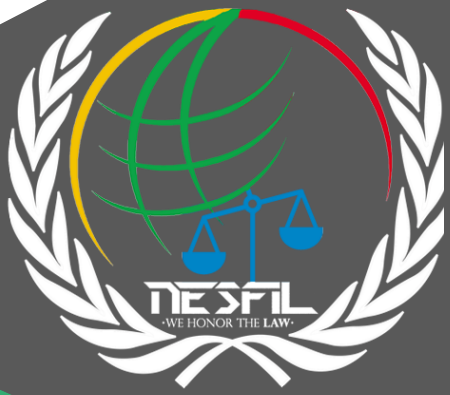
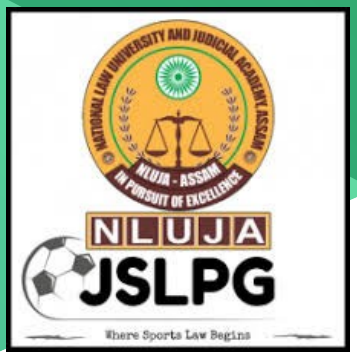
Journal for Sports Law, Policy and Governance



NATIONAL LAW UNIVERSITY AND JUDICIAL ACADEMY, ASSAM



Advisory Board

Patron In Chief

Shri Ajit Singh
Hon'ble Chief Justice of Gauhati High Court

Patron

Prof. Dr. J. S. Patil
Vice Chancellor, National Law University, Assam

Senior Member

Shri Mukul Mudgal Ji
Hon'ble Retired Justice and Head, FIFA Governance Committee

Member

Prof. (Dr.) Ian Blackshaw
International Sports Lawyer and Renowned Academician

Member

Niloy Dutta
Senior Advocate, Supreme Court of India

Member

Shamnad Basheer
Leading Expert and Professor of IP Law at Nirma University

Strategic Advisory Board

Jay Satya
Founder, Glaws.in

Aditya Mishra
Founder, Lawmantra

Aradhya Setia

Executive Board

Abantee Dutta
Cofounder & Director, Studio Nilima

Nandan Kamath
Founder, LawNK

Gursimran Brar
Counsel, Asian Football Confederation

Kaushik Moitra
Partner, ArtheLaw, Former TMT Law Practice

Vidushpat Singhania
Partner, Krida Legal, Author, Law of Sports in India

Aahna Mehrotra
Sports and Management Consultant, Former TMT Law Practice

Anish Dayal
Sports Counsel and Practice, Supreme Court of India

Tom Valenti
International Accredited Mediator

Ranjana Adhikari
Co-Head Media Entertainment and Gaming Law Practice, Nishith Desai Associates

Editorial Board

Santosh Vikram Singh

Tiran Gunawardena

Saurabh Bhattacharjee
Assistant Professor, West Bengal National University of Juridical Sciences

Satchit Bhogle
Associate, Hariani & Co., Founder, Indian Sports Law Blog

Shivam Singh
Counsel, Supreme Court of India

Aditya Shamlal
Partner, Gamechanger Law Advisors

Anirban Saikia
Associate, LawNK

Roshan Gopalakrishnan
Research Associate, Sports Law and Policy Centre

Nitin Mittal
Associate, Krida Legal

Nick De Marco
Blackstone Chambers, United Kingdom

Rustam Sethna
Sports Law Master's Student Placement, Coccia De Angelis Vecchio & Associati

Academic Editors

Chiradeep Basak
Erasmus Mundus Fellow, Assistant Professor, National Law University, Assam

Gitanjali Ghosh
Assistant Professor, National Law University and Judicial Academy, Assam

Kasturi Gakul
Assistant Professor, National Law University and Judicial Academy, Assam

Student Editorial Board

Managerial Editor

Angshuman Hazarika

Europa Institut, Saarbrucken (University of Saarland)

Senior Student Editors

Amrita Ghosh

National University of Juridicial Sciences, Kolkata

Ashray Behura

Government Law College, Mumbai

Amit Singhal

National Law Institute University, Bhopal

Gautam Mohanty

Central European University, Budapest

Anshuman Sahoo

Icfai Law School, Dehradun

Jane Maria

National Law University, Odisha

Rishika Mendiratta

Gujrat National Law University, Gandhinagar

Manasvi Tewari

National Law Institute University, Bhopal

Associate Student Editors

Ishwar Singh Punia

National Law School of India University, Bangalore

Aashna Sheth

Government Law College, Mumbai

Saranya Mishra

ILS Law College, Pune

Siddharth Sonkar

National University of Juridicial Sciences, Kolkata

Deepali Singh

Chanakya National Law University, Patna

Akham Khan

Ram Manohar Lohiya National Law University, Lucknow

Aditi Singh Kashyap

Jindal Global Law School, Sonepat

Vishal Aggarwal

Amity Law School, Noida

Aayush Grover

Government Law College, Mumbai

Arun Chauhan

Institute of Law, Nirma University, Ahmedabad

Prateek Srivastava

Gujrat National Law University, Gandhinagar

Organising Board

Manvendra Singh Jadon
CEO and Founder

Animesh Bordoloi
Co-Founder

Kanishk Joshi
Co-Founder

Prannoy Joe Sebastian
Co-Founder

Devansh Tomar
Co-Founder

Abhishek Rathore
Co-Founder

Ankit Bhandari
Co-Founder

From the desk of the Managing Editor

Whether it be the hand of God goal by Maradona or the 9.58 second run by Usain Bolt in Berlin, there are certain moments in sports, which transcend beyond athletic achievements and become a part of human history. Elite athletes represent the prime of human mental and physical abilities. However, as with any other field there must be certain accepted rules which must govern how the sportspersons act on and off the field and this is where sports law comes into play. With a unique legal structure, it is an area of law, which has seen rapid expansion over the last decades commensurate with the commercialisation of sports.

As a subject, which has existed at least since the beginning of the 19th century, sports law has only come into spotlight into recent years and this has primarily been due to certain unfortunate circumstances such as doping and controversies on match fixing. It is however a field that cannot be ignored owing to the close connection, which sports, has in our daily lives, right from our involvement as players in our schools, local clubs or universities to being fans of the athletes who represent our countries. The elite athletes in many situations acquire God like status and are role models for the upcoming generations and it is hence necessary to ensure the integrity of sports through stringent rules. This journal is dedicated to this cause and promotes discussion on the laws governing sports and sportspersons.

Being ardent sports fans, it has been a delight for us to bring the first issue of the Journal of Sports Law, Policy and Governance (JSLPG). It has taken more than a year in making and we apologise for the delay in the entire process. Personally, it has been a privilege for me to work closely with the Student Editorial Board who have put an untiring effort behind the publication of the journal and I am grateful for their perseverance and dedication which has made this issue possible. It would also be pertinent to acknowledge the overwhelming response from authors who submitted their articles for the inaugural issue and we look forward to more submissions in the future.

On behalf of the entire team of JSLPG, we acknowledge the continued support of the NLUJA, Advisory Board, Organising Board, Executive Board of NLUJA and NESFIL, without which the first issue of JSLPG would not have come into existence. We also acknowledge the support of the Staff a NLUJA, Assam who have been involved in every step from the inauguration of the website to the publication of the journal.

Any errors and omissions are all mine. The JSLPG team looks forward for your comments and suggestions along with continued support in the future.

Citius, Altius, Fortius

Angshuman Hazarika
Managing Editor, JSLPG
Research Associate, Universitat des Saarlandes, Germany

TABLE OF CONTENTS

Sport today: towards a 'Lex Sportiva'?

Prof Dr Ian Blackshaw[1]

[1]International Sports Lawyer, Academic, Author and Member of the Court of Arbitration for Sport

ian.blackshaw@orange.fr

ABSTRACT

Sport has been practised since ancient times and is now a big business throughout the world, where there is as much at stake off as on the field of play. As such, apart from the so-called 'Laws of the Game' which regulate internally the playing of each sport, there is a need for a set of external legal regulations governing sport as a whole. A so-called 'Lex Sportiva'. In other words, a discrete body of law, which applies in a sporting context. In this article, the author examines the evolution of this body of law, particularly in relation to its development through the decisions ('awards') of the Court of Arbitration for Sport (CAS), which deals with the settlement of a wide range of sports-related disputes, including commercial ones. The CAS has been operating for 33 years, registering, nowadays, some 600 cases a year. The author also reaches some general conclusions.

KEYWORDS

Sport

1. INTRODUCTION

Sport has been practised and followed by fans since ancient times. For example, sporting events were an integral and popular part of the social calendars of Ancient Greece and Imperial Rome. It is now a multi-billion-dollar 'industry' in its own right. There is so much at stake not only on, but also off the field of play, to engage sports fans and also a wider general audience.

Consequently, sport today is not confined only to the back pages of newspapers, but is increasingly finding its way onto the front pages as well. Sports cases and developments are also widely covered in other non-print media, especially on the Internet and other digital platforms, as news stories in their own right.

This is especially true of doping cases, which, sadly, are on the increase and regularly hit the headlines, despite the efforts of bodies such as the World Anti-Doping Agency. In addition, other sports cases and disputes, dealt with, as part of an ever-increasing workload, by the Court of Arbitration for Sport, are

[1] The latest version in force as from 15 September 2017

also finding their way into our 24/7 media and becoming a staple part of our daily general and sporting news diet.

A body of Law, which we may call 'Sports Law' is likewise developing apace, as a subject in its own right, and is being studied more and more by a wider constituency at all levels of interest and competency.

2. SPORT TODAY

Sport is an integral and important part of society throughout the world.

Indeed, according to the Olympic Charter,[2] the practice of sport is a human right which is to be enjoyed without any kind of discrimination:

"Every person must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play."[3]

Likewise, the International Paralympic Committee (IPC) exists

"To enable Paralympic Athletes to achieve sporting excellence" and believes that "all individuals should enjoy equal access and opportunities for leisure, recreation and sporting activities, and such rights be granted and guarded by the legal and administrative systems through responsible governments and communities."[4]

As Prof Dr Rian Cloete, Director of the Sports Law Centre, at the University of Pretoria, and Editor of an 'Introduction to Sports Law in South Africa',[5] points out in his introductory remarks:

"The influence of society on sport is not always positive. Whenever societies have experienced a state of decline, sport as followed suit. During the decline of the Roman Empire in the first five centuries AD, bribery and corruption were the order of the day and this impacted on the ancient Olympic Games. One tale tells of the Roman Emperor Nero who ensured that he would be the only participant in the horse race. Although he did not even finish the race, he was crowned victor and Olympic champion! Eventually, things became so appalling that Emperor Theodosius the Great banned the Olympic Games in 394 AD after almost a thousand years of competition."[6]

So, what is sport?

[2] The latest version in force as from 15 September 2017.
[3] Para. 4, Fundamental Principles of Olympism, Olympic Charter. IOC website: www.olympic.org.
[4] IPC Position Paper on Human Rights. IPC website: www.paralympic.org.
[5] Lexis Nexis Butterworths, Durban, South Africa, 2005.
[6] Ibid. para. 1.04.

Probably the best definition is the one provided by the Council of Europe:

"Sport means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels."[7]

Certainly, this is the traditional and generally accepted one that is applied, especially when deciding whether a particular activity, claiming to be a sport, usually for funding purposes, for example, through National Lottery Grants or for tax purposes, for example, for claiming exemption from VAT, is or is not a sport.[8]

Furthermore, according to the Council of Europe, Sport makes diverse contributions:

"….. to personal and social development through creative activities, recreational pursuits and the continuous search for improving sporting performance and ….. that physical exercise helps promote both the physical and the mental well-being of individuals."[9]

Also, according to the IOC, Olympism exists to promote certain characteristics and qualities of sport as follows:

"1. Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.

2. The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity."[10]

Also, according to Justice Mukul Mudgal, the Chief Justice of the High Court of Punjab & Haryana, India:

"Sports have also played a key role in nation-building and fostering unity and friendship between warring nations and hostile communities. For instance, during the 1955 India-Pakistan Test cricket

[7] Art. 2.1.a., Council of Europe Revised European Sports Charter of 16 May 2001.
[8] See the post of 22 September 2015 on the Global Sports Law and Taxation Reports (GSLTR) website (www.gsltr.com) on 'Is Bridge a Sport?' by Prof Dr Ian Blackshaw. Also, the post by Prof Blackshaw of 16 October 2016 reporting on the English High Court Decision of 15 October, 2016 that Bridge is not a sport!
[9] Ibid., para. 7.
[10] Paras. 1. & 2. Fundamental Principles of Olympism, Olympic Charter.

series, an estimated 20,000 Indians were given permission to attend the Third Test in Lahore creating what one newspaper described as 'the biggest mass migration across the frontier since Partition."[11]

Mention may also be made of the 1914 Christmas Truce during the Great War of 1914-18 and its famous football match played on Christmas Day of that year!

3. SPORT AS AN INDUSTRY

But, apart from its political, social, cultural and health aspects, all of which are important, sport is now also an industry in its own right.

It is worth more than 3% of world trade and 3.7% of the combined GNP of the current 28 Member States of the European Union (EU), which comprises 508 million people. 5.4% of the EU labour force, that is, some 15 million people, are now engaged in sport.

Some further financial statistics are worth mentioning:

The sale of sports broadcasting and new media rights generate billions of dollars. For example, the English FA Premier League - the world's most popular and financially successful football league – sold their rights to their live matches for the three seasons beginning in 2016 for a record sum of £5.136. The sale of additional rights, including other platforms, has increased this sum to £8.3 billion!

In December 2015, 'La Liga' in Spain announced a new TV rights deal worth €2.65 bn.

Also, on 9 June 2016, the German Bundesliga set a new record for the sale of TV rights in a deal worth €4.64bn over four seasons: 2017/18 – 2020/21.

Furthermore, on 8 August 2016, the Japanese Soccer 'J League' sold its on-line broadcasting rights in respect of its matches in Japan to the British 'Perform Group' for US$2 bn over 10 years.

