

**A GAMBLE OF LAWS: RECONCILING THE CONFLICTING JURISPRUDENCE ON GAMBLING
LAWS IN INDIA**

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ABSTRACT

Gambling and betting aren't uncommon in India. The questions regarding their legality have resurfaced in light of the incumbent government's policy of promoting business on one hand and greater societal control on the other. The Telangana Ordinance & Amendment Bill has not only outlawed gambling and betting on games of pure chance, but also on games of mere skill, which were previously allowed by the Supreme Court. Additionally, the Gujarat High Court in the Dominance Games case declared poker to not be a game of skill. All these incidents have occurred in the backdrop of highly out-dated laws shaping an inconsistent and unstable central policy. This article seeks to address three key questions. First, in the context of the creation of a different conception of mere skill in Telangana Ordinance, than that of Supreme Court; whether such conception has any basis in law and rationality. Second, in the wake of direct conceptual clash between the Supreme Court's decisions and state laws, determining the regulatory and policy issues that need to be settled. Third, in the light of express restriction by state laws, whether protection under Article 19(1)(g) is accorded to betting or gambling on games of mere skill. Through discussion of these three questions, the authors seek to propose an alternate and (in their opinion), a more rational conception of the dominant factor test, evaluate the correctness of regulatory decisions by the state, centre and the judiciary, and its implications.

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I. INTRODUCTION

Gambling is deeply embedded in the roots of India and has prevailed in several forms that can be traced to Indian mythology.¹ Over time it grew in popularity and due to the resultant addiction and bankruptcy of gamblers in society, it came to be considered as a vice which needed to be regulated.² The first such notable regulation, the Public Gambling Act of 1867 was enacted in colonial India.³ It implicitly justified upper class gambling while it outlawed middle class gambling, by permitting betting on gaming (game of mere skill) and not without gaming (game of chance). Such differentiation permitted *elite* gambling on horse racing but restricted several popular card games and other forms of betting commonly practiced by middle class.

After Independence, discretion to regulate gambling was given to states pursuant to List II Entry 34 of the Seventh Schedule.⁴ However, in the absence of a state-specific law, the central Public Gambling Act still continues to govern gambling in some of the states. Discrepancies in regulation of gambling arise out of different state laws or state amendments made to the central Public Gambling Act. For example, states such as Karnataka,⁵ Kerala⁶ and

¹ C. RAJAGOPALACHARI, THE MAHABHARATA (57th ed. 2012).

² LN RANGARAJAN, KAUTILYA - THE ARTHASHASTRA (Penguin Books India 1992).

³ Public Gambling Act, No. 3 of 1867 (1867). [hereinafter PGA].

⁴ INDIAN CONST., List II Entry 34 of Seventh Schedule.

⁵ Karnataka Police Act, No. 4 of 1964, Ch. VII (1964).

⁶ Kerala Gambling Act, No. 20 of 1960 (1960).

Odisha⁷ are governed by respective state laws, while Himachal Pradesh on the other hand, has passed a Public Gambling (Amendment) Act 1976,⁸ making the requisite modifications to the central law according to its needs. While this degree of independence given to the states to customize the gambling laws appears to be a liberal policy adopted by the centre, it raises several questions pertinent to distribution of power, uniform national policy, and whether gambling is a fundamental right.

The Public Gambling Act and the Supreme Court (“SC”) decisions have excluded games of mere skill from the ambit of gambling, through provisions⁹ and decisions¹⁰ respectively. Section 12 of the Public Gaming Act, 1867 states that:

“Act not to apply to certain games: Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played”

However, this exception of “mere skill” is vague and the discrepancies in state regulation are a result of individual interpretations of the exception adopted by states. It leaves the fundamental question of what constitutes gambling¹¹ to be settled through judicial interpretation. The SC for several games, such as Rummy,¹² horse riding,¹³ Bridge¹⁴ and video games¹⁵ has determined the degree of skill. It has adopted the *dominant factor* test borrowed from the United States,¹⁶ (also called the *preponderance* test) to determine a game of skill.¹⁷ A game of skill, according to the SC, is identified through the relative dominance of degree of skill over degree of chance.¹⁸

⁷ The Odisha (Prevention of) Gambling Act, No. 17 of 1955 (1955).

⁸ The Public Gambling (Himachal Pradesh Amendment) Act, No. 30 of 1976 (1976).

⁹ PGA, *supra* note 3, Section 12.

¹⁰ State of Bombay v. RMD Chamarbaugwala, (1957) AIR SC 699 [hereinafter Chamarbaugwala II].

¹¹ While betting has not been specifically mentioned under the Public Gambling Act, gambling is the broader word that has been used to encompass betting. Betting, in the true sense, implies placing stakes on an uncertain future event whereas gambling involves the player staking money on a game in which he himself participates. Since both gambling and betting refer to games of chance, which the Act intends to prohibit, the legislature has not differentiated between them. Both, gambling and betting also fall under the term “wagering”, which is as prohibited by section 30 of the Indian Contract Act, 1872. Wagering is considered as the staking of money on an unforeseen event.

¹² State of Andhra Pradesh v. K. Satyanarayana, (1968) 2 SCR 387, ¶ 12.

¹³ Dr. KR Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226, ¶ 29.

¹⁴ Satyanarayana, *supra* note 12, ¶ 12.

¹⁵ M.J. Sivani v. State of Karnataka, (1995) 3 SCR 329, ¶ 11.

¹⁶ Lakshmanan, *supra* note 13, ¶ 27.

¹⁷ The Sports Law and Policy Centre, *Games of Skill in India: A Proposal for Reform* (Mar. 16, 2017), <https://drive.google.com/file/d/0B6LE5s8UEIKGZXNKNGRnQk94ZEE/view> [hereinafter Sports Law and Policy Centre].

¹⁸ Lakshmanan, *supra* note 13, ¶ 20.

Astoundingly, the promulgation of Telangana State Gaming (Amendment) Ordinance, 2017 (“Telangana Ordinance”)¹⁹ assumed its own interpretation of games of skill and games of chance, placing activities to a standstill in the state. The Ordinance, approved by both the houses, was the first law that took a contrary position to the interpretation of the Supreme Court. Through the Ordinance, the following Explanation to §15, pertaining to exemption of games of mere skill, was added:

“Explanation I: A skill game is a game which is totally based on skill and ability of the person and not otherwise.

Explanation II: Any game which depends partly on skill and partly on luck or chance cannot be termed as skill game.

Explanation III: Rummy is not a skill game as it is involved partly skill and partly luck or chance.”

