

THE DICHOTOMY IN SELF-REGULATION OF ONLINE FANTASY SPORT PLATFORMS

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ABSTRACT

The rise of internet has given birth to a plethora of digital platforms all performing various kinds of functions. One such distinct platform is that of Online Fantasy Sports, a sub-category of the Online Gaming Platforms. The Online Fantasy Sports Platforms in India face a unique problem for two reasons— lack of regulatory norms and confusion regarding the level of skill or chance involved in the game. In this article, an analysis of the self-regulation system is done which proves that the system is heavily flawed. Finally, a conclusion is drawn based on the analysis drawn that self-regulation is not an effective practice with respect to OFSPs and therefore is not a feasible means of regulation.

INTRODUCTION

The dawn of internet gave rise to a form of communication that is very easy to use. However, it is equally difficult to define or explain. The term “digital platforms” covers a wide ambit of applications and websites. All the platforms have one thing in common: bringing people together. Therefore, digital platforms can be defined as applications or websites that bring together communities like individuals or organizations to communicate, interact and innovate irrespective of their real world location.ⁱ

There are various types of digital platforms and the most convenient method of classifying them would be to use the resource that they grant access to.ⁱⁱ Based on this criteria, the types of digital platforms would vary from platforms that give access to a variety of content for example search engines like Google and Bing,ⁱⁱⁱ to platforms that gives access to goods and services like Alibaba, EBay and Amazon.^{iv} Furthermore, there are platforms which give access to personal information like Facebook, Twitter and Instagram,^v and the ones that provide access to capital and payment systems like PayPal, Paytm and also crowdfunding portals like Kickstarter.^{vi} Platforms that provide access to gaming and sports include online game applications like Call of Duty and Clash of Clans can also be categorised based on these lines. This category also includes the new segment of Fantasy Sports including applications like Dream11 and MyEleven Circle.

Each type of digital platform has its own distinctiveness and presents its own unique challenges. Hence, different platforms should be regulated differently. That begins by correctly categorising platforms and studying the appropriate regulatory framework to govern the category under discussion. The segment of fantasy sports within the online gaming sector is relatively new and presents a unique challenge to regulators across the world.

A DIFFERENT KIND OF DIGITAL PLATFORMS: FANTASY SPORTS

Recently, the Indian government proposed amendments to formalise and regulate online gaming, all but recognizing it as a sector.

The Potential and the Drawback of the Industry

The Online Fantasy Sport Platforms ('OFSP') offer users the opportunity to create drafts of players playing actual sport and based on their real life performance, acquiring points or monetary rewards. OFSPs are inherently linked with actual sporting events. OFSPs have seen a growth in the number of users from 2 million in in 2016 to 90 million in 2019.^{vii} The sector has seen a three-fold growth in revenue from approximately Rs. 920 crores in Financial Year ('FY') 2018-19 to approximately Rs. 2470 crores in FY 2019-20.^{viii}

Despite the extraordinary growth numbers, a major drawback faced by OFSPs is the classification of games as games of skill and games of chance. This ambiguity is preventing the sector from an extraordinary growth rate because only games of skill are legal in India under the Public Gambling Act 1867 ('PGA')^{ix} but there is no objective test or a regulatory guideline to classify a game as either.^x

The Skill-Chance Dilemma

The determination can be done only if a dispute arises and it is adjudicated upon by a Court of law. Indian jurisprudence has used a simple test to solve the skill-chance dilemma. It has been held that games of skill can be mastered over a period of time whereas games of chance cannot because they are contingent on the happening or not happening of an event.^{xi} The Indian Contract Act that has provisions for contingent contracts also does not recognise the validity of wagers or bets because they are based on pure chance.^{xii} Furthermore, the only law that criminalises gambling or games of chance is the ancient PGA.^{xiii} The PGA restricts gambling but allows "games of mere skill" within its purview.^{xiv} The term "games of mere skill" has been interpreted to be predominantly of skill allowing a small element of chance.^{xv} The game of Rummy has been held to be of skill and not chance because it requires memorisation and judgement.^{xvi} Even the game of horse racing has been held to be predominantly of skill.^{xvii} These judgements gave birth to the 'dominant factor test', laying down that most games have both skill and chance but it is the dominance of one over the other which shall be the deciding factor on whether the game is of skill or of chance. However, this test is only applied when a dispute arises and the matter is heard in Court.