It may be added that the exploitation of broadcasting rights in football has become so valuable and important that many leading football clubs, such as the English club Manchester United, now operate their own television channels for the benefit of their fans and also their commercial sponsors, which is made possible with the advent of digital TV.

[11] 'Law & Sports in India, 2011, LexisNexis, Haryana, India, at p. 37.

The Olympic Games have been described as 'the greatest sporting show on Earth' and this is reflected in the mega sums for which the IOC sell their broadcasting rights to the Games. In 2016, for example, the IOC signed a US$7.5 billion broadcasting deal with NBC which runs until 2032.

Again, taking association football (soccer), for example, the world's most popular and lucrative sport, top professional footballers, like Wayne Rooney, formerly Captain of both Manchester United FC and the England National Team, but now of Everton FC, can expect to earn £260,000 per week! In China, top footballers playing in the Chinese Super League, like Carlos Teves, can earn £615,000 per week!

Such salaries are considered, in some quarters, excessive and obscene – even for sports' 'stars'!

Writing in the UK '*The Times*' newspaper on 31 August 1994, the doyen of sports writers, Simon Barnes, had this to say:

"Sport is caught up in a spiral of inflation: inflation of interest, inflation of media coverage, inflation of financial possibilities for all concerned. *Each one of these feeds on the other's increase: the radius of the spiral decreases, the velocity increases, and round and round and round we whiz, dizzy, disorientated and sometimes more than a trifle sick*

Groggy sporting administrators find themselves at permanent loggerheads with life as they seek to reconcile the two great irreconcilables. The value of sport and its ever-increasing price.

As sport is seen more than ever before, is followed more closely and is contested more intensely, so more things go wrong, and more things are seen to go wrong. Sporting bodies were originally established to organise a bit of serious fun. These days, the same organisations are trying to run billion quid industries. It is hardly surprising that things get out of step sometime. And, as the spiral tightens and quickens, the anomalies will come at us more and more often."

Today, his remarks are even more pertinent and valid!

Mention may also be made of the increasing and eye-watering amounts of transfer fees being paid for football players, culminating in the world-record fee of almost £200 million paid during the 2017 'Summer Transfer Window' for the transfer of the Brazilian forward Neymar Jr from FC Barcelona to Paris Saint-Germain FC!

As far as association football is concerned, therefore, the words of the legendary Liverpool Football Club Manager, Bill Shankly, ring true even more so today as when they were first uttered several

decades ago. Asked if football was a matter of life and death, he replied: "Oh no! It's much, much more important than that!"

Football has also provided sports lawyers and administrators with a leading decision in the European Union (EU), namely, the Jean-Marc Bosman case, which has changed the landscape of association football for ever. In fact, there is an important and evolving EU Sports Law, including a so-called 'Sport Article' in the EU Treaty.[12]

One of the pernicious effects of so much money circulating in sport has been the need, on the part of a number of athletes, to win at all costs. This obsession has given rise to an increasing use of banned performance-enhancing drugs - an ever-present scourge of sport - and other forms of cheating. Many sports persons are departing from following the Olympic ideal, which holds that it is not the winning but the participation in sport that counts. The integrity of sport has also been undermined in other ways. For example, corruption in various forms has reared its ugly head, especially, one might mention, at FIFA on an unprecedented scale, the effects of which are still being felt around the world in the so-called 'beautiful game'. Match-fixing in several sports, including cricket, is also, sadly, on the increase.

As a consequence of all this and to meet the need for the legal regulation of sport for the benefit of the sporting community and its various stakeholders, a discrete body of Sports Law is evolving: a so-called '*Lex Sportiva*', which we will now examine.

4. 'LEX SPORTIVA'

According to Prof Dr Steve Cornelius of the Sports Law Centre, at the University of Pretoria, South Africa:

"For a while, there was a significant debate around the question whether one should speak of sports law, or whether it should rather be sport and the law. The argument was that sports law was no more than various other fields of law applied in the context of sport.

However, it has been long since it become clear that sport poses various unique questions to the law and that various aspects of sport are regulated in ways that have no equivalent in other spheres of business and governance. For instance, safeguarding the integrity of sport against practices, such as doping and match-fixing, hardly have any clear parallels outside the world of sport. In addition, the International Olympic Committee enjoys a special legal status, similar to that enjoyed by international

[12] See Article 165 of the Lisbon Treaty signed on 13 December 2007 and effective as from 1 December 2009.

organizations in public international law. As a result, it is now generally accepted that sports law is a distinct subject worthy of recognition, study and research in its own right."[13]

The emergence and importance of 'sports law' in the above sense is also well recognised by Beloff, Kerr, and Demetriou, all of whom are practitioners, in the following terms:

"….. *the law is now beginning to treat sporting activity, sporting bodies and the resolution of disputes in sport, differently from other activities or bodies. Discrete doctrines are gradually taking shape in the sporting field…….English courts are beginning to treat decisions of sporting bodies as subject to particular principles*."[14]

In other words, sport is considered to be 'special' and, as such, is deserving, in certain circumstances, of 'special treatment' from a general legal point of view.

This is certainly true at the EU level reflecting the views of the European Commission and the European Court of Justice, where the term the 'specificity of sport' (also referred to, particularly by Sports Governing Bodies, as the 'sporting exception') has been coined and is widely considered in various Commission rulings and Court decisions in sports cases and also in the European Commission 'White Paper' on Sport of July 2007.[15] This term refers to the special characteristics and dynamics of sport that have been recognised in the 'White Paper' and also in the so-called 'Sport Article' in the Lisbon Treaty of 2009.[16]

Additionally, Messrs. Lewis and Taylor, both academics and practitioners, have the following to say on the subject of an emerging 'sports law':

"…… *the editors share the belief of many writers in the field that in at least some areas, for example where international institutions such as the Court of Arbitration for Sport review the decisions of sports governing bodies, a separate and distinct body of law inspired by general principles of law common to all states is in the process of development*."[17]

The Court of Arbitration for Sport (CAS) has also been contributing to a discrete body of sports law during its 33 years of operations, as a result of the substantial number of cases, covering a wide range

[13] Foreword, 'International Sports Law: An Introductory Guide' by Prof Dr Ian Blackshaw, 2017, Asser Press, The Hague, The Netherlands, at p. v.
[14] Beloff, M, Kerr, T, and Demetriou, M, *Sports Law* (1999), Oxford: Hart, p 3.
[15] See the EU 'White Paper on Sport' published on 11 July, 2007 (COM(2007) 391 final); see also the European Court of Justice Decision in *David Meca-Medina and Igor Majcen v Commission* (C-519/04 P) defining the limits of the so-called 'sporting exception' to EU Law in general and EU Competition Law in particular. See also Blackshaw, Ian, 'The Specificity of Sport and the EU white paper on Sport', 10 October 2007, at pp 14-16.
[16] There is now also a so-called 'Sport Article' in the TFEU (Article 165).
[17] Lewis, Adam, and Taylor, Jonathan, *Sport: Law and Practice*, (2nd *edition* 2008) London: Bloomsbury Professional, p *vii*.

of sports-related legal issues, that the CAS has handled to date. It currently registers some 600 cases a year.

Since the end of 2002, all Olympic International Federations and several non-Olympic Federations have recognised the jurisdiction of the CAS. Indeed, as Despina Mavromati and Matthieu Reeb point out:

"The world of sport, particularly athletes, sports clubs and sponsors, is now more aware that the CAS exists. The so-called *lex sportiva* now has a solid foundation and references to the CAS jurisprudence are more and more frequent, even outside the sports community."[18]

Although CAS arbitrators are not generally obliged to follow earlier decisions and obey the sacred Common Law principle of '*stare decisis*' (binding legal precedent),[19] in the interests of comity and legal certainty, they usually do so.[20] As a result of this practice, a very useful body of sports law is steadily being built up.[21]

However, one of the difficulties faced by the CAS in its desire to develop a '*Lex Sportiva*' and provide some degree of legal certainty and consistency stems from the fact that, generally speaking, CAS proceedings and decisions are a matter of private law and confidential to the parties.

CAS being a private arbitral body, therein lies the paradox: the need of the sporting community 'not to wash its dirty sports linen in public'; and the need of the wider public to know how cases are being decided, for future guidance and reference.

As regards the confidentiality of CAS Ordinary Proceedings, Article R43 of the CAS Code of Sports-related Arbitration 2017 provides as follows:

"*Proceedings under these procedural rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS*."

[18] '*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*', Despina Mavromati & Matthieu Reeb, 2015, Kluwer Law International, Alphen aan de Rijn, The Netherlands, at p. 7.
[19] See *UCI v J.* 7NCB, CAS 97/176 Award of 28 August 1998, 14.
[20] But see the CAS Appeal Awards in Webster (30 January, 2008), Matuzalem (19 May, 2009) and Shakhtar (28 September, 2011) and try to reconcile them!
[21] See further on this, Nafziger, J, 'Arbitration of Rights and Obligations in the International Sports Arena', (2001) 35(2) Valparaiso University Law Review 57; Nafziger, James A.R., 'International Sports Law', Second Edition (2004), Ardsley, NY, Transnational Publishers, Inc. (ISBN 1-57105-137-6) at pp. 48-61; and Blackshaw, I, Siekmann, R.C.R. & Soek, J (Eds.), 'The Court of Arbitration for Sport 1984-2004', (2006) The Hague, The Netherlands, TMC Asser Press (ISBN 978-90-6704-204-8), at pp. 409-454.

But, the last sentence of this Article provides the following exceptions to the general rule of confidentiality:

"*Awards shall not be made public unless all parties agree or the Division President so decides*."

However, as regards the confidentiality of CAS Appeal Proceedings, Article R59 of the CAS Code of Sports-related Arbitration 2017 provides in para.7 as follows:

"*The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential*. *In any event, the other elements of the case record shall remain confidential*."[22]

Thus, in CAS Appeal cases, the emphasis is more on publication of the Awards and less on confidentiality, unless both parties agree otherwise, and, therefore, in this particular respect, this provision goes some way towards encouraging the development of a '*Lex Sportiva*' In practice, more CAS Awards are being published, especially on the CAS official website, which contains a CAS Jurisprudence Archive section.[23]

The extent to which the CAS is contributing to a discrete body of sports law ('*Lex Sportiva*') is a complex and controversial subject and divides academics and practitioners alike.[24] In fact, an entire Book could be devoted to the subject.

5. CONCLUSION

Sport is so important and special to so many people for so many reasons around the world - as players and spectators alike - and this is now encapsulated in the legal concept of '*the specificity of sport*' with its application to a variety of practical situations, not least in an economic and business sense, which is a common theme running through various aspects of Sports Law at the National, European and World levels.[25]

[22] CAS Hearings are held in private, although there are some calls for them to be held in public.
[23] 'www.tas-cas.org'.
[24] See Chapter 15 of '*Sport, Mediation and Arbitration*', Ian S.Blackshaw, 2009 TMC Asser Press, The Hague, The Netherlands, ISBN 978-90-6704-307-6.
[25] For example, in adjudicating on disputes arising under the FIFA Regulations on the Status and Transfer of Players (RSTP), the FIFA Dispute Resolution Chamber must, *inter alia*, take into account the 'specificity of sport' - Article 2 of the Procedural Rules (2015 edition) and Article 25, para 6, of the RSTP (2016 edition).

But this does not mean that sport is so special that it should be treated as such in all cases;[26] neither does it mean that sport, sports persons and sports bodies should be treated differently and be above the Law.[27]

But, of course, circumstances alter cases, and there may well be situations in which a so-called 'sporting exception' might apply.

It is very much, to use a sporting metaphor, a matter of 'horses for courses'. But, it is also something of which sports persons, lawyers, administrators, promoters and marketers, as well as students of Sports Law should be particularly cognisant.

Finally, to answer the question posed in the title of this article: is there such a thing as 'Sports Law'? I would entirely agree with Prof Dr Steve Cornelius, as quoted above, that 'Sports Law does exist and "is a distinct subject worthy of recognition, study and research in its own right."

[26] See the European Court of Justice decision in the *Meca-Medina* case, 18.7.2006, C-519/OP.
[27] See the Decision of the Swiss Federal Tribunal of 27 March 2012 in the *Matuzalem* case, 4A_558/2011.

ARTICLE 19 RSTP, A RIGHT STEP IN THE TRANSFER POLICY JURISPRUDENCE?

Tejaswa Naswa [1] and Ateet Parihar [2]

[1] National Law Institute University, Bhopal

tejas.naswa66@gmail.com

[2] National Law Institute University, Bhopal

ateet266@gmail.com

ABSTRACT

With possible transfer bans handed over to inarguably three (Atletico Madrid, Real Madrid and Barcelona)[28] of the top five European Clubs for transgressing provisions of Article 19, Fédération Internationale de Football Association (FIFA) and Court of Arbitration for Sports (CAS) have sent a strong statement across all clubs working hand in glove with players yet to attain the age of majority. The provision has ensnared major clubs who with all their might contravene the prohibition culminating in the financially and mentally abuse of minors and their families. The authors have analyzed the significance of the Bosman ruling and how it shaped the international transfer system in 2001. This paper aims at analyzing the role of CAS in interpreting the contents of Article 19 and giving it a strict construction regulating all clubs to comply with the provision. The CAS through its judgments in Acuna[29] and FC Midtjylland case[30] has carved out two exceptions to this rule, namely the "parents rule"[31] and "EU-EEA rule"[32], which has made it all the more tough for clubs to sign young promising players. This paper looks at the complexities of the two exceptions and how it affects the minors' careers. To appreciate the issue, the authors have made an in-depth case study of Acuna case[33] and how it has settled the transfer laws jurisprudence. The authors have finally thrown light on the impact of Article 19 in the backdrop of developing and underdeveloped nations who find it difficult to retain the local players from moving internationally and subsequently have to bear the loss without accruing any external benefit.

