IAAF agreed that the Hyperandrogenism regulations amounted to discrimination on the basis

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19 *Id* at 426, 436.
of sex as there was no such regulation for the males. Hence, the burden on IAAF was to show that the discrimination was justified.

The tribunal held that IAAF had not been able to justify the discrimination under the garb of fair play cry and that there was “insufficient evidence about the degree of the advantage that androgen-sensitive hyperandrogenic females enjoy over non-hyperandrogenic females.”\textsuperscript{20} The tribunal took note of various international studies and authors conducted in this regard and held that the evidence was insufficient. The tribunal held the regulations to be against the spirit of the Olympic charter that “Every individual must have the possibility of practising sport, without discrimination of any kind”.\textsuperscript{21} Based on these observations, the panel suspended the Hyperandrogenism regulations for two years. It was the effect of this ruling that the IAAF amended its regulations and backed the same with specific scientific data.

The above catena of decisions brings out the plurality and ambiguity prevailing in the international forum. Which rule is to be applied, which process to be taken up, which authority is going to hear the dispute? These case laws go on to show that there exists no straightjacket formula. However, through the cases, the role of CAS as an International Court for sports has been highlighted and CAS post the amendments have had substantial autonomy and has decided cases having international implication on Sports law. In view of the authors, to bring a global uniformity in rules there needs to be an International Court which shall lay down a guiding route for the national bodies which even if governed by different rules shall test their decisions on the anvil of the international resolutions. CAS fits this role aptly, and as the influence of the CAS decisions grows, they would provide ‘lex specialis’ to guide the arbitral decisions within the general


\textsuperscript{21} Rule 4, Olympic Charter.
process of international sports law. The authors propose that steps must be taken for the development of ‘Lex Sportiva’ by the CAS decisions and in moving towards certainty and uniformity. The internationalisation of sports-related arbitration would provide an efficient regime would help not only the international disputes, say for that matter between athlete representing a nation and foreign chartered sports federation, but would also assist in the domestic matters. For developing ‘lex Sportiva’ it must be ensured that the decisions of CAS and another international body shall be published and provided for in the public domain, in languages other than French and English.

**EXTENT UP TO WHICH THE COURTS SHOULD INTERFERE**

This section of the article would focus on the role that the courts have in sports-related matter and would decipher as to what has been the trend and extent of court intervention in sports-related disputes. In this part of the article, the authors would do some globe-trotting and would come up with the approach of the courts in different jurisdictions with regards to sports-related disputes. The section would also give an insight into the standard of review opted by the courts worldwide.

**England**- The courts in England have developed a legal tradition that the courts do not generally intervene in sports disputes. These disputes are left to be decided by the regulating authorities and special international procedures so established by these authorities which are considered to be “far better fitted to judge than the courts.”22 The approach of the courts can be summed up by Lord Denning’s observation in the English case of

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22 Vice Chancellor Megarry in the case of McInnes v. Onslow-Fane, 1 WLR 1520, 1535 (1978).
Enderby Town Football Club Ltd v. Football Association Ltd: “[…] justice can often be done in domestic tribunals better by a good layman than a bad lawyer.”²³ Hereby domestic tribunals Lord Denning meant the bodies which are outside the hierarchy of the courts and include sports authorities. Thus, the courts in England understand that the non-interference of the courts would better serve sports. However, it is pertinent to note that the courts in England do not have complete apathy to sports-related matters and have interfered in cases where there has been a breach of natural justice or restraint of trade. Concerning matters related to non-observance of natural justice the English Court of Appeal²⁴ has laid down some general principles which are to be followed by the concerned sports authorities:-

- The complete notice of the case, which is to be answered by the accused is to be provided to him beforehand.
- The accused should be allowed to present evidence, witnesses’ evidence and cross-examine the witness of the prosecution.
- Moreover, there should be a right to a fair hearing and a reasoned decision by unbiased and impartial tribunals as justice must not only be done but must also be seen to be done.

For the restraint of trade issue, the English courts interfere when any restriction goes beyond what is necessary to achieve some necessary and desirable aim. The doctrine was discussed in the landmark judgment of Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.²⁵, and the following was observed- “The public have an interest in every person’s carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there

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²³ Enderby Town Football Club Ltd v. Football Association Ltd, 1 Ch 591, 605 (1971).
is nothing more, are contrary to public policy.” Thus any ban or restriction placed upon any athlete by the sports regulation authority be it national or international shall meet the criterion of reasonableness in their scope in terms of time, area and extent.

**United States of America**- A similar position exists in the United States of America. The position of the courts on intervention and their role can be succinctly summarised through the observation of the Federal District Court in *Harding v United States Figure Skating Association*26 where it was held that-

“The courts should rightly hesitate before intervening in disciplinary hearings held by private associations […]. Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute.”

