

Gaming Law Wrap

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THE TIME FOR A CENTRAL LAW FOR INDIA'S ONLINE GAMING INDUSTRY IS NOW

Over the years, we, at Nishith Desai Associates, have been advocating for a Central law for India's online gaming sector¹. In this article, we discuss recent court rulings on real-money skill games and suggest a way forward for Central law.

BACKGROUND

Under the Indian Constitution, states have the power to legislate on 'betting and gambling'². Thus, the law varies across states. "Skill gaming" is excluded from the applicability of the gambling bans in most Indian states. Some States like Goa allowed licensed brick-and-mortar gaming activities, while some States (such as Meghalaya, Nagaland and Sikkim) have introduced licensing regime to regulate online gaming activity.

The Supreme Court of India, in the case of *RMD Chamarbaugwala & Anr v Union of India & Anr*³, recognized that offering games of skill is a protected activity under the Article 19 (1) (g) Constitution⁴ i.e. freedom to practice any profession, or to carry on any occupation, trade or business. In spite of this judgement, in the recent past some States like Telangana, Andhra Pradesh, Kerala and Karnataka, have sought to prohibit games of skills. However, High Courts of Karnataka⁵, Tamil Nadu⁶ and Kerala⁷, have struck down such amendments to legislations banning online skill gaming as unconstitutional.

While holding that States cannot ban skill gaming, the courts have recognised that there may be some controls on the skill gaming activities. We agree with this proposition for reasons discussed hereafter.

The moot question is whether each State should have separate laws to regulate online gaming? Is it not absurd that for the same gaming portal, the operator will have to comply with multiple State laws? Does this augment ease of doing business in India story?

One other aspect to be noted is that under the Constitution, only the Indian Parliament can make laws having extra-territorial operation (applicability to entities and individuals situated outside India)⁸. Thus, any prohibition or regulation under State laws cannot be enforced against offshore operators.

We examine various aspects that should be considered while evaluating the way forward for the online skill gaming industry in the country. Our proposal is to create a single law for all forms of for-money skill gaming with variations that may be required for different formats.

WHY ONLINE SKILL GAMING SHOULD NOT BE PROHIBITED

Citing issues such as gaming addiction among players, financial loss and suicides, the States of Telangana, Andhra Pradesh, Tamil Nadu, and Karnataka sought to prohibit all real-money gaming activity, (including skill gaming), while the State of Kerala sought to prohibit Rummy when played for stakes. All these legislations were challenged on the ground of they being unconstitutional.

The High Court of Madras⁹ was the first one to strike down the law banning skill gaming.¹⁰ It noted that:

- The complete prohibitions on games of skill were unreasonable, excessive, and manifestly arbitrary, thereby falling afoul of Article 19(1)(g) of the Constitution. The court relied upon the case of *KR Lakshmanan v State of Tamil Nadu & Anr*¹¹ in which the Supreme Court had recognized that games of skill were distinct from games of chance, and were business activities protected under Article 19(1)(g).
- The court held that skilled players had the right to exploit their skills and make a living off their skills, and only reasonable restrictions should be imposed on such right. The ban introduced in the State completely prohibited any opportunity to exercise such skills in respect of online games played for skills. Accordingly, the ban was unreasonable to the extent of being manifestly arbitrary, especially in the background of the Supreme Court's pronouncements, and fell afoul of Section 19(1)(g) of the Constitution.
- The State's legislative competence to enact laws pertaining to 'betting and gambling' under the Constitution was confined to games of chance, as gambling had been judicially interpreted to mean betting or wagering on games of chance. The Court however observed that, "There is little doubt that the State has the authority by virtue of the Constitution to enact a law pertaining to betting and gambling; just as the State has due authority in such regard, inter alia, in respect of public order¹²; sports, entertainments and amusements¹³; and, offences against laws with respect to any of the matters in the State List."

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- The court acknowledged that the object of the ban was to protect the public from gambling and betting, which has the potential to be ruinous. However, the State had failed to justify the need for a total prohibition on even games of skill, apart from anecdotal references to suicides and perception of 'evil' addiction. The State had also failed to provide any scientific or empirical data to justify the need for a complete ban, nor demonstrated why a lesser form of restriction would not suffice. Accordingly, the ban was disproportionate to the object sought to be achieved.