KEYWORDS

Article 19, FIFA RSTP, Bosman, CAS

[28] *A.* v. *Club Atlético de Madrid SAD & Real Federación Española de Fútbol (RFEF) & Fédération Internationale de Football Association (FIFA)*, award of 10 October 2013 (*A.* v. *Club Atlético de Madrid*).
[29] *Carlos Javier Acuña Caballero* v. *FIFA and Asociación Paraguaya de Fútbol,* CAS 2005/A/956.

[30] *Midtjylland* v. *FIFA*, CAS 2008/A/1485.
[31] Article 19(1)(a) Regulation on the Status and Transfer of Players (hereinafter referred to as "FIFA RSTP") (2005).
[32] Article 19(1)(b) FIFA RSTP (2005).
[33] *Supra* note 2.

1. INTRODUCTION

The Bosman ruling[34] delivered by the European Court of Justice (hereinafter referred to as "ECJ") in 1995, which was principled on the rules for status and transfer of players, finally compelled FIFA, the governing body of football, to change and bring them in consonance with European Commission (hereinafter referred to as "EC") law. The ruling was a landmark reference for the world of football and had serious implications on the non-European citizens that changed the system of transfers forever. The ruling, an out of court settlement by Belgian Football Association (hereinafter referred to as "BFA") which came 8 years after Bosman's boycott by the BFA heralded a significant change for football players by drastically improving the conditions of future players. Bosman did not only have an impact on the conditions of football players, it also had major repercussions for FIFA which was finally compelled to take a positive action following the Bosman verdict. The judgment sought to meet major objectives in a two-fold manner, inasmuch it aimed at improving the position of non-European players who were aggrieved by the prohibition on international transfer system pre-Bosman ruling. The first objective empowered out of contract players (free agent players) to negotiate with potential clubs which were willing to buy their services for a transfer which vested with the free agent players and not their newly signed clubs. The second objective proposed to do away with the prohibition on international transfers that flouted EC Competition rules, thereafter FIFA reached an agreement with the EC in March 2001, on the principles for the amendment of said rules**.** Another implication that stemmed from the ruling was the amendment of the rules prohibiting minors' movement. Restriction on minors' movement first came into picture when a "Commission-condoned" FIFA transfer rules incorporated Article 12 which specifically dealt with the protection of minors i.e. refusal of their transfer request from one club to another club of a different country[35]. The provision intended to withstand the detrimental repercussions of international transfers of a minor, ushering a new era in the transfer policy across footballing nations[36]. These principles were later implemented in the revised FIFA RSTP, predominantly regulating the transfer of football players between clubs belonging to different national associations. The prohibition was not absolute and Court of Arbitration for Sports ("CAS" has appellate jurisdiction over FIFA's internal decisions and has been the focal point of regulations governing the minor's protection. CAS has framed the governing/applicable law on the protection of underage players from illegal transfers to clubs) carved out two exceptions; the "parents-

[34] Case C-415/93 Union Royale Belge des Sociétés de Football Association, Royal Club Liegeois, UEFA v. Jean-Marc Bosman and others (1995) ECR I-4921, referred to as 'Bosman Ruling'.
[35] FIFA RSTP, Art. 12 (2001).
[36] FIFA RSTP, Art. 12(1) (2001).

rule" allowing minors to transfer internationally along with their family, in which the new club is located, for "reasons not linked to football[37]". Second being, the European Union ("EU") and European Economic Area ("EEA") rule, which allowed players, younger than 18 but above the minimum working age, to transfer internationally, wherein the training clubs were held accountable for providing a systemic education and sufficient exposure for nurturing of talents[38]. However, these exceptions further led to intricacies which were dealt by FIFA's Players Status Committee ("PSC", body adjudicating on matters related to the protection of minors) adjudicating on issues raised by national associations[39] and after many deliberations added a third exception, known as the "50 + 50-rule"[40] that specifically aimed at improving the situation of players living close to national borders and suffering due to the problem of cross-border traffic[41].

This rule allows minors to take part in trials of a club of a neighboring association within 50 kilometers of the national border (minors' native country) provided the players don't seek a permanent move to the neighboring state. This has given rise to serious uncertainties regarding the prohibition on international transfers as the FIFA circular seeks to vitiate the prohibition on one hand[42] and subsequently allows minors to "partake" in trials of clubs situated within 50 kms of the national border[43], on the other. The new exception (Article 12(1) (c)) to the ban on international transfers was amended and adopted by FIFA in July 2005 repealing Article 12 and inserting Article 19 as the basis for prohibition on international transfers[44]. The amended article sought to modify the existing two exceptions and resolved the ambiguity that lied in the erstwhile exception with respect to "family" and altered the rule stating that "parents" could move with their child to another state provided "reasons for moving were not linked to football"[45]. Further, it brought down the age of "workers" from 18 years to 16 years ("EU-EEA rule")[46] and tasked clubs with the responsibility of providing minors with an adequate football education and standardized training in line with other top European clubs; adding necessary duties that being according players with a suitable vocational education which would secure players' careers if they fell out of their footballing careers, providing players with decent housing and

[37] FIFA RSTP, Art. 12(1)(a) (2001).

[38] FIFA RSTP, Art. 12(1)(b) (2001).
[39] FIFA Circular no. 801, 28 March 2002.

[40] FIFA RSTP, Article 19(2)(c) (2005).
[41] *Id*.

[42] FIFA RSTP, Art. 12(1)(c) (2001), FIFA Circular no. 801, 28 March 2002, "Amendments to the FIFA Regulations for the Status and Transfer of Players".

[43] *Supra* note 14.
[44] *Supra* note 8.
[45] FIFA RSTP, Art. 19(2)(a) (2005).

[46] FIFA RSTP, Art. 19(2)(b) (2005).

securing a proof of the same with FIFA[47]. FIFA has sufficiently cleared doubts over the accountability and enforcement of its rules through PSC which has legitimately adjudicated upon matters of transfers of minors and also authorized national associations to hold clubs accountable for non-compliance of necessary requirements laid down in Article 19(2)(b)[48] of FIFA RSTP, 2005.

2. SIGNIFICANCE OF BOSMAN RULING

Football has generated a lot of intrigue and interest among the EU nations over the last decade resulting in ever-growing popularity amongst European or non-European nations alike. The landmark Bosman[49] ruling set the motion for further development on transfer regulations specifically regarding the protection of minors. The Bosman ruling dismantled the transfer payment system with regard to players who were free agents, wherein the status quo allowed them to negotiate with potential clubs who were willing to sign them. The transfer fees post-Bosman vested with the free agents and not with their current employers. The ruling had a considerable impact on the transfer policies of European Football having major implications for the former clubs that released the free agent player. The free movement of football players within the EU was thus secured, or so it seemed. The ruling proposed to improve the situation of free agent players by bringing the transfer policies in consonance with the Treaty for Functioning of European Union (hereinafter referred to as "TFEU"). Another objective the judgment sought to achieve was the placing of non-European citizens on the same scale with European citizens. Finally, in 2001, 6 years after Bosman, FIFA and the Commission reached an agreement on principles to amend the transfer system with regard to protecting the illegal transfers of minors. These principles were later envisaged in the revised FIFA RSTP, which came into being in the same year[50].

2.1. Facts of the case

Jean-Marc Bosman, a Belgian national, was a professional football player registered with the Belgian league club RC Liège for a period of two years. After his contract expired, he was listed as a compulsory transfer or "free transfer" by the club and was offered to other clubs. The cause of the compulsory transfer was Bosman's refusal to accept a salary cut by BFA, which was a condition precedent for renewal of the contract. When no club made a transfer request to sign Bosman, Mr. Bosman approached United States ("US") Dunkerque (second division French club) and reached a successful transfer deal, on the condition that French Football Association send a transfer certificate to BFA. However, a successful deal between the clubs could not be arrived at and as a result Mr. Bosman was suspended

[47] FIFA, COMMENTARY ON THE REGULATIONS FOR THE STATUS AND TRANSFER OF PLAYERS 53 (2006), available at http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf.
[48] FIFA RSTP, Article 19(4), Article 19(5) (2005).
[49] *Supra* note 7.
[50] *Supra* note 8.

from playing for the season of 1990. Bosman, aggrieved from the order of BFA approached the court[51], on the grounds of being unavailable in US Dunkerque's roster for the 1990 season.

2.2. Effect of the Bosman ruling

The two most significant effects of the ruling were (i) setting aside out of contract transfer payments for transnational transfers within the EU- EEA for EU-EEA citizens and (ii) the abolition of nationality quotas for EU- EEA citizens in European club football. This largely benefitted the players and their agents as the transfer fees now vested with them as against the previous requirement of transfer fees being given to clubs. Transfer fees assumed the form of signing amount coupled with salaries. Since players on free transfer were no longer available in their previous team's roster they could fairly negotiate and deliberate with clubs who were willing to sign them. Consequently, this allowed smaller clubs with lesser financial power to sign free agent players from other clubs, affecting their capital structure proportionately. This seriously weakened the position of former clubs as the status quo pre-Bosman allowed to re-invest in new players, new stadiums and world class training facilities[52]. With regard to the second rule that abolished the nationality quotas in EU nations, European Football saw a great deal of Non-EU players finding a place in rosters of top European clubs. The Bosman case, consequently, compelled FIFA to enact "FIFA Regulations for the Status and Transfer of Players" from 1997. These regulations sought to abolish the compensation fees for the out of contract players who moved within the EU/EEA, thereby accommodating the Bosman verdict in its true and full spirit.

3. Analyzing the Impact of Article 19 on Developing States

Article 19 of FIFA RSTP, 2005 although, true to its spirit and form has been frequently transgressed by the minors' families indulging in unfair and unlawful practices through using fake visas and passports to move to another State. There have been myriad number of cases where minors' families have moved to another country for employment without any restriction on their movement as they are able to obtain work permits on the basis of jobs arranged by clubs without any caveats from another state (where the minor moves to his club).

Developing states often have to face the menace of training industry hoodlums who manipulate the minors into moving to their academies that unfairly derives them FIFA training compensation which is triggered by the impetus of the families to move away from the horrific working conditions in a developing state to a more developed socio-economic structure[53]. This was seen in a case where a

[51] Bosman Ruling, para 28-34.

[52] Fact Sheet 16: The Bosman Ruling, Football Transfers and Foreign Footballers (www.le.ac.uk/so/css/resources/factsheets/index.html).

[53] Schocket, *Football clubs' recruitment strategies and international player migration: evidence from Senegal and South Africa*, 17 Soccer & Society, p. 121 (2016) ; *The scandal of Africa's trafficked players*, The Guardian, 6 January 2008, Supra at 2, pp. 117-129.

fisher was caught in Tenerife (Spain) carrying some African men of which 15 were going to be part of trials at Real Madrid (one of the most popular European Clubs in the World)[54]. This makes it all the more difficult for FIFA to curb these activities as they lack systematic regulations to bind such training academies and they get a freehand in manipulating the facile structure of FIFA Regulations.

On the other hand, developing states are often marred with famine, war, corruption finding themselves hand in glove with severe socio-economic disparities, which force minors to move to a developed state. Turning a blind eye to such a deplorable situation would only mean more exploitation of the minors and their talent going to waste**.**

3.1. Arguments strengthening FIFA and CAS' cause

Restriction on minors' movement first came into picture when a "Commission-condoned" FIFA transfer rules incorporated Article 12 which specifically dealt with the protection of minors' i.e. refusal of their transfer request from one club to another club of different country[55]. This was accompanied by a circular issued by the Apex body which "proposed according to standard and stable development of a minor", that is to say FIFA mandated the home-grown clubs to take responsibility of managing minors' training while providing them with a protocol education system"[56]. The circular intended to ward off any interest from any international club to avoid exploitation of minors' services which was very possible had there been no limitation on the transfer policies.

Countering the problems posed by human trafficking was one of the primary aims of FIFA and Article 19 of FIFA RSTP, 2005 fairly scrutinizes it by restricting international transfers which even though hampered their natural growth as players but eventually cut down the rates of human trafficking to a considerable level, laid down in the white paper report of European Parliament and Commission[57]. It is often debated that the contents of this article unfairly limits the minors from international exposure and facilities however, it is often seen in the best interests of the footballing world as it curbs down any serious repercussions of an international transfer which have affected FIFA's transfer policies for years now"[58].

3.2. Article 19's shortcomings

Protecting minors by prohibiting international transfers might do more harm than good as it might hamper minors' stable development and subsequently put an end to his ambitions and desires. One of the counter narratives to this Article is moving internationally might be a viable livelihood strategy

[54] *The dark side of football transfers*, The Telegraph, ", 31 December 2014 ; Supra at 2, p. 132.
[55] FIFA RSTP, Art. 12 (2001).
[56] FIFA Circular no. 769, 24 August 2001.
[57] European Parliament, Report on the future of professional football in Europe (2006/2130(INI)), paras. 33-34; The White Paper on Sport, COM391 final, p. 16.
[58] FIFA, *FAQ Protection of Minors*, September 2016.

to lift an individual and therefore vicariously their family out of poverty**.** One of the reasons why modern eras best players hail from developing nations is because they get a golden opportunity to play for the biggest European Clubs gaining exposure internationally. Lionel Messi, regarded by many as the best player of this generation, moved from Argentina to Spain to play for one of the most well-developed academies (La Masia, Barcelona) in the world. Luka Modric (Croatia, Dinamo Zagreb) and Mohammed Salah (Egypt) are some of the more popular names who have carved their images as astute footballers having moved from lesser known clubs of developing nations to popular clubs of developed nations**.** This measure with the aim of protecting minors may, in fact, reduce opportunities for youth living in developing countries[59]**.**

4. IS ARTICLE 13 IN LINE WITH THE EU FREE MOVEMENT LAW?

FIFA has carved out an exception to Article 19 of FIFA RSTP, 2005 keeping in mind the requirements of EU Free Movement Law which are to be complied with by the International Sports Authorities, by envisaging Article 19(2)(b) of FIFA RSTP, 2005 which is also known as the "EU or EEA rule". However the contents of the said provision do not completely guarantee free movement of minor football players as they require clubs of the Member States to comply with additional requirements i.e. a minor player can get his transfer request to a club of Member of State approved only when they ensure education, proper standard of living and standard football training which does not hinder his natural development and does not operate as an exploitation of his services and talent.[60] Minors under 16 years of age cannot solely rely on this exception on account of being not considered as "workers" under Article 45 of TFEU and their services are remunerated against. Even so, under-16 players can press for their citizenship rights envisaged under Article 21 TFEU (together with Art. 34(2) of the EU Charter of Fundamental Rights) as non-economically active EU migrants.