**European Civil Law Countries**- Generally speaking, the stance of the courts in the majority of European civil law nations is that the courts are amenable to the settlement of disputes by the parties by the use of alternate dispute resolutions. Concerning sports, the courts will not generally interfere with disputes relating to the “rules of the game” of the sports concerned. A more extensive understanding of the legal scenario in sports law can be taken by reference to one of the most advanced legal systems of Europe, i.e. Switzerland. The Swiss federal Code27 in its provisions provides that a decision of the CAS is taken to be an arbitral award under

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26 Harding v. United States Figure Skating Association, 851 F Supp 1476 (1994).
27 Art. 190(2) of Swiss Federal Code on Private International Law.
the Swiss law and can be challenged only on restrictively limited grounds. These grounds include the irregular appointment of the arbitrator, lack of jurisdiction, against Swiss public policy, and where party’s right to equality of hearing was not respected. Thus, the global position is somewhat uniform in the civilised jurisprudence that the courts interfere only in limited circumstances.

SUGGESTIONS FOR ARBITRATION IN RESOLVING SPORTS-RELATED DISPUTES

The authors would now provide specific suggestions which can help in bettering the future of arbitration in resolving the disputes related to sports.

The CAS Statute and Regulations were amended by the IOC on September 20, 1990, but has failed to create an independent CAS as the President of the CAS shall also be a member of IOC according to Article 6 of the statute.28 There is a need for CAS to be a completely independent body which would mean that its President should be knowledgeable in the field of Sports and at the same time unaffiliated with the IOC. Furthermore, if CAS is to become a truly independent tribunal, it will not have 30 of its 36 members chosen by the IOC, 15 of which include IOC members. Therefore, the need for an independent CAS is imperative, and the independence has to be absolute with supervision being exercised by a higher authority.29

There is a need to lessen the powers granted to the IOC such as its election process, self-governance and self-perpetuation as it answers to no higher authority and is free to make decisions without appeal to other bodies. Even the United Nations has no control over the IOC owing to the provisions

29 Id.
of Article 71 of the United Nation Charter. In such a scenario, even the arbitration cases about sports disputes are met with abrupt endings. A feasible way to counter this is the establishment of an “International Sports Court”\(^{30}\) which would be analogous to International Court of Justice and this institution would be the highest authority in terms of sports disputes and would also supervise the actions of CAS. This would provide comfort to any athlete on foreign soil and would protect and individual’s right to due process.\(^{31}\)

Another way to lessen the powers of IOC about adjudicating a dispute which involves the IOC must include this clause:

“Any dispute arising from the present contract which the parties are unable to settle amicably, shall be settled exclusively and definitely by a tribunal-of one or three members-constituted in accordance with the Statute and Regulations of arbitration of the Court of Arbitration for Sport (CAS). The parties undertake to abide by the provision of the said Statute and Regulations and execute in good faith the award to be rendered. They agree to establish the seat of the tribunal in ... and to apply . . . law.”

Language and time effectiveness is another issue which needs to be looked at when we talk about the necessary changes to be brought in. Working languages for CAS is French and English, but there are various other languages which the athletes are well-verse. Therefore CAS should ensure that the translation costs should be borne by the parties or CAS itself. Time effectiveness is of utmost importance because no amount of money can substitute a medal in the Olympics or any international/national sporting event. Hence, a specific period should be allotted by the CAS to speed up

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\(^{30}\) \textit{Louis Henkin et al., International Law} 318(2\textsuperscript{nd} ed. 1987).

the Arbitration proceedings and allow the athlete to participate in time.\textsuperscript{32}

- \textit{Ad-Hoc tribunals should be brought into games. In 1994, at the Paris convention, all the International federations said that the decision of CAS would bind them. However, none of these federations has delivered on their promise. None of them quickly changed their rules to ensure that CAS had the power of overruling their decisions. Hence, to counter this, ad hoc tribunals can be brought into existence to prevent an athlete from knocking at the doors of different organisations.}\textsuperscript{33}

- \textit{Quality of arbitrators being picked for a sports dispute needs to be properly scrutinised. In most of the cases, people appoint arbitrators which they want to be represented by, but there is an imperative need to know about the different sport knowledge cases, and hence, the arbitrators need to be adequately trained before appearing in such arbitration proceedings.}

- \textit{The scope of lex Sportiva needs to be enhanced by ensuring greater and equal accessibility to the opinions and judicial precedents of CAS, and this has to be done by ICAS. Furthermore, there is a need to provide more commentaries on the judicial pronouncements and opinions of CAS, and this can be done by law students, scholars and professors which would give a better insight than the lawyers who give their opinions on why they were wronged. A critical component of a meaningful lex sportive and a dynamic legal system must include this type of commentary.}

- \textit{Online Arbitration should be used extensively for an efficient proceeding. The most significant advantage is the fact that it saves time as well as travel costs. Further, it serves as the best platform if the parties are not comfortable in meeting each other and would instead prefer a non-confrontational method. The issue of jurisdiction is avoided because the


\textsuperscript{33} \textit{Id.}
parties to the dispute will submit to an online provider and lastly it records the evidence, statements, correspondence, pleadings and any other such visual or oral communication electronically.

- To solve the problems between the owners and the players in a professional sport would require the fundamental concept of “fairness” being appropriately utilised. There must be parity between both the groups, i.e. the players and the owners. This parity can be achieved via the use of Grievance Arbitration as it provides meaningful remedies to resolve collective disputes, thereby, not letting these ordinary disputes to pile up and wreak havoc in the future. This is evident from the fact that the inclusion of the Arbitration clause in the CBAs has settled a large number of cases in the past few years. Hence, Grievance Arbitration can be used to develop amicable relations between the owners and players, resulting in a lesser number of disputes.

