

REGULARIZATION OF INDIAN GAMBLING LAWS BY MR. AVINASH SINGH *

Introduction

True luck consists not in holding the best of the cards at the table; luckiest he who knows just when to rise and go home.

--- [John Ray (1627-1705)]

Gambling is one of the best known practices we ever had in our history as it has rather been a question of legality than a topic of having mythological relevance which witnessed its presence in ancient Indian epics. Today known gambling was also played during the time of 'Mahabharata' period wherein the greatest war in India history took place due to a game of dice. So it is undeniable fact in Indian scenario that the practice of gambling was prevalent Indian society and therefore the question arises to its restraint in India of which answer can be traced back in a pre-Independence statute known as The Public Gambling Act, 1867 (hereinafter called as Act of 1867). This Act of 1867 made punishment for public gambling and keeping common gambling houses.¹ Although many of these provisions of this Act of 1867 are used to be just a nuisance creating provisions which can be easily used prejudicially against innocent people and even this act gives some overwhelming power to police enter into place by making it an cognizable offence. As the Act of 1867 is founded in pre-independence era and therefore its founder's intention must be kept into mind while interpreting this act and its consequences in any form. Now as the act is being made in colonial period of Britain and therefore concerned laws of UK needs to be referenced. There was a gaming act of 1845 of which objective was to discourage gambling and gaming activities in UK and consequently the Act of 1867 introduced into India. We can find objective and material similarities in both the act of UK and India as both were restricting the gaming industries in their society. But meanwhile an astonishing was figured out which revealed that United Kingdom has changed gambling policy by way of a Gambling Act of 2005.

This new and more comprehensive text regarding regularization of gambling laws have made this practice of gambling as legal in UK with keeping a strict licensing policy for same that can be easily traced from the Gambling Act of 2005. The further part of paper will have an comparative study on both the act whereby the constructive value of the regularization of gambling will be focused for India and its economical development. There are three ways to curb a problem if relative views are present about a topic. The first one is to give air to libertarian or egalitarian views which have greater chance of being misused by beneficiaries, the second give rise to restrictive approach wherein a condition of blanket ban can be imposed which is condemned in a democratic setup and the third one is regularisation of subject matter that must a balanced with keeping in mind of the rights and freedom of people.

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¹The Public Gambling Act 1867, preamble

To solve the problem of gambling as an offence, the third approach seems to be more feathered approach than the other ones.

Morality forms a base of majority of laws in most of the democratic system that may be either express or implied presence in making of those laws and therefore an moral approach should also be considered while making any opinion about the gambling because compatibility of society's demand is mainframe objective of any law to be introduced. Therefore Chapter II of current paper discusses about the moral view point of legalising gambling in sports industry of India and makes recommendable reference that proves the efficacy of gambling in Indian sport industry.

Judiciary as an inseparable part of Indian machinery has also pronounced some landmark judgments that added much to gambling jurisprudence wherein the most favouring was to differentiate the act of skill separate from act of chance and therefore exempting it from the preview of Act of 1867. Thus these entire judicial pronouncement bears a relevance while discussing right of gambling with its relation to other fundamental rights that is encountered in Chapter IV of the paper. At last chapter V ends with concluding remarks that have recommends stringent steps to draw new sketch of gambling laws of which legalization would have an inclusive benefit of both people as well as government. These solutions in the present scenario seem to be fully attuned and compatible with legal structure of India.

1- Indian constitutional support for amending and regularizing gambling Laws

The present paper focuses on acceptance and regularization of gambling laws within the moral and legal conception of country. According to Black's Law Dictionary meaning of gambling is give as 'the Act of practicing or following game of chance and skill with the expectation and purpose of thereby winning money or other property.'² Gambling includes basically three types of acts that can be classified into gaming, betting and lottery as per English laws and our main concern is on the gaming laws that need to be addressed in the present paper. Now when these gambling laws if legalized in sport industry will act to make some of the crimes put to end but still some major problems like match fixing and others will not be constrained as they have no relation with the actual gambling and therefore they will continue to be in action for which the new legislation have to address this problem while legalizing gambling in India. Gambling (legal and illegal) amounts to around 3.5% of India's total GDP³ and hence to legalize this act of gambling with a proper regulation will not only benefit the traders and generate employment opportunities but also increase the capital generation in form of taxes levied on the transaction of gambling. Leaving Indian market, the rest of international scenario is full pathbreaking ideas to bring a revolutionary change in the

² Blacks Law Dictionary (2nd Edition), P. 534

³ Jay Satya, ' Legality of poker and other games of skill: a critical analysis of India's gaming laws' (2012) 5 NUJS L. Rev. 93,94

gambling market⁴. India needs time for reaching to that goal and bring it to the international market if it legalizes the gambling in present.