Under-16 EU minors cannot rely on the free movement of their parents even if they are recognized workers under Article 45 of TFEU for the sole reason that they are by Article 19(2)(a) underlining the "parents-rule" i.e. parents are permitted to move to another State (where the minor has been transferred to) "for reasons not linked to football". The CAS has hereby clarified that the family's move must be entirely disconnected from the transfer of the minor to a new football club. To draw a clearer picture, parents who move for reasons partially connected with the transfer of minor come under the red zone and are indicted as violators of the "parents rule" even if it was their secondary aim[61]. This

[60] FIFA RSTP, Art. 19(2)(b): Hereby, it is important to indicate that the CAS in *Vada II* (TAS 2012/A/2862) has established a workable account for the particular case of players with the nationality of a EU or EEA Member State residing in a non-EU/EEA country, by allowing them to invoke this exception.

[61] TAS 2011/A/2494, *FC Girondins de Bordeaux* c. *Fédération Internationale de Football Association (FIFA)*, sentence du 22 décembre 2011 (*Vada I*), paras. 31-38; CAS 2013/A/3140, *A.* v. *Club Atlético de Madrid SAD*

provision however, gives rise to various inconsistencies with the free movement of workers who are well within their rights to move to a foreign state in for a desired source of income and as such the provision should be amended balancing the rights of such workers.

The provisions of Article 19 of FIFA RSTP 2005 have been found to be incompatible with the free movement of workers compared to the "home grown players" introduced by Union of European Football Association (hereinafter referred to as "UEFA"). The regulations have been incorporated to aid and promote growth of quality, local talents who often find themselves down the pecking order for more popular names. These rules have been analyzed in detail on the touchstone of TFEU that authorizes free movement of workers in the next statement, with the objective of juxtaposing regulations imposed by FIFA and UEFA.

5. RULE OF HOME GROWN PLAYERS

The new eligibility criteria incorporated into the UEFA regulations that scrutinized all European clubs to meet the requirements of "home grown players" acted as a counterbalance to the free movement of minors[62]. However, the European Parliament approved this study in its resolution stating that "Rules requiring that teams include a certain quota of 'home-grown players' could be accepted as being compatible with the TFEU provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as enhancing and protecting the training and development of talented young players"[63]. The rule provides that squad lists for UEFA club competitions will continue to be limited to 25 players for the main 'A' list[64]. European clubs were directed to register four 'locally trained players' (a 'club trained player' or an 'association trained player') in the final squad list which was extended to one additional 'club trained player' and one additional 'association trained player'[65]. A club trained player is defined as a player who, irrespective of his nationality and age, has been registered with his current club for a period, continuous or non-continuous, of three entire seasons or of 36 months whilst between the ages of 15 and 21[66]. An association trained player fulfils the same criteria but with another club in the same association[67]. It is suggested that this rule will promote competitive balance among national

& Real Federación Española de Fútbol (RFEF) & Fédération Internationale de Football Association (FIFA), award of 10 October 2013 (*A.* v. *Club Atlético de Madrid*), para. 8.25.

[62] White Paper on Sport of 11 July 2007 (COM(2007) 391).

[63] Resolution on the White Paper on Sport — 2007/2261(INI).

[64] 16 Case C-438/00, Deutscher Handballbund v. Kolpak [2003] ECR I-4135 and Case C-265/03, Simutenkov [2005] ECR I-2579.

[65] UEFA 2006-07.

[66] Commission Press Release IP/08/807, 'UEFA rule on home-grown players: compatibility with the principles of free movement of persons', 28/05/08.

[67] *Id.*

teams/clubs which in turn will go on to strengthen minor's position financially and academically. This rule was incorporated by the Premier League from 2010/11, thereby requiring 8 home grown players in a 25 men squad, and this rule was subsequently picked up by other European Leagues (clubs not in English Premier League) restricting the International squad list to twelve players in their official sixteen men match day squad players, 4 of them to be registered as home grown players for three consecutive seasons before their 21st birthday, with the number increasing to 10 home grown players in the subsequent year. These rules have however been found to be compatible with EU law, as contended by the Commission, consolidating balance in competition and triggering training for young home-grown players who find themselves ditched because of lack of resources available to them. The European Parliament has cracked down on clubs who manipulate home grown players into child trafficking and has come up with a report[68] agreeing to the fact that external measures are required to combat such consequences and that 'young players must be given the opportunity for general education and vocational training, running parallel with their club and training activities, and that the clubs should ensure that young players from third world nations are not exploited further and return safely to their respective countries if their career does not take off in Europe.'[69]

6. CAS AND EU'S ROLE IN SAFEGUARDING MINORS FROM POTENTIAL ABUSE

There have been varying instances where the minor, who has moved to another club of a different nation, has been subjected to cruelty in the form of potential drug abuse, sexually and morally harassed, exploitation of his services with meagre incentives, deprivation of educational opportunities and locally trafficked by drug lords and kingpins. These raging issues were raised in a European Sports Forum (EU recognized yearly Sports Forum) which deliberated upon some of the key issues of transfer policies; anti-competitive practices carried out by popular clubs which could attract young talents from lesser known clubs and thereby disturb the equilibrium of talents, causing huge losses to smaller clubs in terms of monetary and training investments inyouth talent. EU has explicitly recognized protection of minors as a valid concern, wherein it has resolved to cover certain transfers which have had a negative effect on players' health and have been at the receiving end of labor laws of European Union, specifically from Sub-Saharan and Middle East nations (Nice Declaration on Sports)[70].

[68] European Parliament (2007), 'Resolution of the European Parliament on the Future of Professional Football in Europe', A6-0036/2007, 29 March, (The Belet Report). European Parliament (2008), 'European Parliament Resolution of May 8 2008 on the White Paper on Sport' 2007/2261(INI), (The Mavrommatis Report).
[69] Ibid.
[70] Declaration 29, Treaty of Amsterdam. Presidency Conclusions, (2000), Nice European Council Meeting, December 2000.

Human trafficking in the footballing world has continued to plague FIFA and EU, albeit not being covered under the legal definition of illicit trafficking, making it difficult for EU to crackdown on the illicit traffickers[71]. Reports further state that the situation is even worse in South American and African countries where young players are picked by agents from remote areas and then brought to to top European clubs. The situation gets even murkier when the players who do not fit the profile of such clubs are left abandoned at the helm of drug lords and gangsters[72]. However, EU has found it considerably easy to ward off such a danger as they have had a major hand in promoting transparency across sporting institutions protecting the moral interests of young sportsmen and sportswomen, through ratifying Article 165(2) of Treaty which empowers EU to develop the European dimension in football.

Furthermore, national associations now have to file an application to a sub–committee constituted by PSC, for the first registration of players who are not citizens of country so as to not violate Article 19, altering the erstwhile position which bound national associations to keep in check necessary compliance of Article 19(2)(b)[73] of FIFA RSTP, 2005. In addition to the abovementioned requirements, national associations are authorized to maintain a register which comprises of names and dates of birth of the minors and the clubs and academies (having legal, financial or de facto links) must first report the players to the national association[74]. EU has therefore played a crucial role in safeguarding minors from any potential abuse and that protection of minors tops their priority list[75]. However, such regulations tend to offer some proportional measures which balance out the effect of protection of minors by entitling minors to train with another club across border provided the club is within 50 kms of the national border, with clubs charged with "ensuring suitable and stable education and training". Perhaps, it is imperative to assess the measures in the backdrop of their enforcement which was observed in *Midtjylland v FIFA* wherein the CAS quashed appeal of a Denmark league club FC Midtjylland referred against sanctions imposed upon them by FIFA for violation of Article 19 RSTP[76]. CAS set out to adjudicate on four major issues, while maintaining the *status quo* on prohibition of international transfers of minors:

"*First, the club argued that Article 19 of the FIFA Regulations was applicable only to professional and not amateur minor players. The CAS found that Article 19 was applicable to both. If it were not, the*

[71] Commission of the European Communities (2007), 'White Paper on Sport', COM(2007) 391 final.
[72] European Parliament (2007), 'Resolution of the European Parliament on the Future of Professional Football in Europe', A6-0036/2007, 29 March, (The Belet Report). European Parliament (2008), 'European Parliament Resolution of May 8 2008 on the White Paper on Sport' 2007/2261(INI), (The Mavrommatis Report).
[73] FIFA RSTP 2005, Art. 19 (4).
[74] *Id*.
[75] *Càdiz C.F., SAD* v. *FIFA and Asociación Paraguaya de Fútbol*, CAS 2005/A 955, *Carlos Javier Acuña Caballero* v. *FIFA and Asociación Paraguaya de Fútbol*, CAS 2005/A/956.
[76] *Midtjylland* v. *FIFA*, CAS 2008/A/1485.

intended objective of the provision which is the protection of minors, could be circumvented. Second, the CAS found that the exceptions to the prohibition on the international transfer of minors contained in Article 19 did not apply to the case. In particular, the club could produce no evidence that the relocation of the players to Denmark was not football related. Indeed, the club made claims on its website suggesting that its link with the Nigerian club was for the purpose of attracting new talent. Third, Midtjylland claimed that a strict application of Article 19 would contravene EU legislation, particularly the Cotonou Agreement. As has been established by the Court of Justice, non-EU nationals covered by such association agreements who are legally employed within a member state of the EU can claim non-discrimination rights in relation to employment conditions[77]. The CAS considered that as the players have no employment contract and are not therefore employed in Denmark and given that the Danish immigration service defined the players as students and not workers, the relevant provisions of the Cotonou Agreement cannot be relied upon as the Agreement does not extend to the regulation of access to the employment market. Finally, the club argued that FIFA were inconsistent in the application of the rules contained in Article 19 and that they allowed one of the larger European clubs, Bayern Munich, to register a non-EU minor without sanction. The CAS found no evidence that it was the constant practice of FIFA to accept the registration of minor players from outside the EU. Based on the above arguments, the CAS dismissed Midtjylland's appeal. It also endorsed the Acuña case in that the FIFA rules limiting the international transfer of minor players "do not violate any mandatory principle of public policy and do not constitute any restriction to the fundamental rights that would have to be considered as not admissible. Lastly on the fourth issue, in reaction to the appellant's allegation that FIFA's approach was inconsistent and favoured bigger clubs (by reference to Bayern München's registering a minor player from South America), the CAS solely pointed at the general principle "that no one can claim for equal treatment by referring to someone else who has adopted an illegal conduct, without sanction (nemini dolus alienus prodesse debet)". Concluding, FC Midtjylland was found to have breached Article 19 RSTP as the CAS favoured a strict interpretation, yet simultaneously, it allowed for two additional implicit exceptions for students".

7. CASE STUDY: THE ACUÑA CASE

The overall effect of these provisions protecting minors from the wrath of powerful clubs is that these have a free space to operate without any external interference and have been judicially brought into

[77]Case C-438/00, *Deutscher Handballbund* v. *Kolpak* [2003] ECR I-4135 and Case C-265/03, *Simutenkov* [2005] ECR I-2579.

effect by CAS[78] and FIFA RSTP. CAS ruling in *Cádiz C.F. and Carlos Javier Acuña Caballero* v. *FIFA and Asociación Paraguaya de Fútbol*[79] set the law for forthcoming issues concerning the provision's enforceability. Acuna Caballero aged 16 represented Paraguan club Olimpia and his performances earned him an interest from Spanish third division club Cádiz C.F., with the player subsequently signing an employment contract, which was agreed by Olimpia[80]. The FIFA PSC decided upon the matter, on Paraguayan Football Association's decision of not issuing an International Transfer Certificate to Acuna Caballero, accentuating Acuna's lack of intention to continue his education. The single judge refused the Spanish Football Association's request to register the player on the grounds that the player's move to Spain was triggered by a transfer interest by the Spanish club and not on account of seeking formal education and training. The PSC found the case to be in total violation of the spirit of the exemption to Article 19 of FIFA RSTP, 2005: "the mother would have followed the player"[81], stressing on the fact that mother's move with regard to her occupation commenced on account of his son getting a transfer call-up from the club. The tribunal for Football transfers incriminated Spanish association on registering Acuña with Cádiz C.F.[82], violating provisions of Article 19.

The appellants (Cadiz C.F and Acuna) approached the CAS Panel pressing upon the rule that FIFA's provisions restricting the movement of underage players to international clubs violated basic principles of public policy under Swiss Code of Obligations ("CO"). The Tribunal rejected the contention of the appellants underlining that the provisions under RSTP limiting the transfer of underage players were in consonance with CO inasmuch that "they pursue a legitimate objective, namely the protection of young players from international transfers which could disrupt their lives, particularly if, as often happens the football career eventually fails or, anyways, is not as successful as expected and they are proportionate to the objective sought, as they provide for some reasonable exceptions"[83]. Consequently, the Panel was asked whether the mother's move to Spain was stimulated by her son's move to the Spanish club. The Panel held in affirmative by observing that "the players' decision to move to Spain was made first" and her mother followed. The Panel held the

[78] A. Duval, *The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman* ; A. Duval and B. Van Rompuy (Eds.), *The Legacy of Bosman*, Asser Press, pp. 81-116 (2016) ; A. Duval, *The Court of Arbitration for Sport and EU Law. Chronicle of an Encounter*, MJ , pp. 224-256 (2015)

[79] *Cádiz C.F., SAD* v. *FIFA and Asociación Paraguaya de Fútbol,* CAS 2005/A/955 and *Carlos Javier Acuña Caballero* v. *FIFA and Asociación Paraguaya de Fútbol,* CAS 2005/A/956.