- To further improve the use of arbitration in sports leagues will require the termination provision to be used by the players as well. As a general rule, the owners have the power to cancel the contract and to allow mutuality about employment relations a player must have the same right. This enables the player to take his services elsewhere if he is mistreated.

Therefore, these suggestions could bring in the necessary and essential changes to provide a better future for arbitration in solving the disputes related to sports.

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EXPLOITATION OF MINORS IN FOOTBALL: THE NEED TO ENACT MORE PRACTICAL RULES

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INTRODUCTION

As football gets competitive each year, clubs get fierce with signing players that better their chances at competing for major trophies. Moreover, most clubs are willing to pay any amount of money to get the best players to represent them. Real Madrid signed Eden Hazard from Chelsea for a massive fee of 100 million euros.\(^3\) Manchester City and Paris Saint Germain have invested vast amounts of money ever since their takeover in 2008\(^4\) and 2011\(^5\) respectively. However, these big clubs and small alike have also invested in their youth Set-ups. Manchester City spent 200 million pounds for their new football academy set up to produce and nurture young players. Paris Saint-Germain had announced of their intentions to open six soccer

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schools in Turkey to raise players for their youth set-up with an investment of close to a million Dollars etc. All big clubs invest heavily in their youth set-ups, soccer schools and scouting to produce and find talented young players.

However, why do these big clubs, even with their vast resources, invest in academies when they can go ahead and buy players? There could be two reasons for this notwithstanding UEFA’s homegrown players rule. Firstly, younger players usually have a higher ceiling if appropriately trained, i.e. they can achieve much more than established players if nurtured properly; and secondly, clubs can earn massive profits by selling young players as the minimal amount is invested in acquiring these players. Southampton made a business model out of this. According to the CIES Football Observatory’s study that was published in 2015 showed that their youth academy had accumulated more than 90 million euros through selling their youth stars. However, this also means that clubs could take some unethical measures to recruit young players for cheap because young players, while having the best chance at profitability also are the most vulnerable to exploitation. Moreover, if the current scheme of things is any proof, big clubs do not shy away from violating FIFA norms meant for safeguarding the rights of a minor.

Earlier this year, Chelsea was faced with a transfer ban and a hefty fine for violating rules relating to safeguarding rights of a minor in football. Which means they were not going to be able to register any new players for two successive seasons. Chelsea is not the first team to have been in

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this situation. The big three of Spain’s La Liga, FC Barcelona, Real Madrid and Atletico Madrid have all been in this situation as well where they faced transfer bans for not conforming to FIFA’s Regulations on the Status and Transfer of Players (hereinafter “RSTP”). Not only these clubs but their respective national associations were also fined for tacitly approving the wrongdoing of clubs competing in their league. However, what are these rules that Chelsea or Barcelona or the Madrid Clubs did not conform? Are there any special rules that are to be kept in mind while signing young players?

NEED FOR SAFEGUARDING MINOR RIGHTS: HISTORY

With the start of commercialisation of football, there were a few problems that persisted. The problems were brought out, deliberated and then ironed out by the ruling in the case of Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman.9

In this case, Jean-Marc Bosman was a professional football player who had signed for Liege but was entering his final months of the contract. His time at Liege had not worked as well as he had hoped for and thus he was tempted when an improved offer came from French second division side, Dunkirk. Before the ruling in Bosman’s case, the standard was that even after the expiry of the contract of a player, the player could not leave without the club’s permission. It had to be through the consent of the club he belongs,


where it decides to let the player go for free or if the buying club would pay the amount demanded by the selling club. In this case, Bosman was not given permission to leave and owing to the supposedly high demand of Liege, Dunkirk was not willing to pay either. The transfer did not happen, and the lawsuit followed. The court removed the club's power to dictate what a player can do following the conclusion of his/her contract, i.e., the player can move freely once the contract has not been renewed. Secondly, it also removed the three-plus two rule which mandated that a club can only field three foreign players when playing in European Competitions and along with that an additional two players who have been brought through the academy.

The abolition of the 3+2 rule saw an 1800 per cent rise of foreign players in the Premier League in four years post the Bosman Ruling. Clubs started to sign agreements with EU associations with flexible nationality and work permit rules and hence tapping into Non-EU talent pools, and clubs also started signing deals with Non-European Clubs to sign players from a vast Non-EU talent pool signalling an increased investment in foreign youth. This meant that the clubs did not have to spend on their academies; instead they could just buy players for a cheaper amount.