The Explanation contradicted the SC on two fronts. *Firstly*, according to Explanation I, a game of skill must be entirely based on skill, leaving no room for chance. However, the SC has expressly stated that an element of chance cannot be eliminated even from a game of skill.²⁰ Explanation II excluded mixed games of skill and chance from exemption, even if skill dominates, thereby disregarding the *dominant factor* test in its entirety. *Secondly*, the Ordinance went a step ahead to absolutely clarify that even Rummy, deemed to be a game of skill and expressly allowed by the SC,²¹ was made subject to prohibition by the state gambling laws on account of not being a game of skill. The Ordinance was soon challenged for violating the fundamental right to business²² as it precluded operators and gaming houses from exhibiting games, which despite having an element of chance, required a dominance of skill to play the game.²³

Telangana isn't the only state that has disregarded the SC's decisions. Resting under its shadows, the Karnataka Police Act, 1963 stipulates that games of chance would include mixed

¹⁹ Telangana State Gaming (Amendment) Ordinance, No. 4 of 2017 (2017) [hereinafter Telangana Amendment Ordinance].

²⁰ Lakshmanan, *supra* note 13, ¶ 3.

²¹ Satyanarayana, *supra* note 12, ¶ 12.

²² INDIAN CONST., Article 19(1)(g).

²³ Jay Sayta, *SC to hear challenge to Telangana ordinance, simultaneous hearing to continue in HC*, GLAWS (Sept. 5, 2017), <https://glaws.in/2017/09/05/sc-hear-challenge-telangana-ordinance-simultaneous-hearing-continue-hc/>.

game of skill and chance.²⁴ Thus, even if skill were to be the dominant element in a game, an iota of chance would preclude the game from being exempted.

These laws raise certain questions that deserve to be outlined and analyzed. The article seeks to, *first*, determine if the Telangana Ordinance, the Amendment Bill, the Karnataka Police Act and any other law following a similar definition of mere skill have any basis in law and rationality. *Second*, in the wake of a conflict between a state law and the SC, the article seeks to determine the regulatory and policy issues that need to be settled. *Third*, the article discusses the scope of protection accorded to games with preponderance of skill under fundamental rights, in light of express restrictions by state laws.

II. APPROPRIATENESS OF THE DOMINANT FACTOR TEST

Before we discuss the deviation of the Telangana and Karnataka laws from the *dominant factor* test, it is essential to explore if this test is the appropriate stance for India to determine what constitutes gambling. The dominant factor test is the interpretation provided by the SC of the term “mere skill” found in §12 (exemption clause) of the Public Gambling Act.²⁵ The SC has allowed²⁶ and disallowed²⁷ betting on certain games through interpretation of this clause. The function of the exemption clause has been to make a clear distinction between games of skill and games of chance, in essence, determining gambling. It is determined through the employment of skill by the participants of a particular game. This provision allows states to undertake independent evaluation and set their own criteria to exempt a game from the application of gambling laws.

To determine the degree of skill and chance in any game, it is essential to first understand the interpretation of the words skill and chance. A game of skill is one in which nothing is left to chance and in which superior knowledge and attention or superior strength, ability and practice, gain victory.²⁸ On the other hand, a game determined entirely or in part by draw of lots or mere luck, and in which judgment, practice, skill or adroitness have honestly

²⁴ Karnataka Police Act, No. 4 of 1964, § 2(7) Explanation (ii) (1964).

²⁵ PGA, *supra* note 3, §12.

²⁶ Lakshmanan, *supra* note 13, ¶ 29.

²⁷ Satyanarayana, *supra* note 12, ¶ 12.

²⁸ Rex v. Fortier, (1957) 13 Que 308 (K.B.).

no office at all or are thwarted by chance.²⁹ The SC has interpreted the word ‘mere skill’ extensively and liberally to expand the contours of the exemption clause.

A. *The Common and Favourable Conception of ‘Mere Skill’*

The foundation of the commonly known preponderance test or the dominant factor test was laid in *State of Bombay v. R.M.D. Chamarbaugwala*³⁰ (“Chamarbaugwala II”). The apex court, while deliberating over the Bombay Prize Competition Tax Act,³¹ made a reference to § 2(2) of the Act that dealt with the definition of ‘prize competition’.³² The definition excluded any game that did not substantially depend on exercise of skill. It was thus considered to be of a gambling nature.³³ Therefore any competition game wherein success did not depend to a substantial degree upon the exercise of skill was considered gambling.³⁴ It is pertinent to note that despite being the first case to quantify the requisite degree of skill, there was no reference to the term ‘mere skill’. The case ostensibly never intended to interpret the word in the context of the exemption clause but it was tagged along.

The test of preponderance was specifically applied for the first time in the case of *K. Satyanarayana*.³⁵ Although the Court determined the degree of skill in Rummy, it did so without expansively delving into question. It merely concluded that Rummy, unlike ‘flush’ or ‘brag’, is not a game based on pure chance. Although all card games have a certain element of chance, however those with subdued levels (of chance) would not qualify as gambling. It may be concluded that while the distribution of cards is based on chance, the gameplay and result is derived out of skill. Rummy thus requires a considerable amount of skill and is preponderantly a game of skill, thus laying down the preponderance test.³⁶ Therefore, such a

²⁹ *Ibid.*

³⁰ *Chamarbaugwala II*, *supra* note 11.

³¹ Bombay Prize Competition Tax Act, Bom. XI of 1939 (1939).

³² *Ibid* § 2(2):

"Prize Competition " includes-

(a) crossword prize competition, missing words competition, picture prize competition, number prize competition, or any other competition, for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot;

(b) any competition in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known; and

(c) any other competition success in which does not depend to a substantial degree upon the exercise of skill, but does not include a prize competition contained in a newspaper or periodical printed and published outside the Province of Bombay."

³³ *Coles v. Oldham Press Ltd.* (1936) 1 Que 416 (K.B.).

³⁴ *Chamarbaugwala II*, *supra* note 11, ¶ 17.

³⁵ *Satyanarayana*, *supra* note 12, ¶ 12.

³⁶ *Satyanarayana*, *supra* note 12, ¶ 12.

game would not be considered as gambling. Strangely, the Court also considered extraneous determinants that don't affect gameplay such as profits made by a club from a game to categorize a game as gambling.³⁷ This case in isolation could be deemed insufficient in terms of its jurisprudential value.

The dominant factor test was solidified in the case of *Dr. K.R. Lakshmanan*. The case specifically considered the meaning of 'mere skill' in the backdrop of Madras City Police Act, 1888 and Madras Gaming Act, 1930.³⁸ It sought to determine whether horse riding is saved by the exemption clause. The Court undertook little analysis on its own while it placed heavy reliance on other sources to come to its conclusion. It endorsed the test of preponderance as derived from the *Chamarbaugwala* case and stated that games based on substantial degree of skill are not gambling. It concluded that horseracing is a sport primarily dependent on the special ability of the horse and the jockey acquired by training, therefore is one predominantly based on skill.³⁹ Therefore, the dominant factor test as per these cases merely held that there may be games of skill, chance and mixed games of skill and chance.⁴⁰ Within these three options, games where skill dominated over chance would not be considered gambling and could be played in India as games of 'mere skill'.