[80] Ibid, paras. 2.6-2.7.

[81] Ibid, para. 2.10.

[82] Ibid, para. 2.16.

[83] Ibid.

appellants for contravening the contents of Article 19 thereby not availing them the benefits of Article 19 (2)(a), since the family's move to Spain was for "reasons related to football". This was a landmark case in the jurisprudence of illegal transfer of minors wherein CAS carved out an exception to Article 19[84] of FIFA RSTP, 2005, allowing minors to move internationally on the condition that the minor followed the family for reasons not linked to football and that the move shall be a result of family's intention of seeking livelihood in another country. This came as a relief to many raw and quality talents who could not have been afforded an opportunity to play with top clubs and players, except for the situation where the player followed the family and not the other way around and the move was triggered by "reasons not linked to football"[85]. The CAS verdict heralded a new era in the discourse of FIFA RSTP and Article 19 specifically by counter balancing the impact of prohibition on transfer of minors, provided they meet the condition envisaged under Article 19(2) (a) of FIFA RSTP, 2005. This interpretation of Article 19 was affirmed by CAS in another leading case of *Real Club Racing de Santander, SAD v. Club Estudiantes de la Plata (speler Brian Oscar Sarmiento)*[86], thereby creating the exception as a different interpretation to Article 19. The two important cases, *CAS Caballero* and *CAS F.C. Midtjylland*, were applied strictly since there were possibilities they might be abused frequently by the potential powerful clubs. To circumvent the abuse of these exceptions, FIFA decided to amend and extend Article 19 of FIFA RSTP, 2005 to further protect minors in football. One of the regulations enacted by FIFA was introduction of Article 19bis, which required all academies linked to a club to report all minors registered with the academy to the national association and if there is no direct nexus between the players and academy, then the liability fell upon the associations to ensure the academy runs a club in the national championships.

FIFA has frequently found itself in turmoil with regard to the exception's wording as to how would it be implemented to prevent transfers in situations to which the exception should presumably apply. For instance, consider a scenario wherein a football manager moves with his family to manage an international club, would the exception still apply to minor son or daughter, as the case maybe? In such cases, the Commentary on FIFA RSTP suggests that regard should be paid to minor's motivation to move and not the parents. This would certainly be "not linked to football" as the wording of Article 19 suggests[87].

[84] Article 19(2) (a) FIFA RSTP 2005.
[85] Ibid.
[86] CAS 2007/A/1403 Real Club Racing de Santander, SAD v. Club Estudiantes de la Plata (speler Brian Oscar Sarmiento).
[87] Commentary on FIFA RSTP, http://www.thefa.com/-/media/files/thefaportal/governance-docs/registrations/december-2015-updates/commentary-on-the-regulations-for-the-status-and-transfer-of-players.ashx.

8. CONCLUSION

With the growing menace of illegal trafficking of young players from remote and underdeveloped nations and further exploitation of their services by the clubs physically and mentally, FIFA has found it difficult to maintain a steady ground for the minor players and their families. Article 19 has legitimately done the damage control regulating the international transfers of minors, albeit with a few caveats. Article 19(2)(a) FIFA RSTP, 2005 the "parents-rule", however, has proved to be infructuous for the minors which has effectively made the prohibition worthless. The case has been hit by conflicting opinions wherein the judiciary has applied this exception strictly i.e., the minor has to follow his parents and not the other way around. However, there do exist loopholes which can be maneuvered easily to one's own advantage[88].

This rule has suffocated the free movement of minors hindering their development with regard to their footballing abilities and talent. The *Acuña* case[89] serves as a good precedent for highlighting the inconsistencies of the rule with the interests of minors, turning a blind eye to the needs of minors who are not financially well off but are gifted in abundance of talent. The prohibitions seemingly act as a stopgap on the movement of minors which is permitted only if the family moves to another city/state "for reasons not linked to football".

Another spectrum of the debate relating to the "parents rule" is whether refusing financially well-off families, who have residence permits, to move to another country for reasons linked to football is contradictory to the intent of Article 19? Answering this in negative CAS allowed a minor to register with Atletico Madrid because his family was financially stable and weren't a burden on the social welfare program of Spain[90]. Another case could be where the poorer families could also opt to move to another country following their child's transfer which is potentially in consonance with the idea of Article 19 of FIFA RSTP, 2005. This could, on a brighter side, combat the scenario where a minor falls into wrong hands and is left at the peril of the notorious club, possibly when the move has taken place from a developing country to a developed European State. The minor can benefit from a well-structured education system and developed socio-economic framework where he can grow as a player and human being and need not care about the exploitation of his services.

[88]KEA, CDES and EOSE, Study on Sports Agents in the Eurropean Union, November 2009, p. 128; Supra at 3, p. 240. (A study commissioned by the European Commission (Directorate-General for Education and Culture)) http://ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf.

[89] CAS 2005/A/955 Cádiz C.F., SAD v. FIFA and Asociación Paraguaya de Fútbol and CAS 2005/A/956 Carlos Javier Acuña Caballero v/FIFA and Asociación Paraguaya de Fútbol.

[90] CAS 2013/A/3140 A. v. Club Atlético de Madrid SAD & Real Federación Española de Fútbol (RFEF) & Fédération Internationale de Football Association (FIFA), award of 10 October 2013.

Consequently, amending Article 19 will shift the tide in favour of parents and minors and is a welcome change in the footballing discourse benefitting the clubs in the long run as well. However, this can be achieved only by expanding the scope of mandatory obligations of the clubs and binding them to it pertaining to the well - developed education system and thorough training regime which forms the basic structure of Article 19(2)(b) or the EU-EEA rule. One way of tackling the unwarranted consequences of human trafficking would be according to the traffickers status of legal guardians of the minors charged with responsibility of securing education and a respectable standard of living coupled with managing their football training and expenses. In this way the FIFA could do away with this notorious rule and make laws favouring the minors and parents which would have a very notable impact on their growth as a player, subsequently, skyrocketing the possibility of raw talent to attain center stage internationally, without disrupting the rhythm and purpose of the Article.

THE ANTEDILUVIAN BIRTHS AND DEATHS REGISTRATION ACT, 1969 AND THE PREVALENCE OF AGE FRAUD IN INDIAN SPORTS

Devang Agarwalla[1]

[1] West Bengal National University of Juridical Sciences, Kolkata

devaang@nujs.edu

ABSTRACT

Age fraud has been a consistent threat to the legitimacy of a number of Indian sports, its sportspersons, as well as that of the various national bodies in charge of their respective sports. This paper seeks to review the policies which are inadequate in their current form to prevent these age fraud violations, most of which were designed as supplements to the Births and Deaths Registration Act, 1969. This is sought to be done by analyzing the relevant sections of the Act, in light of the policies that seek to supplement it in the current circumstances of the country, to prove that a comprehensive review or repeal of the Act is necessary to make significant changes in the fight to clamp down on age fraud violations.

KEYWORDS

Age Fraud, registration, India

1. INTRODUCTION

Age frauds have been rampant in Indian sports, from the junior-most to the senior levels. At the outset, it is important to note that this practice has been propagated at a systemic and structural level, right from the point where the child is born, with India's basic birth registration system to blame. Only 81% of births are attended by skilled health personnel in India.[91] This is indicative of a gap in the healthcare system which not only puts babies at risk but also results in a lack of documentation of several births.

There has always existed a strong positive relationship between skilled care at birth and household wealth. In developing countries, the poorest 20 per cent of women are far more likely to give birth without assistance than women in the top wealth quintile.[92] The highest wealth-based inequality in use

[91] *State of World Population 2017*; UNITED NATIONS WORLD POPULATION FUND, http://nigeria.unfpa.org/sites/default/files/pub-pdf/EN_WEB-READY_SWOP%202017%20report_11.pdf

[92] Wang, et al, *Levels and Trends in the Use of Maternal Health Services in Developing Countries* (DHS Comparative Reports' No. 26, ICF Macro. Washington, D.C., United States Agency for International Development, 2011)

of skilled birth care is currently in West and Central Africa, followed by Asia and the Pacific, and East and Southern Africa.[93] Therefore, the fact that India is generally a poor country without access to basic healthcare must be taken into account as a factor for discrepancies in birth registration. However, in addition to infrastructural failure, it is also necessary to keep in mind that there exists fraudulent behaviour whereby birth registration details are purposefully manipulated by young sportspersons and those around them, in order to gain a significant advantage in their age category in sports.

The State of World Population Report 2017, developed by the United Nations Population Fund states that 28% of India's population is aged between 10-24.[94] This is the basic age group where age-based categorization occurs for different sports. This huge chunk of the country's population must be guided by an effective central legislation, which is currently lacking in India as the outdated Births and Deaths Registration Act, 1969 (*hereinafter,* "**the Act**") which is currently in force has perpetuated an environment of corruption and permeated the entire framework of sports in India. The fallacies in the Act have allowed individuals seeking to participate in age-categorized sporting events to manipulate their age in an attempt to gain an advantage over their peers, which in turn has forced National Sporting Federations (*hereinafter,* "**NSFs**") in charge of their respective sports in the country to take measures beyond their capacity to try and curb this problem.

By manipulating birthdates to appear younger than they are, players gain a competitive advantage by being allowed to compete with younger players. Even when the offenders are caught, the Sports Integrity Unit (*hereinafter,* "SIU") of the Central Bureau of Investigation (*hereinafter,* "CBI") can only recommend 'suitable action' against them without filing charges of cheating, etc.[95] as it claims it needs the permission of states to formally charge anyone.[96] An experienced coach is quoted saying that "over 95% of professional footballers in India have incorrect date of births".[97] The NSFs in charge of their respective sports in the country have tried various measures to combat a problem that has been equated to match-fixing and corruption.[98] The Board of Control for Cricket in India (*hereinafter,* "BCCI") has begun conducting bone-density tests, while requiring that players who enter competitive cricket at the

[93] *Id.*

[94] State of World Population 2017, *supra* note 1.

[95] *TT players manipulated age to represent India, finds CBI*, BUSINESS STANDARD, (Jan. 16, 2015), http://www.business-standard.com/article/beyond-business/tt-players-manipulated-age-to-represent-india-finds-cbi-115011601113_1.html.

[96] *CBI unit says age fraud rampant in Indian sports*, TIMES OF INDIA, (Jan. 17, 2015), https://timesofindia.indiatimes.com/sports/more-sports/others/CBI-unit-says-age-fraud-rampant-in-Indian-sports/articleshow/45920150.cms.

[97] Akarsh Sharma, *Indian football's age of deceit,* LIVEMINT, (Sep. 23, 2017), http://www.livemint.com/Sundayapp/x3V2ziga7NhHzAfsFfnUKN/Indian-footballs-age-of-deceit.html.

[98] *Age-fudging no different from fixing – Dravid*, ESPN CRICINFO, (Dec. 1, 2015) http://www.espncricinfo.com/india/content/story/946611.html.

Under-19 level to submit at least three documents to attest their date of birth.[99] The BCCI also decided that players cannot represent India in more than one Under-19 World Cup, even if they meet the requisite age criteria to do so.[100] The Sports Authority of India (*hereinafter*, "**SAI**") subjected the national teams for the Asia Under-17 and Under-15 Junior Championships to medical tests, following complaints about fudging of certificates and overage players.[101] SAI was forced to take this step as the Delhi High Court had refused to interfere with the method of bone age determination adopted by BCCI to ascertain the age of players.[102] However, many measures have been taken by the Government of India to try and combat this problem, as well as supplement the Act as it exists today.

2. MEASURES TAKEN BY THE GOVERNMENT OF INDIA TO SUPPLEMENT THE ACT

2.1. National Code against Age Fraud in Sports, 2010

The National Code against Age Fraud in Sports (*hereinafter*, the "Code") came into effect from April 1st, 2010, aimed at clamping down on age fraud violators.[103] The Code was introduced with the intention of supplementing existing legislations against age fraud violators, such as the Act. The Code made it mandatory for participating athletes to undergo medical examinations before being issued identity cards by SAI or the respective NSFs. Non-compliance with the Code would attract suspension and de-recognition in respect of the defaulting NSFs. Many NSFs including the Indian Weightlifting Federation, Athletics Federation of India and All India Football federation welcomed this move, stating that they were ready to adhere to the new Code formulated by the Sports Ministry.[104] The Badminton Association of India sent a notification to the Ministry of Youth Affairs and Sports on February 9th, 2017 stating that steps had already been taken to combat the vice of age fraud, in line with the Sports Code guidelines issued by the Government of India.[105]

2.2. Draft National Sports Development Bill, 2013

---

[99] *BCCI issues guidelines to states to tackle age-fudging*, ESPN CRICINFO, (Jul. 7, 2016), http://www.espncricinfo.com/india/content/story/1033019.html.

[100] *India players barred from playing multiple U-19 World Cups*, ESPN CRICINFO, (Jun. 24, 2016), http://www.espncricinfo.com/story/_/id/16473396/india-players-barred-playing-multiple-u-19-world-cups.

[101] Narain Swamy, *SAI orders age test for junior badminton players*" TIMES OF INDIA, (Oct. 2 2015), https://timesofindia.indiatimes.com/sports/badminton/SAI-orders-age-test-for-junior-badminton-players/articleshow/49191123.cms.

[102] *Id.*

[103] *National Code against Age Fraud in Sports*, MINISTRY OF YOUTH AFFAIRS AND SPORTS https://yas.nic.in/sites/default/files/File824.pdf.

[104] *NSF's welcome Code against Age Fraud*, ZEE NEWS, (Mar. 21, 2010), http://zeenews.india.com/sports/others/nsfs-welcome-code-against-age-fraud_613081.html.