Notably, Dream11, the popular fantasy cricket game had been held to be "predominantly of skill" the Chandigarh High Court.^{xviii} It had been further upheld in the Bombay High Court.^{xix}

However, the Supreme Court stayed the order of the Bombay High Court,^{xx} reigniting the ambiguity and reaffirming the problems of the OFSP industry. Furthermore, the Draft Notification of the MEITY intends to clarify that betting and gambling on online platforms is in violation of current Indian law and is a penal offence, yet it fails to lay down a statutory test to differentiate between games of skill and chance.^{xxi}

THE CURRENT AND PROPOSED LAW GOVERNING ONLINE FANTASY SPORTS PLATFORMS AND THEIR REGULATION

There is not one uniform law which governs the operations of OFSPs. Since fantasy gaming is not an item in Schedule VII of the Constitution, it falls in the Residuary List, meaning that only the Centre can frame laws.^{xxii} However, betting and gambling have been recognised in Schedule VII.^{xxiii} Therefore, they can be legislated upon by the State Legislatures.^{xxiv}

The Current Laws Governing OFSPS

Digital platforms in India are regulated by the Information Technology Act, 2000 ('IT Act'). In 2021, the Indian government introduced the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules').^{xxv} This brought in stricter provisions to regulate digital media and social media platforms. The government further aims to classify a provider of online games as a "intermediary".^{xxvi} This would give the government broad powers to order any Online Gaming Intermediary to block public access to any online game in the interest of India's sovereignty and integrity, defence, security, friendly relations with foreign states, or public order and provide the information necessary to law enforcement authorities in relation to investigations, prosecutions, or public order.

In India, digital intermediaries are encouraged to practice self-regulation as a means of ensuring compliance with the IT Rules and promoting responsible behaviour on their platforms. The IT Rules recognise the importance of self-regulation and provide for the establishment of self-regulatory bodies by digital intermediaries. The key aspects of self-regulation of digital

intermediaries in India lay down a few key rules. *First*, there needs to be a code of conduct that the digital intermediaries need to establish to ensure that their platform is used responsibly and in compliance with applicable laws and regulations.^{xxvii} *Second*, digital intermediaries need to provide guidelines to the users especially pertaining to hate speech, harassment, and misinformation.^{xxviii} *Third*, digital intermediaries need to conduct regular audits of their platform to ensure compliance with the code of conduct and user guidelines.^{xxix} *Fourth*, digital intermediaries must enforce the code of conduct and user guidelines by taking action against users who violate them.^{xxx}

The IT Rules also prescribe a three-tier grievance redressal system for digital intermediaries to address complaints and grievances related to online content.^{xxxi} Level I of the three-tier grievance redressal system for digital intermediaries in India consists of a Grievance Redressal Officer ('GRO') who is responsible for receiving and addressing user complaints related to online content.^{xxxii} The GRO must acknowledge the complaints and resolve them within a stipulated period.^{xxxiii}

Level II consists of a Self-Regulatory Body ('SRB'). The SRB can be approached if the complainant is not satisfied with the resolution provided by the GRO.^{xxxiv} The SRB is an industry-led body, consisting of representatives from digital intermediaries, civil society organizations, and independent experts.^{xxxv} It is responsible for ensuring compliance with the Code of Ethics for digital intermediaries and can impose penalties for non-compliance.^{xxxvi}

Level III is the oversight mechanism.^{xxxvii} It is a government-led body, consisting of representatives from the Ministry of Electronic and Information Technology, civil society organizations, and independent experts.^{xxxviii} It can issue binding directions to digital intermediaries and impose penalties for non-compliance.^{xxxix}