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13 *Id.*
Therefore it became imperative that the Footballing authorities frame rules to regulate this practice which could potentially harm young players. FIFA’s Regulations for the Status and Transfer of Players was the result of an informal agreement reached between the European Union, FIFA and UEFA. The international bodies thought fit to discuss the whole international transfer system, and one of the outcomes was that International transfers of minors were now subject to some agreed conditions. The football authorities had to formulate and enforce a code that guarantees the sporting, training and academic education to minor players.\textsuperscript{14} The introduction of RSTP was also aimed at striking hard against trafficking of children or abuse in the process of transfer.\textsuperscript{15} This gave rise to the first RSTP statute of 2001, which was meant to bring in reform to existing transfer policies. The RSTP regulations have been amended a few times, and it is because of the increase in transfer activities that such a dynamic approach has been chosen.\textsuperscript{16}

\textbf{EVOLUTION OF THE RSTP REGULATIONS THROUGH THE YEARS}

In this section, we shall look at how FIFA has reformed RSTP to provide a better mechanism for protection of interests of minors throughout the years. Some amendments to the RSTP did not concern minors, and hence, they shall not be discussed.

\begin{itemize}
\item \textsuperscript{14} Outcome of discussions between the commission and FIFA/UEFA on FIFA regulations on International Football transfers, European Commission, Mar. 5, 2001 (May 08, 2020, 12:54 AM) \url{http://europa.eu/rapid/press-release_IP-01-314_en.html}.
\item \textsuperscript{15} Serhat Yilmaz \textit{et al.}, \textit{Children’s rights and the regulations on the transfer of young players in football}, \textit{International Review for the Sociology of Sport} (2018).
\item \textsuperscript{16} Protection of Minors FAQ, FIFA, Sep 2016, (May 08, 2020, 12:54 AM) \url{https://img.fifa.com/image/upload/xbnooh14lcaxzadstknx.pdf}.
\end{itemize}
RSTP (2001) was the first time FIFA had codified and organised regulations under Article 5 of FIFA statutes laying down rules of transfer. Furthermore, it also brought in the very first provisions regarding a protection system for the international transfer of minors. It defined the age group of under eighteen (18) as minors for the regulations and also stated that players within the EU/EEA could be transferred subject to some conditions. RSTP stipulated that the maximum commitment that a minor can make to a particular club is three years, i.e., the most extended contract a particular minor could sign with a club with is three years.\textsuperscript{17}

Then RSTP was amended again in 2005, as the first-ever RSTP was seen as a bit challenging to comprehend and thus apply. Therefore, the amendment of 2005 was more to create a user-friendly mechanism. It also made some changes to the provisions regarding the protection of minors.\textsuperscript{18} The significant difference between RSTP 2001 and RSTP 2005 is that while in 2001 regulations an association in EU/EEA could make provisions as to the minimum age at which a player could transfer in the EU, but in 2005 it was cemented that the minimum age shall be 16.\textsuperscript{19} This may be because of irregular rules of contract law owing to the age of minority within the European Nations.\textsuperscript{20} There were four additional requirements that the buying club had to observe which are similar to the requirements in place today and will be discussed in the latter part of the paper.

\textsuperscript{17} FIFA Regulations on Status and Transfer of Players, 2015 (May 08, 2020, 12:55 AM) \url{https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-2018-2925437.pdf?cloudid=c83ynemkp62h5vgwg9g}.

\textsuperscript{18} Supra note 11.

\textsuperscript{19} Supra note 9.

\textsuperscript{20} Id.
After 2005 regulations, the following significant amendment concerning minor rights came in 2009 primarily because most associations were negligent in applying the provisions.\textsuperscript{21} FIFA became tighter sealed with these amendments concerning international transfers. First of all, it was stipulated that every single international transfer of minor shall be on approval of Sub-Committee duly appointed by the Players Status Committee.\textsuperscript{22} It was also tasked with checking every first registration, i.e., a player who has previously not been registered with a club and is not of the nationality of the respective association in which he wishes to be registered.\textsuperscript{23} The regulations also added Article 19(bis) to address the loophole of unregistered academies. Now, each minor player that attends an academy shall report to the national association under which National Association it operates. This is irrespective of the fact that the academy does not take part in a national championship or has any link to a club participating in the national championship, whether it be legal, financial or de facto.\textsuperscript{24}

The next two amendments of 2015 and 2016 brought in the provision of reducing the age limit for which an International Transfer Certificate is issued. As per Article 9 of the RSTP, for any transfer of a football player to take place from one football association to another, an International Transfer Certificate (ITC) has to be issued by the association from which


\textsuperscript{23} Id.

\textsuperscript{24} Supra note 16.
the player is being transferred to the destination association, i.e., the association which governs the destination club. It has been clarified that the onus is on the National Associations to ensure procedural requirements and regulatory framework for the protection of minors are respected.

Before the 2015 amendment, an ITC was not required for transfer of players below the age of 12 years. However, this age was reduced to 10 years in the 2015 amendment. As far as the reduction in age from 12 to 10 for the requirement of an ITC, this was done due to the increased number of international transfer of players aged below 12.\textsuperscript{25} We further understand that this would also help prevent trafficking and exploitation of minors as FIFA is kept in the loop for every single transfer.

The amendments required that every transfer for whom an ITC is required, a subsequent approval from FIFA and an implementation of a five-year rule is also required. The five-year rule says that if a minor has lived in a country for five years and wishes to be registered with the association of that country, then that is subject to the approval of the sub-committee.\textsuperscript{26}

**LAWS RELATING TO MINORS IN FOOTBALL**

This section will be divided into two parts. First part will cover what a minor means in football and what is the minimum age requirement for a player to be offered a professional contract from a football club. The second part will cover obligations on the part of the club to register an international transfer of a minor and the steps taken under RSTP to prevent abuse of the process.

(a). **Definition of a Minor**

\textsuperscript{25} Circular Letter No. 1468, FIFA (Jan. 23\textsuperscript{rd}, 2015).