[105] BADMINTON ASSOCIATION OF INDIA, (Mar. 21, 2010) http://www.badmintonindia.org/download/Players%20Age%20Verification%20Procedure.pdf

The draft National Sports Development Bill, 2013[106] (*hereinafter*, the "Draft Bill") was introduced by the previous Congress government and completely abandoned by the current BJP Government, though it had pushed for its passage while it was in the opposition.[107] It sought to allow the Central Government to make rules relating to age fraud, and to ensure each NSF would take measures to prevent age fraud. The Draft Bill also sought to establish an Ethics Commission, which would enforce the Codes of Ethics along with the NSFs. However, the Government was unable to find consensus even within its own cabinet, eventually scuttling it in its entirety.[108]

2.3. National Sports Ethics Commission Bill, 2016

The National Sports Ethics Commission Bill, 2016 (*hereinafter*, the "Bill") was introduced with the stated aim:

> "*to provide for the constitution of a National Sports Ethics Commission to ensure ethical practices and fair play in sports including elimination of doping practices, match-fixing, fraud of age and sexual harassment of women in sports and for matters connected therewith or incidental thereto."*[109]

The Bill also delineated offences, along with criminal and administrative penalties supplementary to those under existing laws for 'age or gender fraud' in Section 18. This was defined to include facilitation of participation and withholding of information by a guardian, coach, sportsperson or member of a sports federation that permitted an ineligible athlete to participate in a competition unsuitable for the age or gender of that athlete. While the offences described in Section 18 has the potential for permanent debarment from participation in any activities of the sports federation, there also exist criminal penalties envisaged from not less than one year for the offence of gender or age fraud, to not less than ten years for the offence of match-fixing along with a range of fines for all of the aforesaid offences (including a fine of five times the amount involved in any match-fixing).[110] While the Bill is an ambitious attempt to balance the independence of sports federations with adjudication and oversight by the creation of a penal environment, these are measures that could better be implemented in the Act. A section-wise analysis of the Act could show how many loopholes are yet to be plugged, which cannot be done to the fullest extent by the Bill.

---

[106]National Sports Development Bill, MINISTRY OF YOUTH AFFAIRS AND SPORTS https://yas.nic.in/sites/default/files/File921.pdf.

[107]", Nandan Kamath, "*Fighting sports corruption in India: A review of the National Sports Ethics Commission Bill 2016*, LAWINSPORT (Jul. 1, 2016), https://www.lawinsport.com/articles/item/fighting-sports-corruption-in-india-a-review-of-the-national-sports-ethics-commission-bill-2016.

[108]*Id.*

[109]N*ational Sports Ethics Commission Bill*, 2016, (Mar. 21, 2010) https://164.100.47.4/BillsTexts/LSBillTexts/AsIntroduced/4408LS.pdf.

[110]N. Kamath, *Supra* note 18.

3. SECTION-WISE ANALYSIS OF THE ACT

The loopholes existing in the following sections of the Act are amongst the major reasons for the rampant age fraud violations in the country.

Section 8 of the Act states whose duty it is to register births, and by when such registration is to be made. Section 8(1)(a) of the Act states that the 'head of the household' as recognized by the house, or in the last instance the 'oldest adult male person present' is to make the registration. Such descriptions are archaic, chauvinistic and patronizing, not to mention inadequate. The other subsections also impose the duty to register births on the head of the institution that was the birthplace in question. These 'heads' are usually tasked with many other functions essential to their institution, which results in the relegation of this responsibility as unimportant. The duty to register births must be unequivocal and distributed equally amongst all persons present during the birth, and the current scenario allows for the non-registration or late registration of births with the persons involved escaping responsibility.

Section 10 of the Act states whose duty it is to notify births, and when such notification is to be made. This section suffers from similar loopholes of Section 8, as not enough persons are obliged to notify the Registrar of the Births. Currently, only medical attendants present at the time of birth, and 'any other person whom the State Government may specify' have the duty to do so. This places too much discretion at the hands of State Governments, and the Act must either ensure that State Governments take action to prescribe a detailed list of persons to notify, or create a more detailed list itself, to change the situation of Registrars not being notified.

Section 11 of the Act states that every informant giving any facts to the Registrar is to enter their own identification details in the register. This disallows informants from keeping their anonymity in case they wish to reveal facts of any wrongdoing or seek to rectify previous errors as per the Act, discouraging them from coming forward with information that could be vital to catch offenders under the Act. A provision allowing anonymity would certainly increase the inflow of information of previous wrongdoing to the relevant persons. Protection of bonafide or 'good-faith' actions by Section 28 are not a good enough protective mechanism for such persons.

Section 13 of the Act permits the registration of birth dates after an extended period of time with payment of a late fee that is insignificant in amount and verification of the birth date by a magistrate of the first class. This process is easily manipulated, as the late fee is minimal and requisite verification

obtainable based on fake affidavits,[111] or via a 'non-availability report' given to parents that approach a different municipality/panchayat/corporation from that of the child's actual birth.[112] Hereinafter, the magistrate could accept a study certificate as proof of birth of the child – which can easily be tampered with. Thereafter with the certification of the magistrate, these fake certificates proving birthdates are legalized, leaving no incriminating evidence to catch offenders, or halt the process. This section is in dire need of a complete revamp to halt the manipulative practices prevailing with respect to the creation of fraudulent birth certificates.

Section 16 of the Act states that the Registrars are to keep registers in the prescribed form, and print and supply sufficient books to allow for the same while Section 17 states that any person may cause a search of these registers and obtain extracts thereof. However, there is nothing stated with respect to electronic archiving of data or the use of electronic systems at all in the Act. Physical storage of registers manually is bound create inefficiency in an age where electronic data repositories are present nearly everywhere, and the current system allows for a lot of loss of valuable data, and disorganized storage, making searches and obtaining extracts impossible in certain cases. Also, Section 17(b) states that one may obtain an extract of registers relating to any birth or death – this is a serious privacy concern by itself.

Section 23 of the Act prescribes the penalties in place in case of contravention of any articles of the same. However, age fraud violations are only detected, if at all, many years after the actual birth of the accused. By this time, the persons tasked with the responsibility to notify and register births are very likely to not be in the jurisdiction of the Registrar where the original defaults occurred any longer. There exist no mechanisms of checks and balances to ensure correctness or legitimacy. Also, the maximum pecuniary penalty prescribed under this section is a mere fifty rupees, which is a measly sum and not one that would deter any wrongdoing by culprits.

3. CONCLUSION

Age fraud violations in Indian sport are not only a scourge by themselves, they also act to disillusion the honest sportspersons who lose out to violators due to no fault of theirs. The need of the hour is urgently reforming this process by comprehensively revamping the Act or replacing it altogether. This is the only way to plug the many existing loopholes in the Act and to also keep pace with technological

[111] Sagnik Kundu, *CBI catches four youth badminton players from India for cheating via age manipulation*, SPORTSKEEDA, (May 31, 2017), https://www.sportskeeda.com/badminton/cbi-catches-four-youth-badminton-players-india-cheating-age-manipulation.

[112] Shivani Naik, *Tackling an age-old problem: BAI can take a leaf out of chess federation*, THE INDIAN EXPRESS, (Feb. 22, 2017), http://indianexpress.com/article/sports/badminton/tackling-an-age-old-problem-bai-can-take-a-leaf-out-of-chess-federation-4536953/.

advancements, by the creation of watertight provisions in consonance with the views of stakeholders here – such as the SIU (whose powers must be expanded beyond their current 'investigative-only' scope, the Ministry of Youth Affairs and Sports in India, the State Governments, and most importantly – the bodies in charge of the various sports in India – which regularly suffer reputational losses due to the illegal and fraudulent practices of certain sportspersons and their relatives. The missing teeth of the National Code against Age Fraud in Sports, 2010, the political issues that came with attempting to pass the National Sports Development Bill, 2013 and the current challenges faced by the National Sports Ethics Commission Bill, 2016 can all be tackled to a great extent by comprehensively updating the Act. Without this, any number of sports-specific legislations may prove to be ineffective as the systemic loopholes propagated by the Act will continue to be exploited, which can only be mitigated by these forward-thinking sports-based legislations and not cut out altogether.

WHAT ARE THE TREND-SETTING PRACTICES THAT HAVE EVOLVED CHARACTER MERCHANDISING AND VALUE TRANSFERENCE' OF INDIAN CRICKETERS?

Rohit Walavalkar[1]

[1] Deakin University, Melbourne
rohitwalavalkar7@gmail.com

ABSTRACT

The aim of this research paper is to introduce and discuss about the various practices in Intellectual Property Law which have played a huge role when it comes to Indian Cricket. Cricket in India is huge, and the cricketers are idols and role models. Various brands and companies, for their own profit and benefit, rope in these cricketers with lucrative deals and offers.

The role of this research paper is to discuss about where the role of intellectual property comes into play, what are the trend setting practices that are currently available or which have evolved or and what are the available measures, if the cricketer(s) is sued for non-compliance of the contracts.

KEYWORDS

India, Cricket, personality Rights, Internet

1. WHAT ARE PERSONALITY RIGHTS?

1.1. Introduction

Well known personalities and celebrities are often in the limelight. There are certain rights available with such personalities or celebrities which are termed as "personality rights." These rights are available to protect such well known personalities from unauthorized use of their name, image, signature or persona without their prior consent or compensation. In this contemporary age of media, intellectual property has been growing continuously. Currently, it is not only restricted to Patents, Copyrights or Trademarks, but judicial involvement has broadened the scope of IP to introduce new forms of protection – "Personality Rights[113]."

Personality rights mainly comprise of two kinds of rights- 1) Right to Publicity, 2) Right to Privacy. Right to publicity denotes the right to safeguard or control one's image, fame and likeness from being commercially exploited without prior consent or without getting into a prior contract with the personality and paying the contractual compensation before using his/her image or persona. In other words, Right to

[113] *Personality Rights,* LAWTEACHER, (Nov., 2013), https://www.lawteacher.net/free-law-essays/criminology/personality-rights.php?vref=1.

Publicity is often granted to celebrities or people who are famous and of significant importance in the world of entertainment and media. This right evolves from the Right to privacy and is available to only those individuals who are "famous" in the eyes of the public, having a reputation or goodwill which can be commercially exploited. On the other hand, Right to Privacy means right to be left alone and disallow publicly characterizing one's personality without prior permission.

It is not a new practice to associate a player's name, image, and persona, signature with a product or service. Associating a well-known personality with a product or service can either be for merchandising, endorsement, branding or for promotional purpose. Personality endorsement usually means that a well-known personality or celebrity agrees to publicly approve the product or service by word or action. On the other hand, merchandising means making use of the name, image or signature of a well-known personality for promotion of a product or service. People usually get carried away when they see the face of such well-known personalities on the cover of a product or service. The name and fame of such well-known personality often influences a section of people, helping the company to make profits on their good(s) and service(s). Hence, nowadays it is not a surprise when a brand or company pays millions of dollars to rope in a well-known personality just to get that personality associated with their brand or product[114].

Personality Right can even be termed as "Publicity Right." One can describe Publicity right as a right which is available with an individual to regulate and manage the marketable use of their name, persona, likeness or signature. Publicity right is often considered to be more of a public right than a private or personal right. Also, the right to publicity can even survive the death of the individual.

2. IMPORTANCE OF CELEBRITY/PERSONALITY RIGHTS IN THE INTERNET ERA AND THE ROLE OF PRESS.

The concept of celebrity rights has gained greater importance in this age of internet, free press and media, further gaining extra relevance & subject matter of discussion. Media's interaction with individuals and citizens has grown like never before. The media has been faster than ever, and one can use the celebrity's image for publicity, invading privacy or for morally defaming them.

An example would be the case of Julia Roberts where the defendant started a website named "JuliaRoberts.com" and on the same website, the defendant came up with an auction program for selling his goods. Julia Roberts sued the defendant for misusing her name for endorsing his own auction over the

[114] BananaIP Reporter, *Entertainment Law: Personality Rights in India – Part I*, BANANAIP COUNSELS, https://www.bananaip.com/ip-news-center/personality-rights-india/.

internet as the people would be too curious to know every detail about the celebrity and would therefore browse the website to check it, thus making his auction a great hit on the internet[115].

Therefore, we see that presently the concept of celebrity rights has gained greater relevance due to two main reasons:

i. Growing worth and popularity of media and free press.

ii. Faster means of communication through the internet.

Media is playing an important role in today's world. Hence, we often see that media has become a significant part of our society, and therefore, it is necessary to amend the affairs of the media through implementation of effective laws. One law which has a significance in regulating with the affairs of the media is Intellectual Property Laws. The reason behind this is most of the chunk matter, creation and services which media creates and publishes is in intangible form, and thus is a result of intellectual creation of human mind. Thus, a major media activity is often regulated by Intellectual Property Law[116].

However, while computing the features of celebrity rights, we notice that celebrity rights limit the purview of Fundamental rights protected under Article 19[117] of the Constitution of India.

Thus, we face the following two issues while visualizing the characteristics of celebrity rights.

A. Internet conflict between celebrity rights and fundamental rights protected in the Indian Constitution.

B. The conflict between right to human dignity and commercial property right.

3. ATHLETE ENDORSEMENT AGREEMENTS- WHAT ARE THE VARIOUS NEGOTIATIONS MADE OR ARE IN PROGRESS CURRENTLY IN INDIA?

The Indian sports industry, and especially the cricket industry in the country has been on a rise, especially since the last decade. There has been an enormous economic transformation in the last two decades. The credit to this change is the beginning of franchise-based professional leagues in India, commencing from the foundation of the Indian Premier League in 2008. The opportunities available for investment in sports leagues along with growing interest by the Indian private sector in investing in sports, mainly cricket has facilitated an unequal growth in the Indian sports industry. The ever-growing exposure of Indian cricket, especially cricketers to the Indian audience, because of the drastic

[115] Jacqueline D. Lipton, *Celebrity in Cyberspace: A Personality Rights Paradigm for Personal Domain Name Disputes,* 65 WASH. & LEE L. REV. 1445 (2008).
[116] *Celebrity Rights*, LEGAL SERVICES INDIA, http://www.legalserviceindia.com/article/l139-Celebrity-Rights.html.