Following this judgement, the Kerala High Court in the case of *Head Digital Works Pvt. Ltd. v State of Kerala & Ors.*¹⁴, struck down a notification¹⁵ seeking to exclude 'online Rummy when played for stakes' (i.e., essentially seeking to ban online Rummy when played for stakes). It noted that:

- The game of Rummy was a game of skill, based on the judgments of the Supreme Court in the Satyanarayana (supra) case and the Lakshmanan Case (supra), and accordingly even 'online Rummy' was a game of skill.
- Skill in playing a game was not in any manner dependent on stakes. Playing for stakes or not playing for stakes was not a criterion to determine if a game is a game of skill.
- The notification was arbitrary, illegal and in violation of Articles 14 and Article 19(1)(g) of the Constitution of India.
- The notification had the effect of a complete prohibition of online Rummy played for stakes, and was not a reasonable restriction under Article 19(6) of the Constitution.

The High Court of Karnataka¹⁶ also struck down certain provisions of law banning skill gaming. The court noted that:

- The State's legislative competence to enact laws on 'betting' and 'gambling' had to be read conjunctively to mean only betting on gambling activities, and not skill gaming.
- The State also does not have the legislative competence to legislate on games of skill under the entries of 'public order' and 'police,' as games of skill have been judicially held to be business activities protected under Article 19(1)(g) of the Constitution. However, States may regulate games of skill under **'trade and commerce.'**¹⁷
- It observed that playing games and sports of skill is a facet of the right to freedom of speech and expression, as well as the right to life and personal liberty under Articles 19 (1) (a) and 21 of the Constitution, respectively.
- Interestingly, the court also observed that under the Directive Principles of State Policy of the Constitution¹⁸, there is a prohibition on items such as liquors and injurious drugs, and on cow slaughter, however *there is no express or implied prohibition in respect of gambling*. Accordingly, the court appears to suggest that even the makers of the Constitution did not seek to prohibit gaming activities.
- Being constitutionally protected activities, only 'reasonable restrictions' on the right to offer and participate in online skill gaming may be imposed, on certain limited grounds under the Constitution (which *inter alia* include public order, morality, *et al*).
- The restrictions sought to be imposed by the State in completely banning games of skill were excessive and amounted to paternalism, and the State had not demonstrated that it had considered less restrictive means, such as the feasibility of regulating games of skill. The court observed that the State had not constituted any Expert Committee to undertake a scientific study and conduct empirical research as to the arguable ill-effects of online games specific to the socio-economic and cultural conditions in the State.

TAKEAWAYS FROM THE HIGH COURT ORDERS:

- Skill gaming cannot be banned but may be regulated. Any such ban can be challenged on the grounds of violation of constitutional rights;
- States may have the power to regulate the same under following entries:
 - o Trade and Commerce¹⁹
 - o Entertainments and Amusements²⁰

While State may have the power under the above entries of the Constitution to regulate skill gaming, for reasons stated above, the time has come to have a Central law in the country. We have analysed the Constitutional tools through which a Central law could be introduced in the country hereinafter.

We also examined whether any provisions under the Information Technology Act, 2000 could be invoked for the purpose of Central law. However, there are no enabling provisions under which a robust gaming law regime can be established that has enough teeth.

Further, the blocking provisions under Section 69 A of the IT Act can be invoked on limited grounds and under 79 of the IT Act the blocking is possible only pursuant to a court order or order of a governmental authority on specific grounds.

HOW TO ENACT A UNIFORM CENTRAL LAW?

It may appear politically incorrect for any government to actively legislate for regulating skill gaming. There may be several protests. However, there does not appear to be any choice left any more. Courts have made it clear that skill gaming cannot be banned. For reasons stated above, there is an urgent need to regulate skill gaming and control illegal activities. State laws are not effective nor desirable for reasons stated above. We discuss below, different Constitutional provisions through which the Parliament can enact a Central law for the online skill gaming industry. Physical gambling activities in casinos and gaming parlours could be continued to be regulated by the State.

1. Existing Powers of Central Government

The Centre may derive power to enact a law on online skill gaming under the following powers under List I (the Union List):

- Under entry no. 31, **"posts and telegraphs; telephones, wireless, broadcasting and other like forms of**

communication.” As per the Report by the Law Commission of India on “*Legal Framework: Gambling and Sports Betting Including in Cricket in India*”, (“**Law Commission Report**”) since online betting and gambling are offered and played over media covered under this entry, the Parliament has the legislative competence to enact a law dealing with the same.