The Proposed Law Pertaining to OFSPS

With the existing laws proving to be inadequate, the NITI Aayog had proposed guidelines for OFSPs in India in 2020. The proposed guidelines for fantasy sports platforms are wide in their ambit. *First*, fantasy sports platforms must disclose the rules of the game, the terms and conditions, the number of winners, and the distribution of prizes to users.^{xl} *Second*, fantasy

sports platforms must promote responsible gaming by providing information on the risks of gaming addiction and enabling users to set limits on their gaming activity.^{xli} *Third*, fantasy sports platforms must implement anti-fraud measures to prevent cheating and ensure a fair gaming experience for users.^{xlii} *Fourth*, fantasy sports platforms must establish a mechanism for users to file complaints and seek redressal in case of any grievances.^{xliii} *Finally*, fantasy sports platforms must comply with the Advertising Standards Council of India's (ASCI) code of conduct for advertising and promotions.^{xliv}

THE INEFFECTIVENESS OF THE CURRENT AND PROPOSED SELF-REGULATION MECHANISM WITH RESPECT TO OFSPS

The current and proposed self-regulation mechanisms for OFSPs is ineffective for two reasons. *First*, there is a conflict of interest because OFSPs derive their revenue from the same activities that need to be regulated. There is a higher likelihood to prioritise profit over consumer protection.

One example of this conflict of interest is the way in which OFSPs handle advertisements and promotions on their platforms. OFSPs rely heavily on advertising revenue, and therefore have an incentive to promote their services and attract new users. This can lead to the promotion of false or misleading advertising, which can harm consumers. For example, an OFSP might make exaggerated claims about the chances of winning, or fail to disclose important information about the risks associated with playing.^{xlv}

While self-regulatory bodies may attempt to prevent such advertising practices, their effectiveness may be limited by the need to maintain a positive relationship with the OFSPs they regulate. This can create a conflict of interest between the self-regulatory body and consumers, who may have different interests and priorities.

Furthermore, the primary goal of OFSPs is to maximise profits, and self-regulation may prioritise this objective over ensuring responsible gaming practices. OFSPs may overlook the risks of addiction and excessive gambling, leading to a lack of appropriate measures to protect

vulnerable users. Moreover, self-regulation may not be sufficient to address issues such as problem gambling, underage gambling, and money laundering, which require significant resources and expertise to manage effectively.

Second, the structure of OFSPs is such that it presents a massive incentive for cheating. For example, some users may create multiple accounts to gain an unfair advantage in games. Additionally, there is no way to identify the age of a user because it is not difficult to create an account online with a different age. While self-regulatory bodies may attempt to prevent such behaviour, their effectiveness may be limited by the inherent difficulties of identifying and punishing cheaters.

An instance of this is the case of a popular online fantasy sports platform in India, which faced allegations of cheating during one of its major tournaments in 2019.^{xlvi} Several users reported instances of manipulation of scores and results, with evidence of collusion between players and the platform's staff.^{xlvii} The platform initially denied any wrongdoing but later acknowledged the issue and refunded the entry fees to affected users.^{xlviii} In the absence of robust regulations and oversight, there is a risk that some OFSPs in India may resort to unethical practices to gain an edge over their competitors, potentially putting the interests of users at risk.

The current and proposed laws pertaining to the self-regulation of the OFSP sector have failed to address these major concerns.

CONCLUSION

In conclusion, self-regulation of online fantasy sports platforms (OFSPs) in India may not be feasible due to various factors. The conflict of interest, incentive to cheat and absence of clear guidelines and oversight make it challenging for OFSPs to regulate themselves effectively. Moreover, OFSPs' primary objective is profit, which may conflict with the need to ensure fair play and user protection. Therefore, it is crucial for the Indian government to establish clear regulations and guidelines to ensure that OFSPs operate in a fair and transparent manner and prioritise the interests of their users. Such regulations will help prevent issues related to

addiction, unfair play, and manipulation, promoting the growth of the online fantasy sports industry while protecting the interests of users. Online fantasy sports platforms may benefit from independent oversight to ensure that their activities are conducted fairly and in accordance with consumer protection standards.