B. The Overshadowed and Ignored Game-changing Facets of the Law

The SC, however, added another dimension to the interpretation of 'mere skill' in the *M.J. Sivani*⁴¹ case. While determining the fate of video games in the backdrop of the Mysore Police Act, 1963 (now known as the Karnataka Police Act, 1963),⁴² the Court unambiguously stated that no game could be a game of skill alone.⁴³ It also expressed that when chance preponderated over a game, then it must not be designated as one of mere skill.⁴⁴ It may be inferred from the case that the Court believed that there could be only two categories under gaming; a game of mere chance⁴⁵ or a mixed game of skill and chance.⁴⁶ According to this interpretation, there was no scope for a game of mere skill, as chance would inevitably creep

³⁷ Satyanarayana, *supra* note 12, ¶ 12.

³⁸ Lakshmanan, *supra* note 13, ¶ 2.

³⁹ Lakshmanan, *supra* note 13, ¶ 2.

⁴⁰ Lakshmanan, *supra* note 13, ¶ 3; Satyanarayana, *supra* note 12, ¶ 15.

⁴¹ M.J. Sivani, *supra* note 15, ¶ 3.

⁴² Karnataka Police Act, *supra* note 31.

⁴³ M.J. Sivani, *supra* note 15, ¶ 11.

⁴⁴ M.J. Sivani, *supra* note 15, ¶ 11.

⁴⁵ M.J. Sivani, *supra* note 15, ¶ 9 (refers to Satyanarayana).

⁴⁶ M.J. Sivani, *supra* note 15, ¶ 11.

in. A mixed game of skill and chance was, therefore, merely resting under the garb of mere skill.

This interpretation was radical as it deviated from judgments such as *Lakshmanan*⁴⁷ where the SC had divided games into games of skill (mere skill), mixed games of skill and chance and games of mere chance. While the SC in the *M.J. Sivani* case had taken a novel approach in accounting for the element of luck and risk from strategizing that even games of pure skill (such as chess) possessed, it muddled the boundaries between what the legislatures and even future judicial decisions would continue to term as chance. Post the *M.J. Sivani* case, there began to exist two conceptions of chance, one that was an element of strategizing and stemmed as a result of skill, and the other which consisted of people staking their fortunes on an unknown and uncontrolled element such as the turn of cards. While the former, being a byproduct of skill, should not have been considered within the ambit of chance, the *M.J. Sivani* case mistakenly clubbed it with the latter, fortune-based conception of chance that is used in gambling. This distinction between these two concepts can be observed with the examples of chess and betting on horse racing. Chess is a purely skill-based game, however, there are certain risks and unforeseen events that become a part of the gameplay due to the strategizing of the players. Although the *M.J. Sivani* case presumed this to be an element of chance in chess, it was in actuality the result of a set of purely skill-based events. Further, we may also take the example of betting on horse racing. The game involves a purely skill-based analysis of the method in which the betters analyze the strengths of the jockeys and the horses. However, there may also be element of risk from strategizing, as there is in the game of chess. These risks are unlike the uncertainty that presents itself in the turn of cards, where the element of chance is completely out of the control of the player.

Therefore, the test of preponderance since the *M.J. Sivani* case is unequivocally functioning on the premise that chance is an inseparable element from any game. In the quest for mere application of the test to games to determine their nature, the logical inconsistencies in the test have been left unquestioned. The result of this sudden shift in jurisprudence is that in overanalysing the elements in games of skill and games of chance, the SC has been unable to create a consistent approach for the state assemblies to adopt. While the effect of this confusion has been expanded upon in the subsequent section, recent examples of this conundrum are the Telangana Ordinances which prohibit mixed games of skill and chance and

⁴⁷ *Lakshmanan*, *supra* note 13, ¶ 3.

only permit games of mere skill. Since all games possess an element of chance as per the *M.J. Sivani* case, the Ordinance cannot be practically implemented.

C. Difference Between Judicial Interpretation and State Legislations

Until recently, a principally uniform practice was followed due to a verbatim adoption of the exemption clause as provided under the Public Gambling Act, into state laws.⁴⁸ The states' laws were therefore largely in sync with the central law. However, with growing resentment towards gambling and its (believed) social consequences, certain states have created very stringent laws, directly conflicting with the rationale of the Supreme Court. The Supreme Court has stated that there is no game of skill alone⁴⁹ and a game of mere skill would mean preponderance of skill over chance, i.e. mixed game of skill and chance. In the backdrop of the aforesaid, Telangana and Karnataka laws on gambling consider even mixed game of skill and chance to be gambling.

From the perspective of a purely academic question of what constitutes a game of skill according to the test followed in India, sports and athletic games would also fall within the ambit of mixed game of skill and chance. If we were to apply the test of preponderance to any game under the sun, none of them would satisfy the test as being games of mere skill and would accordingly fall within the ambit of gambling. This position could be deduced by only relying upon the analysis of the Court.

However, the SC has extensively relied on foreign sources to interpret the degree of skill or chance in such games.⁵⁰ It appears that there is a certain anomaly in the content cited in the judgments and what has been inferred out of those. In the same breath, the SC has said that games may be of chance, or of skill or of chance and skill combined, and that the element of chance cannot be eliminated from a game of skill.⁵¹ This goes against the long list of precedents established by the SC.⁵²

Although the *M.J. Sivani* case states that there will always remain an element of uncertainty in any game; in our opinion, it must not be interchangeably used with chance as it

⁴⁸ Sports Law and Policy Centre, *supra* note 17, at 5.

⁴⁹ Lakshmanan, *supra* note 13, ¶ 3.

⁵⁰ Lakshmanan, *supra* note 13, ¶ 7,10.

⁵¹ Lakshmanan, *supra* note 13, ¶ 3.

⁵² Lakshmanan, *supra* note 13, ¶ 3; Satyanarayana, *supra* note 12, ¶ 15.

was done. The *Lakshmanan* test states that the expression ‘mere skill’ would mean preponderance of skill.⁵³ However, if we were to reconcile this meaning of preponderance of skill with the Telangana Ordinances and Karnataka Police Act, it would be more appropriate if the skill was dominating over the element of ‘accident’ and not ‘chance’ in the game. Since, games such as chess and betting on horse racing do not possess an element of chance, the term ‘accident’ could be used to define the element of uncertainty that exists in their gameplay. Then, in that case, the Telangana Ordinances could be practically implemented by accounting for this element of ‘accident’ and permit the playing of video games, chess and betting on horse racing. Therefore, it becomes imperative to understand the difference between ‘accident’ and chance in Indian jurisprudence.