[117] SANDRA COLIVER, THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK, (Article 19 1993).

development in the sport meant that the cricketers, who are now considered as celebrities, have become a household names in India. Naturally, this has allowed the Indian brands and companies to consider engage with such cricketers, as brand ambassadors or endorsers to help promote companies' product and services.

While Indian companies have always opted Indian cricketers to endorse their products, recently there has been an increasing trend in engaging with the Indian athletes from other sporting backgrounds who have made a mark in their respective sport. However, the athlete endorsement market continues to be dominated by Indian cricketers in India, who have always been the centre of attraction. In certain occasions, Indian companies have also tried engaging with foreign cricketers as brand endorsers, for example Steve Waugh and Chris Gayle. However, such examples are few and, in the end, the Indian companies stick to modern day and retired cricketers for their personal success[118].

4. ENGAGING A MARKETING AND REPRESENTATION AGENCY

To make the most of the potential for endorsement opportunities and off-field earnings in India, a cricketer may think of engaging himself/herself with a reputable marketing agency to market and represent them. The role of a marketing agency in assisting an athlete is:

i. Presenting the qualities of the cricketer to potential brands and companies;

ii. Researching about the potential companies and being fully aware of the backgrounds of the companies and brands seeking to engage the cricketer;

iii. Being the cricketer's agent in all the negotiations and discussions relating to commercial prospects;

iv. Hiring a legal counsel to draft agreements and do all the required documentation that the cricketer may enter;

v. Acting as an agent between the player and the company in relation to performance of both party's obligations under the signed agreement, which may include any fees due to be collected under the agreement and providing the delivery of athlete's services and commitments.

Engaging a local agency is beneficial to the cricketer as the agency is fully aware about the local conditions and is an expertise of the market. Also, while the cricketer is away playing for his/her country or club, the agency can be made responsible for securing and managing commercial opportunities for the cricketer. It is not strange to say that a dip in the player's on-field performance would have a direct

[118] Roshan Gopalakrishna and R. Seshank Shekar, *Negotiating Athlete Endorsement Agreements in India*, LAWINSPORT (Jan. 18, 2017), https://www.lawinsport.com/topics/articles/item/negotiating-athlete-endorsement-agreements-in-india.

impact on their off-field commercial opportunities. Also, the agreement between the cricketer and the agency must be unambiguous and the athlete is bound to pay a certain percentage of commission to the agency for every confirmed endorsement opportunity.

Even though the athlete given full right to the agency for managing the athlete's commercial opportunities, the athlete must be aware about the agency's activities to ensure that the agency is not doing any act beyond the scope of what is permitted to do under the agreement or bind the athlete/cricketer to any agreements without their prior consent[119].

5. PRESERVING FUTURE FREEDOM TO CONTRACT

The agency which the cricketer engages with may encourage the cricketer to include more provisions in the existing agreement which would further help the athlete/cricketer and the agency to continue the formal bond they share and expand their relationship outside the original scope and terms of the agreement. Such provisions include a specific covenant called as "Right to make first offer", "Right of First Refusal" and "Right to Match" clauses. A company or a brand may request for a similar endorsement agreement with the player too.

Such clauses in the agreement often restrict the player to enter into agreements with other companies or brands for endorsing their goods and services without first providing the original agency or company the right to offer their own terms. The athlete should carefully read all the clauses in the provisions before agreeing to the inclusion of such covenants in the agreement with the agency or company. If the athlete does not read the clauses before signing the agreement, it would affect their commercial freedom and restrict commercial opportunities in future[120].

Such covenants are allowed under the Indian Contract Act, unless the agreement is unreasonable, harsh and void. In the case of Percept D'Mark (India) Pvt. Ltd v. Zaheer Khan & Anr (2006) 4 SCC 227, Mr. Zaheer Khan, the ex-Indian professional international cricketer, had signed a representation and promotional agreement with Percept D'Mark (India) Pvt. Ltd (Percept) in 2000. This agreement with Percept was due to expire in October 2003.

In this agreement, under the terms of clause 31 (a) and (b), Zaheer was forbidden from agreeing to any offers for 'endorsements, promotions, advertising or other affiliations' during the period of agreement and for 180 days thereafter. Also, the agreement stated that before accepting any such offer, Zaheer was obliged to prior inform Percept in writing of all the terms and conditions of such third party offer and

[119] Amrit Mathur, *Indian cricketers' transformation: From brand ambassadors to brands*, HINDUSTAN TIMES (Sep 28, 2017 11:47 AM), https://www.hindustantimes.com/cricket/india-cricketers-transformation-from-brand-ambassadors-to-brands-opinion/story-seoqtECIzSWyhZPNlLQuNN.html.

[120] Azmul Haque, *India: Face Value: Personality Rights and Celebrity Endorsements*, MONDAQ (Sep. 2, 2003), http://www.mondaq.com/india/x/22487/Face+Value+Personality+Rights+and+Celebrity+Endorsements.

provide Percept with the right to match such third party. In July 2003, Percept expressed their desire to continue their relationship with Zaheer and handed him another five years fresh contract, to which Zaheer declined, as he had received offers from other sports management agencies. Subsequently, Percept approached the Bombay High Court seeking an injunction against Zaheer from entering into any other agreement with a third party, claiming that it was a breach of clause 31 (a) and (b). This matter further reached the apex court, i.e. the Supreme Court for appeal.

The Supreme Court did not grant any relief to Percept and held that Clause 31(a) and (b) was void and unenforceable as it was against Mr. Zaheer Khan's right to freedom and liberty to deal with the persons he wished to do his endorsements, and other commercial openings. Further, the Supreme Court believed that such a restriction was beyond the tenure and terms of the contract, which clearly violated **Section 27 of the Indian Contract Act, 1872**[121]which forbids any agreements which oppose fair trade. In another similar issue, Percept was involved in a dispute related to contractual restraints with professional Indian international cricketer, Yuvraj Singh in ***Percept Talent Management Pvt Ltd v. Yuvraj Singh***[122] which was adjudged in favour of the cricketer on similar grounds.

6. Retaining Control Over Image And Attributes

All deals related to endorsement require the athlete/cricketer to grant the company or brand a right or license to use the name, image, likeness, signature and other attributes of the athlete for advertising and marketing purposes. The athlete should have control over how his personal attributes would be used under the endorsement agreement, as even a small mistake in the agreement would have an adverse impact upon the athlete's interest and could further cease athlete's right to publicity.

6.1. Right of Publicity

Publicity right is the right to exploit a sportsperson's name and fame which he/she has created over a period by their own skill. For claiming this right, it is necessary for a cricketer to create that fame in the form of a brand image or a merchandise. A brand image is an act intended to increase the sale or popularity of a good(s) or service(s). Hence, if anyone uses the fame and name of a celebrity cricketer without his/her prior consent, it would account to unfair trade practice, misappropriation of IP rights of the cricketers an also an act of passing off.

There are many instances of such cases. One of the most famous case with regards to publicity/merchandising rights is the case of "***Sourav Ganguly v. Tata Tea Ltd***[123]". In this case, Sourav

[121] Indian Contract Act, 1872, Act No. 9 of 1872 (India).

[122] Percept Talent Management Pvt. Ltd. vs Yuvraj Singh And Globosport India, 2008 (2) ARBLR 49 Bom.

[123] Shamnad Basheer, *Publicity Rights: Sourav Ganguly vs Tata Tea*, SPICYIP (Dec. 13, 2009), https://spicyip.com/2009/12/publicity-rights-sourav-ganguly-vs-tata.html.

Ganguly, the ex-captain of the Indian Cricket Team was returning from England after completion of the tour. After he returned home, he was informed that Tata Tea Ltd, who had employed him as a manager, were promoting their 1 kilo tea packets by offering that consumers who buy their product and register their names by filling out the postcard inside the tea box would get a chance to meet and greet Sourav Ganguly personally. It was obvious that the company wanted to endorse and promote the sale of tea packets in a country where Sourav Ganguly was a household name. Sourav Ganguly, having no prior idea about such promotion, felt distorted and decided to sue Tata Tea for unlawfully using his name for promotion of the product without his consent. The court after hearing both the parties, gave a judgment in favour of Sourav Ganguly by accepting that his name and fame is a part of his intellectual property.

One should know that personal appearances are generally regarded as one of the most valuable assets in an agreement, and thus should be agreed in advance. Scheduling and application of personal appearances are more of a frustration while drafting an endorsement agreement. It is required that both parties must unite in good faith to ensure that appearances and services are provided in the best conceivable way as specified in the agreement. Another example of dispute related to publicity rights is the example of "***M.S. Dhoni vs Karnataka Soaps and Detergents Ltd***[124]" (KSDL) in 2008. This dispute is regarding personal appearances. In 2006, MS Dhoni entered into two (2) year endorsement agreement with KSDL, a personal toiletries brand, wherein he agreed to provide KSDL with 10 personal appearance, with 5 appearances to be used for each year. Dhoni made himself available for 3 days in the first year and for in the second year, he did not provide any further appearance during agreement. In 2008, KSDL decided to terminate their agreement with Dhoni and issued him a legal notice for breach the rules of the agreement.

KSDL made a claim of Rupees 6.5 crores (approx. USD 950,000) against MS Dhoni for incurring loss, MS Dhoni retorted with a counter claim of Rs 13.5 crores (Approx USD 1,800,000) on the grounds of "loss of earnings" as the agreement did not allow him to endorse any other toiletry brand for the period of two (2) years. This dispute was heard by an arbitrator appointed by the Karnataka High Court, who after hearing both the parties, dismissed the claims of both parties. The arbitrator further found that KSDL did not incur any actual damage to prove their claim of compensation from MS Dhoni. Also, the arbitrator believed that KSDL failed to utilize the appearance made by MS Dhoni in the right manner and within the terms of the agreement and effectively absolved Dhoni of any fault for his non-appearance or lack of appearance.

To avoid such accusations from the company in future, the athlete should consider specifying dates for appearances while signing the contract. If pre-agreed dates are cancelled, it should be mentioned in the agreement that provides athletes with an option to provide the company with alternative dates for making

---

[124] DNA Correspondent, *Dhoni wins case against KSDL*, DAILY NEWS AND ANALYSIS (Jul 12, 2012), https://www.dnaindia.com/bangalore/report-dhoni-wins-case-against-ksdl-1713932.

up for the cancelled dates. Appearances and non-appearances have a direct impact on the personality and publicity of the athlete and thus they should take care of it.

However, the law regarding publicity/merchandising rights with regards to celebrities (cricketers in this case) has not been fully developed in India. The legal systems of various other countries have already adopted different approaches to justify this right and make proper and optimum use of it. Thus, in this context, we should recognize the theory of Right to publicity[125].

7. WHAT ARE THE VARIOUS EXIT OPTIONS AVAILABLE WITH ATHLETES TO SAFEGUARD THEIR PERSONALITY RIGHTS?

Every endorsement agreement, like any other contract, have a clause where they can be terminated before the expiry of the term. If the athlete feels that his/her personality right is in danger, he/sheis at will to terminate the agreement before the agreement comes to an end officially[126].

7.1 Right to Terminate

The athlete should have the right to terminate the agreement if the athlete feels that it is harming his/her personality right or if the company is failing to abide by the obligations set out in the agreement. Such instances happen when the company makes untimely payments to the athlete or does not treat the athlete in the right manner or makes unlawful use of his/her image or likeness without their prior consent.

Equally, the athlete should limit the termination options available with the company under the agreement. The company might not accept all the offers made by the athlete, as they are planning to have a long-term relation with the athlete. However, in certain matters, the company may clearly put a stand-by on termination rights for itself while not providing any such similar rights to the athlete.

7.2 Reduce Liability And Risk

By agreeing to endorse a product or service of a company, an athlete attracts a huge group of people, attracts attention, reliability and trust along with intangible benefits to the company. While this enhances company's sales of the product, it also makes the athlete the face of the company when it comes to common audience.

From the athlete's viewpoint, one major drawback to this arrangement is that it also causes the athlete to be at the centre of any rage from the public in the event there are any adverse issues that arise in relation to the company, products or services being endorsed by the athlete.

---

[125] Zoya Nafis, *India: Personality Rights - Need For A Clear Legislation*, MONDAQ (Oct. 8, 2014), http://www.mondaq.com/india/x/345080/Personality+Rights+Need+For+A+Clear+Legislaton.

[126] Anamika Bhaduri, *Trademark: Infringement and Passing Off,* 1 RGNUL Stu. R. Rev 122, 126 (2014).

8. CHARACTER MERCHANDISING IN INDIA- WHAT ARE THE JUDICIAL AND LEGISLATIVE APPROACHES AVAILABLE OR ALREADY TAKEN?

In the present world, it is often seen that there are many who use the name and fame of celebrities for their personal gains and business expansions. Cricket in India is considered more than a game and cricketers are fan-favourites. Such unauthorized publicity of celebrity cricketers by small and big business companies can often cause considerable harm, upset their lives, hurt their sentiments and feelings and even decrease their ability to earn maximum profits from their names, images, likeness and other attitudes. Such business agencies who often make unauthorized use of celebrity's images and names are termed as "free riders." These free riders promote their goods and services making unlawful use of the name, voices, face and likeliness of the celebrity cricketers. It is this way of exploitation which paves way for misuse of their personas and degradation in the reputation of their commercial value. Such kind of free riding is injurious to the cricketers, further leading them to knock the doors of the court and suing the infringer either under trademarks law, copyrights laws, or even under Passing Off[127]. Because of this, a separate statute to introduce a right called as Personality Right is in demand lately. However, the present statutory provisions in India need to be studied and revised to check whether a separate statute is really needed[128].