So as to make the gambling legalize in India, first of all we have to check the current status of gambling laws India and its connecting statues in different states, thereafter we have to try the pith and substance test over the subject matter that is gambling and try to find out the ability of state and centre government to make relevant laws thereto. And thereafter filtering different constitutional and statutory provisions we can come onto to a reasonable belief that laws regarding the gambling can easily exist in Indian without having any malice in formation.

The Public Gambling Act of 1867 prohibits all the gambling activities which are held in public place in addition to prohibiting charge of any common gaming house. Section 1 of the public Gambling Act, 1867 defined common gaming house as – “any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place or otherwise howsoever.” Today the gambling industry have undergone a very modernizing change wherein new instruments and machines have replaced the old one and therefore the Act of 1867 has widen interpretation of ‘other instruments of gaming’ used in section 1 of the act for its application in present day scenario and therefore this 167 year old law have tendency to cover new forms of gambling. This central act of 1867 have been referred identically by many states leaving exception to Goa, Daman and Diu and Sikkim who have legislated their own legislations astonishingly legalizing the act of gambling in their region. While Goa, Daman and Diu have legalized gambling in 1976⁵ and Sikkim have also notified certain palaces for permitting to open gambling houses for purpose of gambling⁶. These changes in country have meaningful toward harmonizing legal sanctioning of act of gambling in all over country.

Now there are two main features that appears from constitution regarding power to legislate on various aspects of gambling. In seventh schedule that differentiate various subjects for legislating purpose of centre, state or both find presence of gambling betting and lotteries therein. Entry 40 of List I that is Union list makes lotteries in the ambit of legislating power of union government even if they are organized by government of Indian or other Government of state and therefore the states are devoid of power in making provisions of lotteries. The reason behind inclusion of lotteries as the subject matter to union legislation could be because of popularity of lotteries in India as a source of simple gambling. Even lotteries are used to funding many structures like jail, college etc. and for various other

⁴ Steven D. Levitt, ‘How do markets function? An empirical analysis of gambling on the national football league’ (2002) NATIONAL BUREAU OF ECONOMIC RESEARCH Working Paper, , <<http://www.nber.org/papers/w9422>>, accessed 12 January, 2014

⁵ The Goa, Daman and Diu Public Gambling Act 1976,

⁶The Sikkim Regulation of Gambling (Amendment) Act, 2005, Paragraph 3
<[http://districtcourtsnamchi.nic.in/laws/gambling%20act%20\(amended\).pdf](http://districtcourtsnamchi.nic.in/laws/gambling%20act%20(amended).pdf)> accessed on 16th January, 2014

purposes.⁷ Moreover it was an instrument to earn revenue for state⁸ that made union to keep the legislating power as schedule it in List I of schedule 7 to Constitution of India.

The main benefit and the enabling provision that empowers state to make laws on gambling and betting derives out of Entry 34 of List II of schedule 7 to constitution of India wherein subject matters are enumerated on whom the exclusive jurisdiction lies to State to legislate on particular matter. This provision can be easily exhausted by all the states to make provision regarding legalization of gambling in their state in accordance with the restrictions thereto. In this way it is contended that legalization of gambling lies within the state of which benefit can be taking by particular state by amending or limiting scope of gambling in accordance with the local customs but conditioned that fundamental structure of all these legislations regarding gambling will have to remain same for proper regularization of the gambling laws in country.

Comparative analysis of UK and Indian Laws regarding gambling

India is following a law that is around 167 year old named as The Public Gambling Act of 1867 for purpose of determining illegality regarding gambling purpose. Now this act have been reference from the colonial British notion of illegality for gambling in that era. However, when UK have re-planned and emerged new law regarding gambling in their country should outcome an new plan in India also because the jurisprudence which was set up by the Britain in 1867 is itself countered by himself in 2005 by evolving a new law named as Gambling Act, 2005. Simple logic regarding demand for regularization and legalization of gambling in India is based on the concern that when Indian was blindly following the laws made by britishers till now ignoring society demands should continue to follow the changes in principles of the same genesis. And therefore the need of the time and logic produces insisting need of legalization of gambling in India. Basically, Indian anti-gambling law i.e. The Public Gambling Act of 1867 is a very small piece of legislation onto which two major offences are considered in which the first offence relates to keeping, owning or having in charge of gaming house and the second one relates to person found in gaming house upon which fine of Rs. 200 and Rs.100 is prescribed respectively and also an imprisonment not exceeding there months and one month is prescribed.⁹ The major drawback can be found in section 4 wherein it is stated that- ‘...any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming.’ That empowers the police to arrest each and every person without finding the relevant material facts in which the probability of harm to innocent increases.