\textsuperscript{26} Minor Player Application Guide, FIFA, Feb. 16, 2018 (May 08, 2020, 12:54 AM)
The definition of a minor and their capacity to enter into contract differs across countries. In the United Kingdom, anyone under the age of 18 years is considered a minor. A minor’s agreement in the United Kingdom is voidable the option of the minor.\textsuperscript{27} Thus, a contract with a minor is binding on the adult but not on the minor, subject to some exceptions which are a contract of service, apprenticeship and education.\textsuperscript{28} There arises the concept of necessaries. Under this concept, a minor is bound under a contract made for his benefit. In the case of \textit{Proform Sports Management Limited v. Proactive Sports management limited and Paul Stretford},\textsuperscript{29} it was held that Wayne Rooney was not bound by the contract which he signed when he was 15 years old as it was a contract of representation by the football agent who was not deemed as something beneficial. It was a trading contract and hence avoidable. In the case, Proform Sports Management Limited (the claimant) entered into a representation agreement with English footballer Wayne Rooney. Six months before the expiration of this agreement, the player and his father wrote to the claimant stating that they would not renew the agreement when it expires. The defendants in this case, i.e. Proactive Sports Management limited was owned by Paul Stretford (Wayne Rooney’s father). On the expiration of the agreement with the claimant, Wayne Rooney entered into a representation agreement with the defendants. The claimants sued the defendants for unlawful interference with and/or inducing of a breach of contract. The defendants filed for summary judgment because inducing the breach of a voidable contract with a minor did not attract any liability. The ruling also laid down the principle that a player’s contract with the Football Club is one which can be considered as a contract of necessaries as the football club provides the

\textsuperscript{27} Nicola Laver, \textit{Entering into a contract with a minor}, \textit{In Brief} (May 08, 2020, 12:57 AM)

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} [2007] 1 All ER 542.
There is no fixed age as to when a club can provide the player with a professional contract. In England, a player aged 16 years can earn a scholarship contract from a football club and then from the age of 17 years, the club can offer him a professional contract, while in Italy no club is allowed to offer a player under the age of 18 years, a professional contract. There is a disparity in rules as to when a player can be offered a professional contract, and it differs from nation to nation.

(b). Rules for an International Transfer of Minors

Article 19 of FIFA’s RSTP provides that no player under the age of 18 years is eligible for an International transfer. However, there are some exceptions to this rule which are discussed below:

**The Parent Exception:** Article 19(2) (a) provides “The player’s parents move to the country in which the new club is located for reasons not linked to football”.\(^{30}\) This exception permits the International Transfer of a player aged under 18 years if his parents move to the country where the club is located for reasons utterly unrelated to football. This exception is often the most misused provision of FIFA RSTP while completing International transfers of minors. The reason is quite simple. FIFA cannot establish a link between the Parents’ new employers and the new club where the minor is being transferred. The landmark and the most cited judgment of this exception is the case of *Caballero v. FIFA*.\(^{31}\) In the instant case, sixteen-year-old Paraguayan footballer Carlos Javier Acuna Caballero was signed by

\(^{30}\) Article 19(2) (a), FIFA Regulation on Status and Transfer of Players, 2019.

\(^{31}\) Carlos Javier Acuna Caballero v. FIFA & Asociacion Paraguaya de Futbol, CAS/2005/A/956.
Spanish first division club Cadiz CF after he had impressed in an Under-20 FIFA tournament. However, it was discovered that mother and brother of Caballero recently moved to Spain and his mother took an employment contract with a restaurant. This happened a week after signing (on behalf of her son) the contract with Cadiz C.F. The Paraguayan Football Association refused to grant him an International Transfer Certificate required for the completion of the transfer, citing Carlos’ age as a primary concern. The matter went to the CAS wherein FIFA’s decision of not allowing Carlos to register with Cadiz C.F was upheld because of the following reasons:

(i) FIFA’s rules regarding the same protect any disruption in the lives of such minors in case their Football career fails after such an International transfer. So, it can be said that such laws pursue a legitimate object.

(ii) Secondly, reasonable exceptions are provided in such law, which means that they are proportionate to the object sought.\(^\text{32}\)

**The EU Exception:**\(^\text{33}\) The transfer takes place within the territory of the European Union (EU), or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:

(i) It shall provide the player with an adequate football education and/ or training in line with the highest national standards.

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\(^{32}\) Supra note 8.

\(^{33}\) Article 19(2) (b), FIFA Regulation on Status and Transfer of Players, 2019.
(ii) It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.

(iii) It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, the appointment of a mentor at the club, etc.).

(iv) It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations.

The object of this exception is to provide an alternative career to a football player if his career does not transpire as expected. This concept of ‘dual career’ is essential to FIFA because it acts as a security for the immigrant player from falling prey to socio-economic problems.

The association where the player’s club is registered has the responsibility of carrying out investigations to ensure that the clubs continue to comply by the provisions of Article 19 of the RSTP to ensure the development of the players registered with them.34 This provision cast a responsibility on the Football Association of the country. However, the EU exception has always been subject to immense scrutiny and controversies owing to two reasons. Firstly, it is exclusively favourable to clubs in EU and EEA by giving those clubs a chance to transfer such players which others clubs, competing

against such clubs in various competitions, cannot transfer.\textsuperscript{35} Secondly, this rule is discriminatory on the face of it, against players from a Non-EU or EEA country as he would not receive the same level of protection as players who fall in the said category.