D. Chance v. Accident

The *Lakshmanan* case has implicitly made a distinction between ‘chance’ and ‘accident’ by placing reliance upon foreign judgments. Through its reliance on foreign judgments, it could be demonstrated that a game could be one of mere skill, one of mere chance, or one of mixed game of skill and chance, wherein skill is the dominant factor and one wherein chance is the dominant factor.

Harless v. United States of America, as referred in *Lakshmanan*⁵⁴, states that there exists a wide difference between ‘chance’ and ‘accident’.⁵⁵ While ‘accident’ is the intervention of some unforeseeable circumstance that influences an expected result, chance is an uncalculated effect of mere luck.⁵⁶ A shot discharged at random strikes its object by chance; that which is turned aside from its well-directed aim by some unforeseen circumstances misses its mark by ‘accident’.⁵⁷ The U.K. Court’s interpretation as cited in the case went on to explain the point with an illustration:

“That the fleetest horse sometimes stumbles in the race course and leaves the victory to its more fortunate antagonist is the result of accident, but the gambler, whose

⁵³ *Lakshmanan*, *supra* note 13, ¶ 20.

⁵⁴ *Lakshmanan*, *supra* note 13, ¶ 27.

⁵⁵ *Harless v. United States of America*, 329 F.2d 397 (1843).

⁵⁶ *Ibid*.

⁵⁷ *Ibid*; *Patamata Cultural and Recreational Society v. Commissioner of Police and Ors.*, (2005) (1) ALD 772.

*success depends upon the turn of the cards or the throwing of the dice, trusts his fortune to chance.”*⁵⁸

If this case was to be scrutinized more carefully in the Indian context, the categorical bifurcation would be clear, leaving no room for absurdity or ambiguity and therefore only presenting scope for application of golden rule of interpretation. Hence, there are many games such as sports and athletic events, the results of which are entirely based upon skill, and certain degree of accident; and in those games chance is in no way resorted to therein.⁵⁹

The current test of preponderance in the Indian context seems incomplete and irrational on another footing as well. The test requires the assessment and determination of whether chance or skill ‘is the dominating factor in determining the result of the game’.⁶⁰ To be determined as a game of skill, skill must control the final result of the game and must not just be a part of the larger scheme.⁶¹ The factor that influences the result of the game is the dominant factor. Therefore, according to the Indian conception of the test that does not recognize an element of ‘accident’, despite skill playing a larger role in a game, if chance determines the result of the game then it would be considered a game of chance.

To put this in context, in a game of chess when the skills of two players are pitted against each other, result is procured through domination of one player’s skill over the other player. According to the Indian conception, with each game involving an element of ‘chance’ and not ‘accident’, such loss of the player would be attributed to chance, as the result is uncertain, even though the game was largely governed by skill. However, if the element of ‘chance’ is to be replaced with ‘accident’, the result could be rationally attributed to an accidental move or a series of accidental moves by losing player which led to his loss. Implying that even though he lost due to incorrect moves, his exercise of skill is not subdued by chance. Correspondingly, the winning player’s skill thwarted the losing player’s skill, leading to an element of accidental uncertainty.

In any game, there is a possibility that some oversight or unexpected incident may affect the result and if these incidents are sufficient to make a game in which it may occur, one of

⁵⁸ Lakshmanan, *supra* note 13, ¶ 26.

⁵⁹ Harless, *supra* note 52.

⁶⁰ Sports Law and Policy Centre, *supra* note 17, at 6.

⁶¹ Commonwealth v. Plissner, 295 Mass 457 (1936).

chance, then there is no such thing as a game of skill.⁶² If the test of character of any game is through the element that determines the result of the game,⁶³ then according to the Indian conception there is no game of mere skill.

It might be concluded that two essential elements of the dominant factor test have not been considered by the Indian Courts. In the absence of consideration of the element of ‘accident’, the Courts are paving a path for higher degree of judicial interpretation while compromising upon the desired legislative clarity sought to exist. Additionally, due to non-consideration of element of ‘accident’, the uncertainty in the result of the game would be attributed to ‘chance’. Upon complete adoption of the test of preponderance, if chance determines the result of the game, then a game can never be deemed one of ‘mere skill’. Therefore, there can be no game according to the Indian conception of the test where skill would be the dominant factor. The only solution left is for laws which ban mixed games of skill and chance, to differentiate between the terms ‘chance’ and ‘accident’, such that they permit games of pure skill wherein chance does not play a part but accidents may occur.

III. POLICY ISSUES HAMPERING THE EFFECTIVE REGULATION OF BETTING AND GAMBLING IN INDIA

As briefly mentioned *supra*, there exists a clash over the interpretation of ‘mere skill’ and the resultant categorization thereof, between the SC and state laws. This can be avoided if there is a clearer delineation between the powers of the SC and state legislatures. While the SC has implicitly created two categories- mixed game of skill and chance and game of pure chance; the Telangana Ordinance has created three categories- game of mere skill, mixed game of skill and chance and game of pure chance. On the face of it, there appears to be direct incongruity. However, the state has the power under Article 162 of the Constitution⁶⁴ to legislate on all matters under the State List. An interpretation of mere skill provided by the SC cannot prevent the state from determining which games can be played within its jurisdiction. If it were to be viewed from a strictly legal perspective, there exists no clash. Otherwise, if the SC provides an additional layer of protection, such as the fundamental right of profession and trade to those wishing to host tournaments or parlors for games of ‘mere skill’ as defined by it, the State

⁶² Engel v. State, 53 Ariz 458 (1939).

⁶³ Joker Club v. Hardin, 643 SE2d 626 (NC Ct. App 2007).

⁶⁴ INDIAN CONST.

would then be unable to restrict the definition of mere skill in its legislature (explained in detail later in the Article).

Post-independence, Entry 34, List II of the Seventh Schedule empowered the state government to regulate gambling and betting in their own territory. Soon after, several states came up with their own laws while most adopted the central Public Gambling Act, 1867. While some states sought to take a view largely concurrent with the central policy, some adopted radical policies. Goa, Sikkim and Nagaland have a liberal policy and even promote betting and gambling for purposes such as tourism, but through their laws; Assam⁶⁵, Odisha⁶⁶, Telangana⁶⁷ and Karnataka⁶⁸ have taken a very stringent view towards gambling. Effectively, it is to be kept in mind that the differential policies have different implications on the interpretation of mere skill.