Section 12 of the act which reads as- ‘ Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played’ is the main protection clause which protects acts on whose result is based on the skill of person and therefore is exempted from being counted as offence in this act. Although when a game of skill and chance mixes creates an nostalgia to determine the real nature of game and in

⁷ Gerald Willmann, ‘The History of Lotteries’ (1999) , Department of Economics, Stanford University Research Paper, <<http://willmann.com/~gerald/history.pdf> > accessed on 17 January, 2014

⁸ Ibid, p.22

⁹ The Public Gambling Act 1867, Section 3, Section 4

absence of such provision police uses it in favour to arrest people under this act. Therefore it was proved that the act is not only illegal per se but also have many illegalities inside of which misuse can be easily done by concerned authorities.

Now looking towards the new gambling policy of UK which can clear a path to be sworn by India by giving us some very precise piece of provisions wherein the interest of state and its people are equivocally addressed.

Gambling Act is made for three objective that find's their place in section 1 of that act that reads as- 'In this Act a reference to the licensing objectives is a reference to the objectives of—

- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
- (b) ensuring that gambling is conducted in a fair and open way, and
- (c) protecting children and other vulnerable persons from being harmed or exploited by gambling”

Therefore the whole basis of the act is to consider these three major principles while acting under this act. Gambling Act, 2005 setup's a gambling commission to control day to day functioning of matters regarding gambling enumerate in act. Section 20 of the said act incorporates gambling commission in the country¹⁰. In section 24 of the act provided code of practice that ensure the arrangement by the service provider of the gambling facility that is also based on the main objective principles adding to provision regarding availability of assistance to persons who are or may be affected by problems related to gambling.¹¹

In the Gambling Act, 2005, gambling is divided in three parts¹² namely gaming, betting and lottery wherein the different provisions govern the separately in the Act. Gaming is defines as playing a game of chance¹³ wherein playing a game of chance include a game in which chance and skill is involved¹⁴ or chance can be eliminated by superlative skill¹⁵ or a game where chance is only present but exclude all the games which are known as sport.¹⁶ Betting is defined as the accepting bet on some outcome of an event or likelihood occurrence or presence of something.¹⁷ The provisions regarding lottery are similar to that of Indian scenario

¹⁰ Gambling Act 2005, Section 20(1)

¹¹ Gambling Act 2005, Section 24(2)(c)

¹² Gambling Act 2005, Section 3

¹³ Gambling Act 2005, Section 6(1)

¹⁴ Gambling Act 2005, Section 6(2)(a)

¹⁵ Gambling Act 2005, Section 6(2)(b)

¹⁶ Gambling Act 2005, Section 6(2)(c)

¹⁷ Gambling Act 2005, Section 9

but UK legislation was able to solve the complexity involved in it. In UK lottery is also being played for on national Basis that has being exempted from the ambit of gambling under Gambling Act, 2005.¹⁸ Although rest of the arrangements will be considered as lottery¹⁹ and hence covered by Gambling act, 2005 as definition in Section 3(c) involves lottery as part of gambling. The act is a complete piece of legislation as it does not only regularize the act of gambling but also makes punitive provisions in case of refuting provisions of the Gambling Act, 2005.²⁰

Now this structure of gambling law being settled in UK can be reference while making national policy for gambling in India involving some modern aspects such as online gambling which has already mushroomed in the India. As there is no specific policy which can restrict Indian users to invest money in international websites such as Bet365²¹ which takes bet from Indian transacting into Indian Rupees and hence opening new doors to gamblers for investing in other countries economy when there is an option to invest the same in Indian as well. Therefore the legislation of UK have to strictly referenced by the Indian authorities while making gambling laws in India while taking into concern of the general societal restrictions and hence formulating a perfect piece of legislation for Indian scenario.

Moral and economical sanction to gambling

Moral side of Gambling is far appealing than the legal side as in legality, gambling is often connected with crime but in moral and economical debate the only matter of apprehension lies on answer two fact. First is regarding the acceptance of gambling in Indian society and second one is economical benefit that society and country as a whole will gain after legalizing gambling in India.