ENDNOTES

ⁱ Michael A. Cusumano, Annabelle Gawer, and David B. Yoffie, 2019, New York: Harper Business. *THE BUSINESS OF PLATFORMS: STRATEGY IN THE AGE OF DIGITAL COMPETITION, INNOVATION, AND POWER*.

ⁱⁱ Alain Strowel & Wouter Vergote, *Digital Platforms: To Regulate or Not To Regulate? Message to Regulators: Fix the Economics First, Then Focus on the Right Regulation*, Intersentia: Cambridge 2018.

ⁱⁱⁱ Strowel, *supra* note 2.

^{iv} Strowel, *supra* note 2.

^v Strowel, *supra* note 2.

^{vi} Strowel, *supra* note 2.

^{vii} KPMG, *Beyond the tipping point: A primer on online gaming in India*, June 2021.

^{viii} *Id.*

^{ix} The Public Gambling Act, 1867 § 12.

^x NITI Aayog, *Guiding Principles for the uniform national-level regulation of online fantasy sports platforms in India*, December 2020 ('Guiding Principles').

^{xi} *State of Bombay v. R.M.D. Chamarbaugwala*, 1957 SCR 874.

^{xii} The Indian Contract Act, 1872, §30.

^{xiii} The Public Gambling Act, 1867.

^{xiv} *Id.* § 12.

^{xv} *State of Bombay v. R.M.D. Chamarbaugwala*, 1957 SCR 874 pp 17.

^{xvi} *State of Andhra Pradesh v. K. Satyanarayan*, 1968 SCR (2) 387 pp 12.

^{xvii} *Dr K.R. Lakshmanan v. State of Tamil Nadu*, 1996 SCC (2) 226 pp 26.

^{xviii} *Varun Gumber v. Union Territory of Chandigarh*, 2017 Cri LJ 3827.

^{xix} *Gurdeep Singh Sachar v. Union of India*, 2019 SLP (Cri.) Diary No. 42282.

^{xx} State of Maharashtra v. Gurdeep Singh Sachar, 2019, SLP (CrL.) No. 2213 of 2020/Diary No. 42282.

^{xxi} MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY ('MEITY') DRAFT NOTIFICATION, ('Draft Notification'), §3(ii).

^{xxii} The Constitution of India, 1950, Article 248.

^{xxiii} The Constitution of India, 1950, Schedule VII, List II, Item 34.

^{xxiv} *Id.*

^{xxv} MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY ('MEITY') NOTIFICATION, G.S.R. 139(E) (Notified on 25 February, 2021) ('Notification').

^{xxvi} Draft Notification, §2qb.

^{xxvii} Notification, *supra* note 22, Part III.

^{xxviii} *Id.*

^{xxix} *Id.* §4.

^{xxx} *Id.* §4.

^{xxxi} *Id.*, Chapter II.

^{xxxii} *Id.*, Chapter II, §11.

^{xxxiii} *Id.*, Chapter II, §11.

^{xxxiv} *Id.*, Chapter II, §12.

^{xxxv} *Id.*, Chapter II, §12.

^{xxxvi} *Id.*, Chapter II, §12.

^{xxxvii} *Id.*, Chapter II, §13.

^{xxxviii} *Id.*, Chapter II, §13.

^{xxxix} *Id.*, Chapter II, §13.

^{xl} Guiding Principles, *supra* note 10.

^{xli} *Id.*

^{xlii} *Id.*

^{xliii} *Id.*

^{xliv} *Id.*

^{xlv} Gargi Sarkar, *Fantasy Gaming Startups Had Most Number Of Gaming Ads Complaints: ASCI Report*, July 2, 2022, available at <https://inc42.com/buzz/fantasy-gaming-startups-dominate-advertisement-complaints-received-by-asci-against-gaming-sector/> (last visited on March 2, 2023).

^{xlvi} Abhay Singh, *EOW starts probe against fantasy sports websites for cheating users*, October 26, 2020, available at <https://www.millenniumpost.in/delhi/eow-starts-probe-against-fantasy-sports-website-for-cheating-users-422085> (last visited on March 1, 2023).

^{xlvii} *Id.*

^{xlviii} *Id.*