The SC interpreted mere skill in the backdrop of Bombay Lotteries and Prize Competition Control and Tax Act, 1948 in the *Chamarbaugwala* case; Hyderabad Gambling Act, 1974 in *Satyanarayana* case; T.N. Gaming Act, 1930 and Madras City Police Act, 1888 in *Dr. K.R. Lakshmanan* case as well as the Mysore Police Act, 1963 in the *M.J. Sivani* case. None of them have similar features to the new Telangana law. While all of the aforementioned statutes, including the Public Gambling Act, 1867, merely deem mixed game of skill and chance to be gambling at most and exempt mere games of skill, the degree of specificity in terms of describing these terms is missing. The Telangana Ordinance, on the other hand provides for an explanation⁶⁹ attached with the exemption clause. Hence, the Supreme Court has interpreted mere skill in a different context wherein the statutes are unclear about the term. Such interpretation, in a pedantic sense, shall not be applicable to the Telangana Ordinance, thereby technically not allowing a clash.

However, if we were to deal with the substance, there exists a direct conflict between the interpretation of the SC and the Telangana Ordinance. The Explanation in the Telangana Ordinance can be deemed to be the state's interpretation of 'mere skill', vastly differing with the interpretation of the Supreme Court. Such variance presents two issues; the lack of

⁶⁵ The Assam Game and Betting Act, Assam Act XVIII of 1970 (1970).

⁶⁶ The Orissa (Prevention of) Gambling Act, No. 17 of 1955 (1955).

⁶⁷ Telangana Amendment Ordinance, *supra* note 19.

⁶⁸ Karnataka Police Act, No. 4 of 1964 (1964).

⁶⁹ Telangana Amendment Ordinance, *supra* note 19, § 15 Explanation I, II & III.

existence of a clear policy of the country and a split in the regulatory powers governing betting and gambling.

A. Lack of a Clear Policy

In the true spirit of federalism, the Constitution places ‘gambling and betting’ in state list and permits the states to formulate their own policies. The vast powers allow states to regulate gambling and betting for varied purposes such as those in societal interest or generating revenue. While some of the states through their legislations are doing the bare minimum of demarcating a policy, they are not effectively regulating and modernizing the law.

First, India’s position on gambling and betting is unsettled. United Kingdom, which enacted the Public Gambling Act, 1867 in India, has formulated the Gambling Act, 2005.⁷⁰ Through this legislation, it has updated, modernized and settled the position of law within its territory. However, India is federally still being governed by a century old legislation, failing to take into account the modern ways of gambling and betting, such as online gambling. Moreover, decentralization through permitting states to create their own legislations has further muddled the position of law. While going against the SC’s decision and restricting specific games such as Rummy through notification or otherwise is acceptable as it doesn’t amount to challenging a settled position of law, Telangana’s act of giving a new meaning to ‘mere skill’ through the Explanation creates a parallel position of such law. Such differences create unpredictability and do not reasonably enable an entity to regulate its conduct. For instance, the Telangana Ordinance which suddenly outlawed Rummy by explicitly not calling it a game of skill caused certain Rummy websites to file a writ petition before the High Court.⁷¹ While the matter was *sub judice*, Telangana passed the Amendment Bill that deemed even games of skill wherein an unknown result was involved to be wagering.⁷² Such acts of states create an uncomfortable environment for businesses seeking to invest in the country. At least some degree of clarity could be retained by not disturbing a settled position of law, despite the imperfections that may exist in the dominant factor test.

⁷⁰ S.S.Rana, *Clipping The Wings of Gaming: The Telangana State Gaming (Amendment) Ordinance, 2017*, MONDAQ, (Oct. 31, 2017), <http://www.mondaq.com/india/x/641468/Gaming/Clipping+The+Wings+Of+Gaming+The+Telangan+a+State+Gaming+Amendment+Ordinance+2017>.

⁷¹ *Ibid.*

⁷² Telangana Amendment Ordinance, *supra* note 19, § 2(2)(i)(d).

Second, in the wake of a tumultuous debate over the legality of online gambling, betting and similar platforms, the centre and states have failed to satisfactorily establish a policy and act upon it. The archaic gambling laws of various states including the Public Gambling Act, neither preempts the emergence of online gambling websites nor has been amended to accommodate the changes. They still regulate gaming houses. On the state level, only Sikkim⁷³, Nagaland⁷⁴ and Telangana⁷⁵ have shown the foresight to govern online gambling. However, another question regarding the difference in degree of skill exercised in physical gambling and online gambling has arisen. Currently, the principle of functional equivalence applies to states that haven't established laws on online gambling. Through functional equivalence, the general legal frameworks existing offline is extended to online equivalent.⁷⁶

Due to the application of this principle, the same problems harassing physical gambling extend to online gambling websites. Additionally, diversity in state laws makes it increasingly difficult for the country to establish a much-needed uniform basic policy across all the paradigms.

To remedy this situation, the 276th Law Commission Report suggested a delineation of power between the Centre and the State to ensure uniformity in legislation. It advised the Parliament to adopt a model law that would subsequently be adopted by the states.⁷⁷ However, since there have been attempts by states such as Telangana to initially deviate from the definition of games of chance under the central legislation (Public Gambling Act), it does not seem feasible that a model law would be sufficient to ensure uniformity. Alternatively, Articles 249⁷⁸ and 252⁷⁹ provide the Centre power to legislate on matters in List II of the Constitution. Since Article 249 refers to legislation made in national interest that can only be applicable for two years, it would be more feasible for the power to stem from Article 252. Article 252 allows the States to cede their powers under List II to the Centre, however, the legislation made by the Centre would only apply to the consenting states, with the remaining states having a choice to

⁷³ Sikkim Online Gaming (Regulation) Act (2008).

⁷⁴ Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act (2015).

⁷⁵ Telangana Amendment Ordinance, *supra* note 19.

⁷⁶ 9 BERT-JAAP KOOPS, *Should ICT Regulations be Technology-Neutral?*, in *STARTING POINT FOR ICT REGULATION*, DECONSTRUCTING PREVALENT POLICY ONE-LINERS, IT & LAW SERIES, 84 (Koops, Lips, Prins & Schellekens eds. 2006).

⁷⁷ Law Commission of India Report No. 276, *Legal Framework: Gambling and Sports Betting including in Cricket in India* (2018), ¶ 9.8.2. [hereinafter Law Commission Report No. 276].

⁷⁸ INDIAN CONST.

⁷⁹ *Ibid.*

implement it as well.⁸⁰ Further, this new Gambling Act that the Centre would formulate must define the scope of the law, the role and responsibility of Central and State governments, a national structure and supervising authority if needed.⁸¹ This supervising authority may be similar to that of the Gambling Commission of the United Kingdom⁸² which provides licenses to gambling operators and ensures their compliance with rules and regulations. The creation of a Gambling Commission of India to regulate the aforesaid matters can occur as the Centre has the authority to create such a body under Article 263 (b) of the Constitution.⁸³ The Article stipulates that an inter-state council may be formed in the interest of a subject matter which is of national and state interest.⁸⁴ Therefore, creation of a centralized legislation under Article 252 as well as the establishment of the Gambling Commission of India would go a long way in removing the disparities that arise across the state legislations in determining which games can be permitted or prohibited.