\textbf{The Border Exception:}\textsuperscript{36} Article 19(2) (c) of the RSTP states that -

\begin{quote}
"The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border. The maximum distance between the player’s domicile and the club’s headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent."
\end{quote}

This provision allows the players from a few particular countries to choose the club they would like to play for as the nearest club in their country is often at more distance than a club across the border where the player wishes to play.\textsuperscript{37} This provision is quite easy to implement and negates any possibility of any trafficking happening.

Apart from the exceptions listed down in Article 19(2), a few additional exceptions are also applicable in cases which involve students. According to the CAS, the exceptions listed down in Article 19(2) are ‘not exhaustive’. The additional exceptions are as follows:

\begin{enumerate}[(i)]
\item If the player concerned can establish beyond a reasonable doubt that the reason for his movement to another country was purely academic and not related to football, then the
\end{enumerate}

\begin{thebibliography}{9}
\bibitem{35} Id.
\bibitem{36} Article 19(2) (c), FIFA Regulations on Status and Transfer of Players, 2019.
\bibitem{37} \textit{Supra} note 26.
\end{thebibliography}
International transfer of such a player can be allowed.

(ii) “The international transfer is also allowed in cases in which the Association of origin and the new club of the players concerned have signed an agreement within the scope of a development program for young players under certain strict conditions (agreement on the academic and/or school education in which authorisation granted for a limited period).”

ADDITIONAL SAFEGUARDS PRESENT TO PROTECT MINORS

FIFA’s Transfer Matching System (hereinafter “TMS”) was approved at the 57th FIFA congress in Zurich in 2007. The objectives of enacting this provision are as follows:

(i) To provide all available details of a transaction to football’s governing authorities when an International transfer of a player takes place.

(ii) To increase the transparency in the entire process of a player transfer.

(iii) To detect any discrepancy in a transfer or take notice of a fraudulent transfer.

(iv) To protect the interests of a transferred player and ensure that clubs that trained young players receive their compensation due to the players’ new clubs.

38 FC Midtjylland A/S v. FIFA, CAS 2008/A/1485.
39 Circular Letter No. 1205,FIFA (Sept. 23, 2009).
(v) To modernise the process of player transfers by having in place an online system which replaced the lengthy and error-prone paper contracts and fax machines.

The TMS puts an obligation on football association of the country and club for putting correct information related to a transfer in the system. All member associations of FIFA are required to keep all information related to a transaction like details of the player; clubs; agent; etc., up to date. This information helps the TMS compliance and monitoring team to decide whether the information entered is correct, the legitimacy of transfer and to identify any other potential irregularities.

The TMS requires the clubs to enter the following information regarding a transfer into the system:

(i) The names of the clubs and member associations involved;

(ii) Personal details (Name, Date of Birth, Nationality etc.) of the player being transferred;

(iii) Nature of transfer in question is a permanent transfer, a loan or a trade;

(iv) Details about the financials involved in a transfer like - transfer fees; agent commission; training compensation; payment schedules and other details related to the payment.

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41 Id.
FIFA has tried its best to prove that the above procedure is infallible and the details entered are correct as it requires the clubs involved to upload a series of documents (including the copy of the player’s new contract of employment, the transfer agreement between the clubs, proof of payment etc.) to prove that the information entered are legitimate and authentic. Once the procedural requirements are complied with, the system generates the International Transfer Certificate (ITC) to complete the entire transfer. This system is as opposed to earlier mailing or the faxing of the ITC between clubs.

FIFA Players Status Committee (hereinafter “PSC”) appoints a subcommittee to review the application for the transfer of minor for ensuring that the requirements and paperwork are up to the mark. Recently, the transfer of Manchester City star Jadon Sancho to Borussia Dortmund was held up to ensure that the teaching facility for Sancho was up to the mark. This process clearly shows the importance that FIFA gives to the academic element while deciding on the transfer of a minor. It is only after, subcommittee approves the application for the transfer of minor, a request for the International Transfer Certificate (ITC) can be made.

Article 9 of the FIFA RSTP says “Players registered at one association may only be registered at a new association once the latter has received an International Transfer Certificate (ITC) from the former association. The ITC shall be issued free of charge without any conditions or time limit. Any provisions to the contrary shall be null and void. The association issuing the ITC shall lodge a copy with FIFA.”

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43 Article 9, FIFA Regulation on Status and Transfer of Players, 2019.
Said provision means that the new association cannot register the player in question unless and until the ITC is received. The primary purpose of an ITC is to determine the training compensation payable for players. Earlier the compensation was calculated from the age of 12 to the age of 23 after the player signed his first professional contract. Every professional transfer of the player ends with a season of the player's 23rd birthday. However, effective from 1st March 2015 (the 2015 amendment of the FIFA's RSTP), FIFA has now reduced the age limit for the requirement of an ITC from 12 years to 10 years, and therefore, now, the compensation has to be calculated from the age of 10 to the age of 23.