(i)Moral viewpoint

To start with the moral vies point, it was in starting showed that society has accepted the game of Dice which is a form of gambling in present days also and a complete restriction on any act of gambling is not possible. The act of gambling will be still be continued as a large section of society is still involve in gambling activity and therefore the main observation which comes out from the moral view point is to legalize the act of gambling as it doesn't harm society as whole unlike other crimes. Utilitarian principle of Bentham classifies an act which satisfies the maximum number of people should be approached and adopted. The act of gambling must not involve any criminal elements into it as would surely attracts the criminal law into motion but individually the punishment for gambling should be made in civil nature after legalizing it. Therefore the moral view point comes out in form that gambling should be first legalized and after that the liability which arises in default of gambling exercise should be of civil nature. So morality speaks up when an innocent plays a

¹⁸ Gambling Act 2005, Section 15(1)

¹⁹ Gambling Act 2005, Section 14

²⁰ Gambling Act 2005, Part three (general offences)

²¹ Richard Huchinson, 'Which bookmakers take bets from India' (Indiabet, 10 April, 2007)

<<http://www.indiabet.com/indian-betting/433021/which-bookmakers-take-bets-from-india>> accessed 17 January, 2014

game of chance with having some involvement of money as a prize which should be granted to the person when chance goes in his/her favour. Therefore when countries on global level have accepted the notion of gambling in their respective state should also move Indian into direction to legalizing gambling. Morality forms base of law and since an activity being practiced by state and supported by people needs to be regularized rather putting an blanket ban on same.

(ii)Economic viewpoint

Gambling that counts for 3.5% of Gross Domestic Production (legal+illegal)²² will doubtlessly makes a reason to think over the profits and benefits that can be raised by legalizing and licensing gambling. Gambling market have a great potential in coming future and as the growth rate and standard of living is getting higher demands for new amenities of which gambling have a better future ahead. Gambling will not only make profits to the government in tax generation but will also provide employment to a varied group of individuals. Studies have shown that even sometimes the share market is used a gambling spot for individuals²³ as many a time it is impossible to ascertain the fluctuation in stock prices. Also the problem that was being traced out in the previous chapter is much of economic relevance as when the international gambling sites uses Indian money for gambling purpose will be an investment in the economy of respective state where the website is based rather than India. Also there are cyber security issues in which an Indian customer may be trapped like forgery or other illegal activities but the aggrieved person may not redress the problem as gambling is itself an illegal act in India and in this way a two way trapping is encountered by the person aggrieved.

Constitutional and judicial scrutiny of gambling law in India

(i)Constitutional test

Constitution is a fundamental document of any country and in India it is the best way to preserve rights of common citizen wherein many examples are evident wherein supreme court have evolved a bundle of precious rights which are hidden in certain fundamental right.

In this way a fundamental right to gambling comes into picture which inherits in the nature of fundamental right and is so basic in nature which cannot be taken away by any law. Free speech, right to life and equality has attracted to provide power to right to gambling.

- a- Article 19 (1) (a) states about free speech of expression , now when a person is debarred from expressing his opinion about a probability of event is clear violation of his free speech article. This right passes through the test of restriction clause and hence making the law of anti-gambling ineffective and liable to be struck down or fall.

²² Supra 3

²³ Xiaohui Gaoa, Tse-Chun Linb 'Do Individual Investors Trade Stocks as Gambling? Evidence from Repeated Natural Experiments' (2011) pg. 23, <<http://ssrn.com/abstract=1622184>> accessed 18 January, 2014

- b- Article 21 talks about life and dignity and therefore in prima facie where gambling is still in practice makes persons liable to be confined for the act which is not effecting the society. Debate can be raised on the nature of act of gambling which is moreover civil in nature rather than criminal in nature. Hence if effect on the society is negligible then why does gambling is a crime. Take an example of a reasonable person who bets on India in a cricket match, if he wins will get the money and if a loss then money is trounced by destiny. In both the event where is the society to play a role in this entire act. This can be easily understood as one invest in a share and share price will fall will make him in a loss and same loss can happen in loss in gambling conditioned that loss is irrecoverable in nature. However gambling doesn't appear prima facie illegal because consent of the individuals involved in gambling has been already taken and is subject to his own risk wherein state have no role to play for restriction although an licensing or taxing lies in the inherent power of state that can be beyond a shadow of a doubt is allowed. Although Article 21 talks about substantive and procedural fairness which should be considered while making laws in regard to gambling.²⁴
- c- Article 14 talks about the equality principle which is an fundamental right under part three of constitution of India. Now this equality principle invoke equal status among citizens of country and when the gambling is allowed in one state and not in other should desirably attracts the principle of equality and infringes the fundamental right to citizens of country as gambling also enjoys a fundamental status in article 19 and 21 and therefore article 14 will also be infringed.²⁵ Let us take an example when one person betting in state of Uttar Pradesh has being punished due to Act of 1867 but another person of state of Uttar Pradesh doing it in Goa is exempted will make a strong case to call in article 14 in action. Although the principle of 'law of land application' doesn't makes a sense because the fundamental rights are those inherent rights that cannot be taken from a mere arbitrary legislation and the present legislation of The Public Gambling Act, 1867 must be struck down with current effect withholding the newly generated fundamental right to gambling.