- Under entry no. 42, “*inter-State trade and commerce*”. Recently, the High Court of Karnataka²¹ and Madras²² recognized that the power to regulate games of skill lies with the State legislature under Entry 26, List II, i.e., trade and commerce. If that is the case, it can be argued that online gaming activities, which take place pan-India and across various States (as an operator and a player may be in different States), amount to ‘*inter-State trade and commerce*,’ and Parliament may hence derive legislative competence to enact a law dealing with such activities.

2. Resolution under Article 252

Article 252 of the Constitution of India allows two or more States to approach the Parliament to enact laws regulating matters where the Parliament does not have the power to make laws for the States. If two or more states invoke the process under Article 252, the Parliament can enact a law for regulating online skill gaming, which may consequently be adopted by States.

The Prize Competitions Act, 1955 (“**PCA**”) is a prime example of this process. While the subject matter of the PCA (gambling) fell under the State List, the States of Andhra, Bombay (Maharashtra), Madras (Tamil Nadu), Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat (Madhya Pradesh), Patiala and East Punjab States Union (Punjab) and Saurashtra (Gujarat) passed resolutions under Article 252(1) to empower the Parliament to legislate on the topic of prize competitions. Subsequently, states such as Rajasthan and Karnataka adopted the PCA as well.

Interestingly, the Rajya Sabha debates explain that there was considerable difference in opinion between the different states regarding regulation for prize competitions. While a few states were in favour of a complete ban of prize competitions, other states did not wish for the Centre to step in at all. However, there appeared to be a large measure of agreement that instead of an outright ban, the solution was to regulate and introduce a licensing regime for prize competitions, which was achieved through the PCA. A similar approach i.e. of state wise licensing regime under state rules which are framed under central law, could be considered for online skill gaming as well.

3. Resolution under Article 249

Article 249 of the Constitution provides for a procedure whereby the Parliament may assume legislative authority over a subject in the State List if it has become a subject of ‘national interest’²³. A resolution would need to be passed by the Rajya Sabha (2/3rd majority) in order for this procedure to be invoked. Law Commission Report had also suggested this mechanism as a means through which a federal law may be enacted, and noted that several stakeholders had cited huge amount of Indian money being siphoned off to foreign countries while participating in foreign gambling websites as sufficient national interest to enact such law. A central law would help in bringing clarity on how online skill gaming platforms should function in India under a licensing regime. This will help the Government also keep track of transactions on gaming platforms and tax these platforms and players accordingly.

WHAT ELEMENTS OUGHT TO BE COVERED UNDER THE CENTRAL LAW

Some of the salient features of the Central law for online skill gaming could be:

- a. A central licensing regime with an independent regulator can be set up who will grant license to operate or simply register eligible operators.
- b. Providing clarity and uniformity in the meaning, definition and scope of games of skill, games of chance, casual games and the like and identify permissible activities and conditionalities for the same.
- c. Mechanism to ensure discontinuation of unlawful apps and websites through blocking orders and the like.
- d. The central law should have extra-territorial effect i.e. also applicable to foreign operators offering online skill games in India.
- e. Provide guidance on due diligence mechanism such as responsible play policies, transparency, KYC Norms, privacy and security as per applicable laws.
- f. Mechanism to ensure secure and tamper proof gaming platforms and technical audit requirements.
- g. Escrow mechanism for protection of player funds.
- h. Protection of children and age verification mechanisms.
- i. Maintenance of transaction details for transparency.
- j. Player protection mechanisms such as
 - ‘Time out’/self-exclusion facilities ensuring that online games are not played continuously, and limits on deposits that can be made during a certain time period.
 - Imposing of an upper cap on user transactions within a specified period (a month, half a year, or a year) where real money is involved.
 - Appointment of counsellors for players to support mental health.
- k. Ensuring that the content of gaming advertisements is appropriate and in compliance with the Advertising Standard Council of India’s *Guidelines on Online Gaming*²⁴.
- l. Grievance Redressal Mechanism: Ensure setting up of robust, three-tier grievance redressal mechanism as follows:
 - Tier 1: Industry operator