B. Split of Regulatory Powers

While the previous section attempted to solve the conflict within state legislations, it did not deal with problems that arise when parliaments or legislative assemblies interpret the court's decisions on what constitutes gambling. The current model of regulation of gambling laws allows the states to determine their own fate. However, due to the lack of foresight by these states and only acting when the need arises, the judiciary is called in times of despair to provide certainty. Due to the lack of a specialized body such as the Gambling Commission in UK⁸⁵, the judiciary in India, through determination of degree of skill, permits certain games to be played. While the judiciary has adjudicated legal questions surrounding games such as Rummy⁸⁶, Bridge⁸⁷, horse riding⁸⁸ and video games⁸⁹, the status of a large number of games is still undetermined. Due to the non-determination of status of several games, they still function in the grey area of gambling, and hence there is no effective regulation of such games unless the Supreme Court determines their status. However, on the other hand, certain states such as

⁸⁰ *Ibid* ¶9.8.2.

⁸¹ *Ibid* at 127.

⁸² UK Gambling Act, *supra* note 63, § 20.

⁸³ INDIAN CONST.

⁸⁴ *Ibid* ¶ 6.3.

⁸⁵ UK Gambling Act, *supra* note 63, § 20.

⁸⁶ Satyanarayana, *supra* note 12, ¶ 12.

⁸⁷ Satyanarayana, *supra* note 12, ¶ 12.

⁸⁸ Lakshmanan, *supra* note 13, ¶ 51.

⁸⁹ M.J. Sivani, *supra* note 15, ¶ 20.

Nagaland through notifications⁹⁰ or explicit mention in their statutes⁹¹ have classified certain games as those of skill according to them. Certain states such as Odisha⁹² have reserved the right to exempt any game from the application of the state law to it. Although such inclusion might still be subject to final judicial interpretation, in the absence of such interpretation it provides certainty and transparency in law. Such proactivity would not only ensure that the states have clearly spelled out their terms of regulation to ensure that the people regulate their conduct accordingly, but it would also reduce the burden of the judiciary. If effectively implemented, the provision could ensure greater freedom of states to regulate gambling and betting matters in their own territory.

Additionally, the current process of deeming a game as that of skill through judicial process, is inefficient as the respective High Court's adjudication is bound to be appealed. If the High Court is to determine the degree of skill in a particular game, the question is not one of law. It is not restricted to the statute in question. It may not be a preferable situation wherein two High Courts have a different idea of degree of skill in a game. Even if it were to happen, such difference would anyway be resolved before the SC, effectively nullifying the High Court's opinion. The opinion might, at the most, come in as an aid to interpret the game. However, it would have very little significance in terms of finality. This could be evinced through the previous cases of *Chamarbaugwala*, *Satyanarayana*, *M.J. Sivani* and *Lakshmanan*, wherein all of them were finally settled by the SC. Even the validity of the Telangana Ordinance and the *Dominance Games Pvt. Ltd.* case, dealing with the aspect of skill in poker, which were recently decided by the Telangana and AP High Court and Gujarat High Court respectively, are speculated to be in the process of being appealed.

Considering that the element of skill in a game must ideally be interpreted uniformly for the country, it's preferable that the apex court determine it, notwithstanding the fact that preemption on part of the state legislature would solidify the division of power.

IV. PROTECTION OF GAMES OF SKILL SUCH AS RUMMY UNDER FUNDAMENTAL RIGHTS IN LIGHT OF THE TELANGANA LAWS

⁹⁰ Government of Nagaland, Directorate of State Lotteries, Kohima, *License for Online Games of Skill: Kohima: License to Bet 365* (Dec. 14, 2016), https://www.khelo365.com/k365_license.pdf.

⁹¹ Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, Schedule (2015).

⁹² The Orissa (Prevention of) Gambling Act, *supra* note 8.

The question of whether betting on games with preponderance of skill is permitted or not, resurfaced with the *Dominance Games*⁹³ case before the Gujarat High Court, dealing with determination of degree of skill in the game of poker. It was contended on behalf of the petitioners that a fundamental right to carry on trade and business exists since poker must not be considered as betting.⁹⁴ While the Court explored the avenue of placing reasonable restrictions upon fundamental rights,⁹⁵ it never got to address this contention as it declared poker to be gambling,⁹⁶ and therefore declared that the question of fundamental rights needn't be discussed. However, a long list of precedents has delved into the question of according protection under fundamental rights to betting and gambling activities.

A. *Gambling and Betting as a Part of Fundamental Rights: Judicial Position*

The foundation was laid down in the cases of *R.M.D Chamarbaugwala v. Union of India*⁹⁷ (“Chamarbaugwala I”) and *R.M.D. Chamarbaugwala II*.⁹⁸ The Court in *Chamarbaugwala I* did not delve into the question of protection of gambling and betting activities under Article 19(1)(g)⁹⁹ as the Respondent had conceded the issue. It however held that gambling is *res extra commercium* and hence, cannot be accorded legal protection under Article 19(1)(g) and 301¹⁰⁰.¹⁰¹ Interestingly, the doctrine of *res extra commercium* was used for the first time in Indian context in *Chamarbaugwala II* and upheld in *Chamarbaugwala I*,¹⁰² and its assent was briefly threatened in *KK Narula v. Jammu & Kashmir*.¹⁰³

The Court in *Chamarbaugwala II* held that gambling constitutes a thing outside of commerce, however it did not expressly adjudicate upon betting. By applying this doctrine, it

⁹³ *Dominance Games Pvt. Ltd. v. State of Gujarat*, C/SCA/6903/2017, ¶ 3 (2017).

⁹⁴ *Ibid* ¶ 11.

⁹⁵ *Ibid* ¶ 70.

⁹⁶ *Ibid* ¶ 75.

⁹⁷ *RMD Chamarbaugwala v. Union of India*, (1957) AIR 628 [hereinafter *Chamarbaugwala I*].

⁹⁸ *Chamarbaugwala II*, *supra* note 11.

⁹⁹ INDIAN CONST.

¹⁰⁰ *Ibid*.

¹⁰¹ *Chamarbaugwala I*, *supra* note 100.

¹⁰² Arvind Datar & Shivprasad Swaminathan, *Police Powers and the Constitution of India: The Inconspicuous Ascent of an Incongruous American Implant*, 28 EMORY INT. L.R. 63, 66 (2014) [hereinafter *Police Powers and the Constitution of India*].