(ii) Judicial pronouncements

There are series of judicial pronouncements while are although short in number that have made an approach toward different concepts of gambling. Although, it is not the work of judiciary to make law and hence judicial pronouncements have taken consideration of the law in present. The judicial pronouncements were although most liberally legal interpretations but as law doesn't allow to go beyond the scope restricts the observations that came in form of judgments like State of Bombay v. R.M.D. Chamarbaugwala²⁶ and M.J. Sivani v. State of Karnataka²⁷ wherein former case the court refused to give protection to prize competitions

²⁴ Maneka Gandhi vs. Union of India, (1978) AIR SC 597

²⁵ Ibid

²⁶ (1957)AIR SC 699.

²⁷ (1995) 6 SCC 289

where prize is based on lotteries and in latter one the video games played in game parlour were prohibited to claim protection of Article 19(1)(g) as in both the cases the game of chance was played and court observed that the protection can be only granted to game of skill under section 12 of act of 1867. Although an opposite and more wider view was afforded to game of rummy where the court have listed that game as game of skill rather than game of chance allowed it to be played in the clubs etc. but restricted its view only up to non-profit making activity.²⁸ Confirming the before mentioned views of supreme court, in another case of Dr. K.R. Lakshmanan v. State of Tamil Nadu²⁹ there were six questions were framed to be discussed wherein one was regarding the status of horse racing as a game of chance or skill wherein court observed it to be game of skill and given it protection under Article 19 (1) (g) of constitution of India. In an recent judgment of Madras high court its was followed that playing chess or carom is protected under Section 12 of act of 1867 as these are game of skills.³⁰

Concluding remarks

In the whole paper one thing that emerged out was a right to gambling that needs to be more elaborated in coming future so that a sufficient legislation can be made by Indian Government that can tackle the needs of people with maintaining peace and security in state. The legislation that is drafted should encounter both social and economic aspect of gambling into concern which can make legislation long standing in society. As we have already mentioned that the power lies in the hand of state to make laws and therefore a collective approach must be endeavored to make a central legislation because gambling includes betting, gaming and lottery but as lottery is in the union list and the next two are in state list will make difficulty to make a unitary law in country and this problem must be sufficiently approach regarded. As many countries across globe have adopted gambling and made regulations thereto in accordance with adaptable purpose and therefore Indian can take reference from any such state while making legislation for own country wherein circumstance and legal history reflects to take reference from legislation of UK. There are two reasons for adopting the legislation of UK is based in two reasoning where one contends that as the present law for gambling in Indian is made by British colonizers and therefore their policy change regarding gambling must be accorded. The second contention states that as Indian law is much influenced by British law and therefore taking into consideration of UK law of gambling must be a correct approach to legislate a law of gambling in India.

Author have also successfully contended that moral and economic viewpoint stands with legalization of gambling laws in India as legislating a 167 year old law without its needs will only jeopardize rights of the people. There are many judicial pronouncements have also been evidenced and fundamental principles were quoted to show the presence of a fundamental right of gambling in the country. Although coming into last part of judicial pronouncements, which practically proves the misuse of this law wherein some society or group of people who are collectively playing age old games like chess, carom etc. are abused by police man under

²⁸ State of Andhra Pradesh v. K Satyanarayana, (1968)AIR SC 825

²⁹ (1996)AIR SC 1153

³⁰ Anandham Manamagil Mandram v. The Superintendent of Police, (2009) 4 CTC 264

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authority of act of 1867 for which the aggrieved party have to suffer all the procedural difficulties to prove him innocent when falsely implicated under these offences. Therefore need of the time is to follow a regulatory mechanism and legalize gambling in India.

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