- Tier 2: Self-regulatory organisation
 - Tier 3: Gaming Commission: This shall act as an appellate/adjudicatory authority.
- i. Co-Regulation: There may be a co-regulatory approach between the Central Government and self-regulatory bodies, similar to how OTT (over the top) platforms are regulated under Part III of the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*. The
- ii. Amendments to other regulations:
- there is a need to bring in clarity on the issue of taxation, both for tax deducted at source (TDS) with respect to income by way of winnings and goods and services tax (GST) on the operator's commission;
 - Strengthening the Prevention of Money Laundering Act, 2002 e.g. by bringing betting and gambling as a part of scheduled offences;
 - Reserve Bank of India to provide guidance to Banks and payment system providers to provide for due diligence requirements and reporting of suspicious transactions.

The suggestions made by Niti Ayog in their report on "Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India"²⁵ should also be taken into consideration for creation of a uniform national law. These suggestions, although made for online fantasy sports industry, should be considered in relation to other online skill gaming formats as well.

There will be an outstanding question about which ministry will have the power to regulate online skill gaming. Once this decision is made, the allocation of business rules²⁶ will have to be amended to give specific power to regulate online skill gaming to the relevant ministry.

Gaming industry has many offerings, including social gaming, casual gaming etc. In this article, we have focused on for-money online skill gaming. The Central law may also include relevant guidelines for other online gaming formats, only to the extent controls need to be established e.g. age rating and age gating.

We believe that a Central law covering the above aspects will be very helpful for the future of online skill gaming industry in India. A clear and well-regulated regime will also attract more foreign direct investment. In addition to giving this sector a boost, it will also bring in transparency and operator accountability towards Indian laws. It will also help consumers to enjoy gaming in a responsible, transparent and safe environment with regulatory oversight.

– Tanisha Khanna, Aarushi Jain & Gowree Gokhale

You can direct your queries or comments to the authors

¹ *Central Law for Skill Games: Need of the Hour*, Gokhale and Khanna: *Skill Games in India* [2019] 8 GLR, available: <https://www.liebertpub.com/doi/10.1089/glr.2019.2382>,

² Entry 34, List II, Constitution of India

³ [1957] 1 SCR 930

⁴ Article 19(1)(g) of the Constitution of India, *RMD Chamarbaugwala & Anr v Union of India & Anr*, [1957] 1 SCR 930

⁵ *All India Gaming Federation vs The State of Karnataka & Ors*, WP 18703/2021

⁶ <https://www.nishithdesai.com/SectionCategory/33/Research-and-Articles/12/45/FEMAHotline/4771/1.html>

⁷ *Head Digital Works Pvt. Ltd. v State of Kerala & Ors*, WP (C) No. 7785/2021

⁸ 245. Extent of laws made by Parliament and by the Legislatures of States (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation

⁹ *Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors*, WP Nos.18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021, Refer to NDA's Hotline available at: <https://www.nishithdesai.com/SectionCategory/33/Research-and-Articles/12/45/FEMAHotline/4771/1.html>

¹⁰ The Tamil Nadu government has appealed against the Madras High Court order which is pending before the Supreme Court, available at: <https://www.timesnownews.com/business-economy/industry/karnataka-hc-allows-betting-on-online-games-of-skill-terms-states-ban-as-unconstitutional-article-89567142>

¹¹ 1996 AIR 1153

¹² Entry 1, List II, Constitution of India

¹³ Entry 33, List II, Constitution of India

¹⁴ Supra note 7

¹⁵ G.O (P) No.26/2021/HOME, Government of Kerala

¹⁶ Supra note 5

¹⁷ Entry 26, List II, Constitution of India

¹⁸ The Directive Principles of State Policy under the Constitution of India, prescribe principles for State Governments to follow, that are considered fundamental to the governance of the country),

¹⁹ As discussed in case laws mentioned in supra notes 5 and 6

²⁰ Supra note 9

²¹ Supra note 5

²² Supra note 6

²³ 249. Power of Parliament to legislate with respect to a matter in the State List in the national interest (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force (2) A resolution passed under clause (1) shall remain

in force for such period not exceeding one year as may be specified therein: Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force (3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period

²⁴ <https://mib.gov.in/sites/default/files/Advisory.pdf>

²⁵ Fantasy Sports_Insides (niti.gov.in)

²⁶ <https://cabsec.gov.in/allocationofbusinessrules/completeaobrules/>

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