¹⁰³ *Krishna Kumar Narula etc v. The State of Jammu and Kashmir & Ors.*, (1967) AIR SC 1368.

rendered gambling as a constitutional outcast.¹⁰⁴ On the other hand, the Court stated that games involving substantial skill are business activities deserving protection under Art. 19(1)(g).¹⁰⁵

Additionally, it is worth noting that a parallel debate has ensued upon the usage of *res extra commercium* by C.J. Das in *Chamarbaugwala II*. It has been contended that the doctrine of police powers was employed under the garb of *res extra commercium*.¹⁰⁶ Das C.J. in *Chamarbaugwala II* held gambling to not be protected on grounds that it was morally repugnant.¹⁰⁷ On the contrary, *res extra commercium* is a Roman law doctrine¹⁰⁸ that enumerates certain things or artifacts that cannot conceptually be owned and, hence cannot be an object of commerce.¹⁰⁹ Hence, the concept is not purported to apply on the grounds that an activity is morally repugnant,¹¹⁰ and cannot strictly apply on the grounds enumerated under *Chamarbaugwala II*.

While in the *Lakshmanan* case it was contended that horse riding is a game of skill and taking the business of the petitioner would be hit by Article 19(1)(g),¹¹¹ the Court never delved into the question. It stated that the relevant Act violates Article 14 and hence it is not necessary to get into the question of violation of Article 19.¹¹²

The *M.J. Sivani* case did not reiterate the aforementioned cases.¹¹³ It recognized that business or trade in video games is covered under Article 19(1)(g), however it is subject to reasonable restrictions.¹¹⁴ While ascertaining the extent of reasonable restrictions, it maintained a high threshold, thereby permitting a greater number of restrictions to be considered as reasonable. The Court vouched for a balance between social control and right of an individual.¹¹⁵ It went on to say that not only a pure game of chance but also a mixed game of skill and chance would be a game prohibited under the statute except by regulation.¹¹⁶ Such

¹⁰⁴ Ugar Sugar Works Ltd. v. Delhi Administration and Others, (2001) (2) SCR 630, 1447.

¹⁰⁵ Chamarbaugwala I, *supra* note 82, at 5.

¹⁰⁶ Police Powers and the Constitution of India, *supra* note 85, at 93.

¹⁰⁷ Chamarbaugwala I, *supra* note 82, ¶¶ 37, 44-46.

¹⁰⁸ WILLIAM BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 310 (1st ed. 1918).

¹⁰⁹ RUDOLF SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 59 (3rd ed 1907).

¹¹⁰ Arvind Dater, *Privilege, Powers and Res Extra Commercium- Glaring Conceptual Errors*, 21 NAT'L L. SCH. IND. REV. 145, 134-36 (2009).

¹¹¹ Lakshmanan, *supra* note 13, ¶ 44.

¹¹² Lakshmanan, *supra* note 13, ¶ 47.

¹¹³ M.J. Sivani, *supra* note 15.

¹¹⁴ M.J. Sivani, *supra* note 15, ¶ 18.

¹¹⁵ M.J. Sivani, *supra* note 15, ¶ 18.

¹¹⁶ M.J. Sivani, *supra* note 15, ¶ 19.

restrictions in public interest would not be arbitrary or unbridled and therefore not violate Article 19(1)(g).¹¹⁷

Strangely in *Dominance Games*, the Gujarat High Court while taking a stance in favour of social control had declared poker to not be a game of skill, and as a result, not covered within fundamental rights. Thus, it revived the controversial position taken in *Chamarbaugwala II*.

Hence, the Court only accorded protection to mere games of skill under Article 19(1)(g); while the threshold of reasonable restriction under Article 19(6) has been set as very high. While in the past certain contentious position has been taken by borrowing foreign doctrines in the wrong context, the Court has eventually moved around it and taken a position in favour of greater social control. The Court must reconsider its approach on reasonable restrictions under Article 19(6). Restrictions must be seen as aiding the exercise of fundamental rights and hampering the freedom of inter-state trade and commerce.¹¹⁸

B. Gambling and Betting as a Part of Fundamental Rights: Legislative position

The laws on gambling across the country have uniformly prohibited games of chance and in most instances have provided an exemption to mere games of skill. However, the term ‘mixed games of skill and chance’ has recently been subjected to jurisprudential debate. As highlighted *supra*, there is no *de facto* distinction between mere game of skill and mixed games of skill and chance, unless chance preponderates in the latter. Hence, the statutes making such a distinction do not take a clear position in line of the SC’s test of preponderance and resulting interpretation.

One such instance that caused widespread tumult was the formulation of the Ordinances of Telangana. Through the Telangana State Gaming (Amendment) Ordinance, 2017¹¹⁹, the state legislature made changes to the Telangana State Gaming Act, 1974 that it adopted from Andhra Pradesh State Gaming Act, 1974. While amending § 15 i.e. the exemption clause, it added three explanations as given *supra*.¹²⁰ The set of explanations were unlike any other statute in the country. It did not only have consequences upon the academic question of what

¹¹⁷ M.J. Sivani, *supra* note 15, ¶ 19.

¹¹⁸ *Chamarbaugwala II*, *supra* note 11, ¶ 28.

¹¹⁹ Telangana Amendment Ordinance, *supra* note 19.

¹²⁰ Telangana Amendment Ordinance, *supra* note 19.

constitutes a game of skill but it also impacted the question of what kind of games are saved by Article 19(1)(g).

By outlawing mixed games of skill and chance, and expressly deeming Rummy to be a part of it, the law went against the settled interpretation of the SC. While the SC deemed it to be a game, mainly and preponderantly, of skill¹²¹, Explanation III of the Ordinance states that Rummy is a mixed game of skill and chance. The Telangana Ordinance would not be incorrect in logic and according to the conception proposed by the authors in this article, however it is directly conflicting and infringing upon a fundamental right of individuals.

In light of this, certain online Rummy websites filed a petition before the High Court challenging the Ordinance. While it would have made an interesting question of law, however, recently, the Telangana government passed the Telangana Gaming (Amendment) Act, 2017¹²² in anticipation of an adverse decision by the High Court. While on one hand it repealed the exemption clause in its entirety, including the Explanations, on the other hand it included an unprecedented provision.

It amended the definition of wagering and betting to include “any act of risking money, or otherwise on the unknown result of an event including a game of skill”.¹²³ Through this act, betting on each and every game except horse riding, irrespective of the degree of skill involved, shall constitute wagering and accordingly gaming. It is an accepted position of law that every game has certain degree of uncertainty, and although a participant is going to win the game, the exact identity of the participant remains unknown. According to the SC’s conception, such uncertainty is chance (it has been argued that such uncertainty must be attributed to accident). Hence, regardless of any degree of skill exercised, the result would continue to remain uncertain. The Telangana government effectively prohibited betting and wagering on all games, thereby rendering the question of skill or chance irrelevant.

This is an unprecedented situation. The SC has never dealt with such a question. While there has been a change in the language, but the impact remains the same. The position taken through adding Explanations to §15 were incompatible with the Supreme Court’s interpretation and similarly, prohibiting betting on games of skill would also be incompatible

¹²¹ Satyanarayana, *supra* note 12, ¶ 12.