THE CASE OF FOOTBALL CLUB BARCELONA AND REAL MADRID FOOTBALL CLUB

Real Madrid and Barcelona have presented two of the most critical cases in the field of Article 19, and the sanctions are given to them were exemplary in the sense that two of the biggest clubs were punished strictly. Before going into the cases, it is essential to understand one structural and administrative fact about the Spanish sporting system, i.e., the way Spanish law governs its sporting bodies inside of the state.

According to Article 148 of their constitution and the law of sport (ley 10/1990), Spanish governs its sport through 17 individual regional associations ("Comunidades Autónomas). These associations have territorial competence throughout their region, and they can also license and register players and the registration by these regional bodies is mandatory if the players are to participate in regional competitions. The clubs have to affiliate with their regional associations mandatorily. The players are registered with the national body for football (Real Federación Española de Fútbol) if they wish to play in the national competitions. The clubs and players also have to abide by the rules and regulations of these regional
a). The Barcelona Case {Fútbol Club Barcelona v. Fédération Internationale de Football Association (FIFA)}

The brief facts of the case were that FC Barcelona (FCB) and the national federation, Real Federación Española de Fútbol (RFEF) were investigated for the transfer and registration of 31 players. Post investigation they were subsequently charged for the violation of Article 5, Article 9.1, Article 19 and Article 19bis of RSTP. FIFA Disciplinary Committee formally placed sanctions, and then FCB appealed to the FIFA Appeal Committee. The Appeal Committee dismissed their appeal and forced them to go to the Court of Arbitration for Sport.

On violation of Article 5 of RSTP which talks about mandatory registration to participate in organised football, FCB pleaded that the players were registered with their regional federations of Catalonia as part of Spain's constitutional framework which required that players should only be registered with the national federation if they take part in national competitions. They also claimed that FIFA had accepted these parts of the statutes of the RFEF. To this, FIFA contended that these registrations are insufficient as these regional bodies are not registered with FIFA like RFEF. In the end, they were not found guilty of breaching Article 5 because they could not register directly with the RFEF because of Spanish rules. The

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45 Fútbol Club Barcelona v. FIFA, CAS 2014/A/3793.
panel defined the association under article 5 meant National Associations, associations registered under FIFA and not regional Associations.

On the violation of Article 9, which talks about obtaining an International Transfer Certificate from other associations before the player’s registration, the club stated that children under 12 years of age do not require an International Transfer Certificate. The pleading was helped by a confusion provided by the official commentary for the 2005 regulations where it said that the provision for ITC only exists for children above the age of 12 but also stated that the content of the RSTP does not apply to those under 12 years of age.\textsuperscript{47} CAS said that though the article states that there is no obligation for the request of ITC for children under the age of 12, but that does not mean that they can be transferred as Article 19.1 prevents it.

On violation of Article 19 which talks about the prohibition on the international transfer of minors, CAS found that FCB had breached the regulations and since the clubs can initiate the process of a transfer they must be the ones to observe the ban on the international transfer of minors. Barcelona had not followed the legal safeguards.

On violation of 19bis, which require the clubs to report all minors attending their academies, it was found that just registration with the associations is not enough and that reporting to the national association is an independent task and must be followed. CAS also added that this sanction was procedural and that they do not doubt the quality of the conditions of La Masia, the academy of FCB.\textsuperscript{48}

\textsuperscript{47} Id.

(b). The Real Madrid Case \{Real Madrid Club de Fútbol v. FIFA\}^{49}

When the case of Real Madrid\^{50} came for adjudication came before the sole arbitrator, it mainly had four issues to decide on which are as follows:

(i) \textit{Applicability of Article 19 of the RSTP to minors below the age of 12 years}

(ii) \textit{Difference between reporting and registering minors present in the academies of the clubs under the provisions of Article 19 bis of the RSTP and the registration of such minors with the respective Football associations of the country.}

(iii) \textit{Liability of the Football Associations of the respective countries concerning the compliance with FIFA RSTP’s established regulatory framework and,}

(iv) \textit{Liability of both, the clubs and the respective associations under Article 5 of the RSTP with respect to registration of minors.}

Regarding the applicability of Article 19 of the RSTP to minors below the age of 12 years, the sole arbitrator in Real Madrid’s case was critical of FIFA for its ambiguous rules and failure to provide with a clarification to the respective associations. In fact, before Circular No. 1468\^{51}, there existed no particular rule or law of FIFA, which clearly stated the applicability of Article 19 of the RSTP to players under the age of 12 years. The sole arbitrator, therefore, very rightly, in the authors’ opinion, refused to apply the reasoning of the panel of

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{\textsuperscript{49}} Real Madrid Club de Futbol v. FIFA, CAS 2016/A/4785.

{\textsuperscript{50}} \textit{Id.}

{\textsuperscript{51}} Circular Letter No. 1468, FIFA (Jan. 23, 2015).
arbitrators in the case of FC Barcelona\textsuperscript{52} and thus concluded that Real Madrid had not done anything irregular concerning the provisions of Article 19 of RSTP while registering 4 players below the age of 12 years, with the club.

As far as the second issue is concerned, Real Madrid argued that the registration of the players with the respective regional associations was sufficient to comply with the provisions of Article 19 bis of the RSTP regarding registration as well as reporting of the players. However, the sole arbitrator rejected the club's arguments to conclude that the requirement of reporting the player under Article 19 bis is different from the one of registration of the player under Article 5 of the RSTP and held the club guilty of violating the reporting requirements under Article 19 bis.