¹²² Telangana Gaming Amendment Bill, *supra* note 112.

¹²³ Telangana Gaming (Amendment) Bill, *supra* note 112, § 2(2) Explanation (i)(d).

with Supreme Court's interpretation in this context. Although the Supreme Court has created an implied difference between wholly uncertain and doubtful result¹²⁴ and a result that can be reasonably predicted, the Amendment Bill makes no such distinction. Even horse racing, allowed by the Amendment Bill, is uncertain in its result.¹²⁵ Hence, the Amendment Bill takes a more stringent position and continues to take an equally anti-gaming position and zero tolerance policy towards gambling as observed through the Amendment Bill's Statement of Objects and Reasons.¹²⁶

The situation is perplexing. On one hand the State has the power to make laws on gambling and betting, and impose reasonable restrictions in pursuance of that, on the other it completely deprives an individual of the right to even play or carry out business on a mere game of skill. Therefore, the question is subjective in nature, and could be reduced to one wherein social control is pitched against individual rights which can only be determined by the judiciary

V. CONCLUSION

Over the past couple of years, India has made significant progress in updating its legislations and making judicial decisions more consistent and predictable. In most sectors, the visible lack of enforcement overshadows adequacy of regulations. However, unlike other sectors, problems arise in the gambling and betting industry out of unwillingness to streamline its regulation. The legal system, in the context of the gambling and betting industry, does not function proactively but in a reactionary manner. The determination to regulate the industry seems largely dependent on societal concerns stemming from political concerns.

While judiciary must not be the authority of first instance when it comes to regulation of the industry, it is made so owing to the legislature's failure to create a law enabling people to regulate their conduct. Gambling and betting are often frowned upon and often meet with adverse reactions when individuals choose to exercise their freedom in light of no express prohibition. This is evinced in the *Dominance Games Pvt. Ltd.* case.

¹²⁴ Lakshmanan, *supra* note 13, ¶3.

¹²⁵ Harless, *supra* note 52.

¹²⁶ Telangana Gaming (Amendment) Bill, Statement of Objects and Reasons states: "The endeavour of the Government of Telangana has been to strictly implement the policy of Zero Tolerance against gambling which has serious impact on the financial status and well being of the common public".

Burdened with heightened responsibility in this regard, the Court also failed to take a conclusive position in its latest string of cases. In *Dominance Games Pvt. Ltd.*, the judgment was laden with apparent absurdity in logic and it was held that all games of skill, when played with stakes, would constitute gambling leading to consequent restrictions under law. Taking the judgment to its logical extreme, even if a game of chess were to be betted upon, it would constitute gambling. In this context, the element of skill in a game is rendered irrelevant in determining the nature of the game under law. The decision was appealed to a division bench almost a year ago however strangely it has failed to reach the Gujarat High Court Board until now.¹²⁷ The Bombay High Court, in the case concerning *Spartan Poker*, verbally observed poker to be a game of chance however simply referred to it as a game of change without any explicit reference in its order.¹²⁸ Meeting with a similar fate, a petition was filed before the Delhi High Court for quashing criminal charges on the grounds of poker being a game of skill under S. 13 of the Delhi Public Gambling Act which initially got deferred only to be withdrawn at a later date.¹²⁹ It is safe to conclude that the approach of various courts towards the determination of nature of poker is murky and it may appear that the courts and parties are playing it safe by avoiding conclusive determination due to the fear of a negative verdict.

From the foregoing, there appears to be a visible lack of foresight. For instance, the central and the state laws, barring not more than a handful, have not been updated and are still meant to govern the conventional ‘common gambling houses’. Technological developments seem to be largely unaccounted for. There are no express provisions under the central law or cases concerning online gambling and betting except *Gaussian Network*¹³⁰ which was withdrawn even before it could reach the high court. There is an alarming lack of regulation or jurisprudence on online gambling and betting, despite its rapid growth in popularity. It continues to be regulated by an extraneous legislation never intended for it.

In a rudimentary sense, there is a need for modernization of laws. Moreover, there is scope for courts to efficiently deal with matters concerning gambling and betting on an immediate basis. *First*, as highlighted in this paper, the courts must reconcile the differences

¹²⁷ Jay Sayta, *Gujarat High Court matter adjourned now heard February 2019*, GLAWS (Dec. 22, 2018) <https://glaws.in/2018/12/22/gujarat-hc-poker-matter-adjourned-now-heard-february-2019/>

¹²⁸ Jay Sayta, *After Dramatic Last Minute intervention by Salman Khan's lawyer, Bombay HC does not mention the word 'poker' in order*, GLAWS (Apr. 3, 2018), <https://glaws.in/2018/04/03/dramatic-last-minute-intervention-salman-khans-lawyer-bombay-hc-not-mention-word-poker-order/>.

¹²⁹ Jay Sayta, *Delhi HC to hear poker petition on 1st November, Gujarat HC on 26th June*, GLAWS (May 2, 2018), <https://glaws.in/2018/05/02/delhi-hc-hear-poker-petition-1st-november-gujarat-hc-26th-june/>.

¹³⁰ *Gaussian Network Pvt Ltd v. Monica Lakhanpal*, (2012) Suti no. 32/2012.

concerning interpretation of game of skill. In our opinion, the courts can significantly clarify their position by laying down a clear test applicable to gambling and betting. By introducing the element of ‘accident’ as argued above, the court may provide for greater judicial precision and certainty. Laying down a conclusive test also may have the effect of reducing the court’s burden. It may avoid the existing status quo wherein courts, which may not be as well-equipped, are approached for determination of the degree of skill in each game individually. *Second*, the uniformity between state legislations can be maintained by the adoption of a model central law which the states may follow. The states may also, under Article 252 of the Constitution of India, empower the center to legislate on matters regarding betting and gambling. Any laws created in this matter would then be applied to those states which had ceded their authority to the center. *Third*, there is a further need for determination of the contours of fundamental right of gambling and betting. The Telangana Ordinance goes against the settled positions of law laid down by the Supreme Court to deem rummy as a game of chance and therefore prohibited. While allowing states to regulate gambling and betting in their own territory must ideally ensure efficiency in regulation, on the other hand, it is currently leading to increasing ambiguity in the wake of apparent clashes in accordance of rights.

On a foundation level, the regulation of gambling and betting appears to be predominantly determined through the lenses of a social control perspective and other such determinants that are completely unrelated with the actual gameplay. Even if prohibition on gambling and betting were to be covered under reasonable restrictions, as a policy concern, it seems to tilt in favor of social control over preferring individual rights which may impact the pro-business position of the incumbent government.

Knowing that the country has been unable to prevent the underground gambling and betting industry from strengthening its roots, regulation in accordance with the recommendations made by the Law Commission of India in its Report seems to be in the country’s and its people’s interest.