When the question of liability of the national football association (Real Federacion Espanola de Futbol or the “RFEF”) with regards to compliance with the regulatory framework in FIFA's RSTP came up before the sole arbitrator, he noted that the RSTP’s goal is to oversee and govern the International transfer of players which, of course, takes place between the national associations of the countries in question. This clearly means that all affairs regarding the transfers and first registrations of minors must remain in the hands of the national associations instead of being delegated to the regional associations, as was the case in Spain.\textsuperscript{53}

About the liability of the club and the respective national association under Article 5 of the RSTP, the sole arbitrator accepted Real Madrid’s argument that registration of the minors with the regional association was acceptable because of the national regulations. This was because the registration of players with the regional association was mandatory for them to play in

\textsuperscript{52} Supra note 38.

\textsuperscript{53} Id.
the regional competitions as such regional associations enjoy exclusive competency under the Spanish law. Secondly, the regional association in the case of Real Madrid had immediately informed the RFEF about the registration of minors by Real Madrid. This act, according to the sole arbitrator, was considered to be sufficient enough to comply with the registration requirements of Article 5 of the RSTP.

CONCLUSION AND SUGGESTIONS

FIFA, as we saw, has been quite active in amending the RSTP provisions through these years to afford more and more protection to minors. Furthermore, it has been an excellent move to keep the law dynamic and up with the time as clubs and academies try to circumvent laws meant to protect the most vulnerable. However, as with every law, loopholes are found out, and the efficiency and intensity of legislation are lessened.

For example, the usual punishment for Article 19 of RSTP has been transfer ban just like we have seen in the cases of Chelsea or Barcelona. But there is a significant time gap between the investigation period and when the judgment is actually made towards a transfer ban. For example, in the case of Chelsea, the investigation allegedly went on for three years as reported by French Website, Mediaparts. So, the considerable gap informally gives

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56 *Chelsea: FIFA allegedly recommends Blues handed two- year transfer ban*
the accused club a reasonable amount of time to sort their transfer business given a looming transfer ban, i.e., register players before the application of the transfer ban. So, in reality, the blow of the transfer ban is not felt as much. While this practice cannot be proved beyond a reasonable doubt, but a safe assumption can be made. Moreover, maybe that is why Chelsea did not wait for the summer transfer window of 2019 to formalise the transfer.\footnote{Roger Gonzalez, \textit{Chelsea Transfer Ban: What does the two window punishment mean for Eden Hazard, Christian Pulisic and more,} CBSS Sports, February 22, 2019 (May 08, 2020, 01:02AM) \url{https://www.cbssports.com/soccer/news/chelsea-transfer-ban-what-does-the-two-window-punishment-mean-for-eden-hazard-christian-pulisic-and-more/}.} A provision should be made with regard to this.

In our opinion, FIFA should make the investigation process and period more transparent. Through that, FIFA could introduce rules that affect transfers made by the club when it is formally investigated. We would suggest that FIFA divides the investigation process into two parts. A preliminary investigation where FIFA just investigates on a prima facie form and when there is a material substance found against a club, proceed to a more advanced form of investigation where FIFA notifies the club in a public manner. During that period, the club in question should not be allowed to make permanent transfers, instead just temporary loan deals amounting to a maximum of a year. Completely disallowing transfers would weaken the club against its competitors, so loan deals allow the club to strengthen, but since it is a loan deal, the club is not allowed to benefit from their possible violations and also deter prospective players from considering a club who do not conform to the established legal standards. This step might make the big clubs much more severe about the regulations regarding minors. Yes, this might seem a bit unfair to the clubs, but Article 19 has been brought

\begin{itemize}
\item \textit{after signing of minors,} BBC, Nov. 15, 2018(May 08, 2020, 01:02 AM) \url{https://www.bbc.com/sport/football/46218627}.
\end{itemize}
in to prevent social evils like child trafficking, the ramifications of which travel beyond the sport. So, FIFA has to take a stern stand.

And FIFA has to impart a stricter form of punishment to the associations. While FIFA fines these associations, like the Football Association in the Chelsea case, 58 there needs to be something more severe. We would suggest that the league be sanctioned with one less spot in the European Competitions, the season succeeding the season when the final order was passed.

Another suggestion that we wish to make is that FIFA should ensure that all the National Associations have similar rules concerning the minimum age at which a club can offer a player a professional contract. Because this is one loophole that clubs have exploited for a very long time like the clubs of England who can offer a professional contract at the age of 17 as against say Spain or Italy where clubs can only offer professional contracts when the players turn 18 years old. 59 This can hurt the league that is selling players as the clubs do not receive enough compensation for a promising player 60 and may resort to more unorthodox methods.

While these suggestions are merely theoretical and the practical effects can never be measured because the kind of legal resources, it would take them very little time to find loopholes within the system if the cases of Real


60 Id.
Madrid or Barcelona or Chelsea are of any reference. However, one thing is for sure that there is a need for stricter regulations. FIFA has to put its foot down and make sure the ethical and the legal standards are always met so that the values of the game are always conserved.

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