Various cricketers in India come from different walks of life, allowing unique traits of their persona to be made use of by business agencies in association with their products and services. From a business perspective, linking celebrity cricketers with various brands serves two purposes. Firstly, it is very easy for the cricketers to attract a hug mass of people by their stardom. This would directly allow consumers to quickly recognize and relate to the products which the cricketers endorse. Secondly, it is a common trend seen in India that consumers often buy or purchase products which form a part of their favourite cricketer's lifestyle. The consumers often tend to copy what their favourite cricketers wear, or the products which they use in their day to day life. Earlier, the cricketers were neither allowed to flaunt nor look for any economic benefit for using their name and fame apart from what they received for playing on-field. However, now with greater social interaction, cricketing celebrities claim contradictory rights- i.e. the Right to Privacy and Right to Personality on one side and on the other, the right to exploit their own name and fame which they have acquired with great hard work.

But a question which needs to be asked is till what extent their success of enforcement lies in India, considering this concept has not greatly developed in India. In fact, the people themselves are not

[127] *Id.*

[128] *Character Merchandising In India-A Legislative & Judicial Perspective*, SHODHGANGA 193, 235 (2012).

conversant enough with this kind of concept and nor are the cricket celebrities, who are uninformed of the legislation for enforcement.

8.1.Are the Various Statutes Protecting Personality Rights of Indian Cricket Celebrities?

In the previous two decades, the celebrity industry in India has grown tremendously. As the use of one's image for promotion of goods and services is greatly appreciated, its lopside has given way for susceptibility. As the cost involved in fulfilling celebrity demands have soared high, the pressure for illegal use of personas has also deepened. In India, till date, there has been no precedent which recognizes or rejects "Personality Rights." Also, there has been no legislation which expresses the issuing of this right. The main idea behind Personality Rights is to protect the financial benefits acquired from use of the name and fame of the Cricketer by the marketing agencies. Granting of a personality right is more of a reward or an incentive granted to the celebrity. The said right can be assigned, licensed, inherited and even prevents unfair and deceptive trade practices, if introduced. But, if seen in a different manner, it is also a negative right, as it only provides a certain class of people to reap the benefits which the right provides, and the rest are disallowed from using this "Celebrity" status.

In India, Personality rights are protected in the following ways:

- An action for violating the tort of privacy with further requesting for an injunction and full damages to be paid.
- An action for Passing Off and infringement.
- To conduct proceedings for breach of confidence with further requesting for an injunction and full damages to be paid.
- To conduct proceedings for defamation, be it civil or criminal. A civil suit may seek an injunction and damages to be paid by the infringer.
- An action for violation the terms of contract where the celebrity who is the plaintiff in the case has/had an existing contract with a third party to commercially violate his/her image/likeliness in any way possible.

However, it is to be noted that there is no precise provision introduced till date under trademark law which protects the image right of celebrity cricketers. Such absence of a specific provision prevents the celebrity cricketers in India to seek relief under the law of Passing Off.

8.2.What Constitution of India Has to Offer Regarding Protection of Personality Rights?

Personality Rights in India ascend from the Right to Privacy and stem from the concept of human dignity, as protected in Article 19 of the Constitution of India (Freedom of Speech and Expression)[129] and Article 21 (Right to Life). According to the media, they have a right and it is their job to inform the people about all the matters regarding public interest or which are of public concern under Article 21[130] of the Indian Constitution, wherein the freedom of press is rooted. The celebrities have consistently challenged the media in relation to this freedom of press, stating that the media has misused their right to freedom and under the pretext of giving news "in the public interest", they have interfered with their privacy rights.

The apex court first recognized Right to Privacy in ***R. Rajagopal v. State of Tamil Nadu[131],*** where the court believed that Right to Privacy, being a constitutional right understood under right to life and personal liberty further guaranteed to the citizens by Article 21 of the Constitution. The apex court, while concluding, held "No one can publish anything on matters concerning to family, marriage, procreating, motherhood, child bearing and education among others without the consent of the individual, whether truthful or otherwise and whether laudatory or critical. If he/she does so, he/she would be violating the right to privacy of the person concerned and would be liable in an action for damages." This is one of the first few cases where the court believed that Right to Privacy would be violated, if someone makes use of a person's name or likeness without their prior consent, be it for advertising or for non-advertising purpose or for any matter whatsoever.

Another landmark case in the Indian judiciary with regards to protection of Personality rights is the case of ***"ICC Development (International) Ltd. v. Arvee Enterprises[132]."*** The Delhi High Court, in a landmark judgment had held that regarding an event, Right of Publicity does not extend to a specific entity. The brief facts of the case were that ICC Development (International) Ltd. (IDL), the plaintiffs in this case, was a committee formulated by the members of the International Cricket Council (ICC) to possess and regulate its commercial rights including media rights, sponsorships and various other Intellectual Property Rights relating to the events hosted by ICC. ICC had organized their Cricket World Cup in South Africa, Kenya and Zimbabwe in 2003 and the company "IDL" was the chief organizer. IDL's job was to create a distinct logo and a mascot for the World Cup event and accordingly filed their application for registration and protection of their trademark[133] in numerous countries including India, where it had filed application for registration of "ICC Cricket World Cup South Africa 2003" and the logo and mascot named "Dazzler."

---

[129] COLIVER, *supra* note 5.
[130] Neepa Jani, *Article 21 of Constitution of India And Right To Livelihood*," 2 VOICE OF RESEARCH 61, 63 (2013).
[131] R. Rajagopal v. State of Tamil Nadu, 1994 SCC (6) 632.

[132] ICC Development (International) Ltd. v. Arvee Enterprises, 2003 (26) PTC 245 Del.
[133] The Trademark Act, 1999, No. 47, Acts of Parliament, 1999 (India).

The Defendants, Arvee Enterprises, who were the official dealers for sales and services of electronic goods, mass-produced by Philips India Ltd. were offering free World Cup tickets as prizes and as a part of promotion, by using the slogan "Philips: Diwali Manao World Cup Jao" and "Buy a Philips Audio Systems win a ticket to the World Cup." While promoting this offer,they also inserted a pictographic representation of the World Cup ticket having an imaginary seat and gate number with "Cricket World Cup 2003" printed on it. IDL, who were the official organizers of the world cup filed a suit for temporary injunction in the Delhi High Court and pleaded before the court to restrain the defendants from publishing any advertisement which associates them with the Plaintiffs in any manner whatsoever and even with the registered trademark "Cricket World Cup 2003."

The court after listening to the arguments from both the parties believed that non-living entities like events, are barred from getting the protection of publicity rights or protection of trademark. The Delhi High Court made some key observations in this case while reading out the judgment. The most critical issue which the court pointed out was that the right to publicity has evolved from right to privacy and can be inherited only in an individual or in any characteristic of the individual like his/her name, likeness, signature, personality, trait, etc. Further, the court believed that even while though the athlete acquires the right of publicity by associating themselves with the event, sport, film, endorsement, this right of publicity could be vested only in favour of the individual athlete, who is the living person and in a non-living entity, such as the event or endorsement in question, that has made the individual athlete famous. In addition, the Delhi High Court also held that anyone who tries to take away the right of publicity from the individual athlete would in turn violate or cease Article 19 and Article 21 of the Indian Constitution, which deals with the right to freedom of expression and right to life and liberty, as stated above.

8.2.1. The Example of M.S. Dhoni

One of the most famous controversies related to Ambush Marketing in the Indian cricket scenario occurred during the 2011 ICC World Cup when the International Cricket Council (ICC) and the organizers of the event "LG" asked M.S. Dhoni, the then Indian cricket team captain to not endorse anything related to "Sony", a competitor of LG. While the regulations regulating ICC's ambush marketing permitted squad members of participating teams to appear in ads and endorsements during the tournament, the players were supposed to sport only "cricket whites" or "any casual wear" in such advertisements, and not wear the official national jerseys. Further, the ICC's rules required that there was no association between the event and the athlete's sponsor and that there was no usage of official ICC logos or the event. M.S. Dhoni appeared in an advertisement wearing a blue kit, which resembled the playing kit of the Indian team. Thus, the ICC deemed such advertisement contradicting the

event rules. Sony eventually had to back out and further changed Dhoni's kit to blackish grey, ending the matter there itself[134].

To dodge any such similar instances in future, companies should be aware that they adhere to all the restrictions and regulations imposed by the event organizers and not post any advertisements contrary to the event rules, unless they obtain prior consent from the event organizers. If the companies violate the regulations listed by event organizers, it would be the athlete who would face the heat and action from the event organizers.

9. WHAT ROLE HAS THE ADVERTISING STANDARDS COUNCIL OF INDIA (ASCI) PLAYED IN PROTECTING CELEBRITY RIGHTS IN ADVERTISING LATELY?

Last year, in December 2016, the ASCI issued certain draft strategies for "Celebrities in advertising" and asked for a feedback from the public[135].

i. The objective of these draft guidelines/strategies is to guarantee that the celebrity endorsers are thoroughly exercising their right with respect to their endorsements. A "celebrity" is someone who is famous in the field of sports and entertainment. The draft guidelines mention, among other things, that celebrities should refrain from violating the code of ASCI's conduct during their course of endorsement.

ii. The draft guidelines place a responsibility upon the celebrity endorser to make sure that the statements and ideas stated by them while endorsing the product or service are honest and they have been well-versed with the background of the product or they have a prior personal experience with the product. The draft guidelines also require the celebrity endorser to undertake due-diligence to ensure that the claims, descriptions and comparisons done in the advertisements are honest and not deceptive.

iii. Thirdly, the draft guidelines disallow the celebrity endorsers from taking part in any such advertisement for product or service whose advertisement is banned by the Government of India, or for certain products such as tobacco or alcohol.

iv. Fourthly, the ASCI even play the role of an advisor. The celebrity endorser has the right to approach the ASCI to seek advice whether the advertisement which they endorse complies

---

[134] Ratna Bhushan, *Ad Blues for Sony and Dhoni,* THE ECONOMIC TIMES (Feb. 14, 2011), http://epaper.timesofindia.com/Repository/getFiles.asp?Style=OliveXLib:LowLevelEntityToPrint_ETNEW&Type=text/html&Locale=english-skin-custom&Path=ETD/2011/02/14&ID=Ar00401.

[135] BW Online Bureau, *ASCI Releases Guidelines for In Advertising,* BUSINESS WORLD (Apr. 14, 2017), http://www.businessworld.in/article/ASCI-Releases-Guidelines-For-Celebrities-In-Advertising/14-04-2017-116319/.

with the ASCI code. However, the draft guidelines clearly state that even though they provide an advice, one must not consider it as a pre-clearance of the advertisement.

10. WHAT CAN BE THE CONTRACTUAL/PRESCRIBED TERMS TO RESTRICT LIABILITY AND TRANSFER RISK WITH THE COMPANIES IN FUTURE?

With growing importance and exposure to sports in India, it is important for the athlete in India to ensure that every endorsement agreement they enter has contractual terms by which their liability is restricted to a certain extent, and further transfer the risk onto the company. To be sure that the athlete is protected in future, the company must be required to do certain things[136]:

i. Provide the athlete with clarity and warranty of the products which they endorse, which would refrain them from making any misleading claims or persuade any customer to buy/use the products of the company having ambiguous claims.

ii. The company should provide the athlete with the logical basis of any claim made in the ads.

iii. The company must make sure the content provided in the advertisement does not provide any personal assurance or representation on part of the athlete with regards to the quality, nature, utility of the product.

iv. The company must protect the athlete for any loss caused to the athlete if the company is at fault and must also provide protection and defense to the athlete if the company or the athlete is sued because of false advertising.

v. Acquire a liability insurance for every endorsement deal and product liability insurance for the endorsed products, with listing the athlete as an insured party in both the policies.

vi. The company must insert a limitation of liability clause which states that the athlete is not responsible for any indirect or substantial loss of the company under the agreement.

11. CONCLUSION

Personality rights are a separate set of rights which require special attention because of their uniqueness. Hence, it is the legislature's responsibility to identify the aspects of the commercial and intellectual property rights of the personality rights to cover up the gaps in existing law and keep pace with the ever-increasing growth of the celebrity. While doing so, the law must be such that it very-well balances the interest of the public along with the interest of the celebrity. The question of where to place personality rights can be resolved by identifying human dignity and property approach. Maintaining a

[136] GOPALKRISHNA AND SHEKHAR, *supra* note 6.

balance between public and private interest is the need of the hour. The legislature, in future, must aim to introduce a law which protects and secures celebrity rights in the right manner.

The Right to Information Act has been utilized in India like never before. The celebrity cricketers can utilize this act to the fullest if they wish to know the entire history of the company before signing any agreement with them to endorse their product. Parallelly, the public can make use of the right to information act if they feel there is a misuse of funds or if they are deceived by the company and the celebrity cricketer endorsing their product.

Also, under the existing legal and commercial background in India, there is an imbalance of power with respect to endorsement agreements, which favours the athlete rather than the company, whether the company is small or big.

Till the time the athlete seeks advice from professional advisers or experts in the field, the athlete must ensure himself/herself that the Indian law enables an athlete to dictate the terms of any endorsement which are to their own benefit.

Such an environment which is low on risk and is commercially suitable will encourage more and more cricketers in India to enter and sign endorsement contracts, provided that the companies believe that the athlete are a convincing or influential face in the eyes of Indian public.

IS YOUR DREAM TEAM EVEN LEGAL? : LEGALITY OF FANTASY SPORTS IN INDIA AND ITS EVOLVING TRENDS

Manav Mehta [1] and Purnima Mathur [2]

[1] Symbiosis Law School, Noida
manavmehta1478@gmail.com
[2] Symbiosis Law School, Noida
purnimamathur7@yahoo.com

ABSTRACT

India is in the middle of a fantasy sports revolution. While other countries already have well established markets, India still has some catching up to do. The daily fantasy sports market has been growing in India in the recent times. Sports fans now spend as much time in studying the past performances and statistics of sports players as much as a Dalal street Broker studying the stock market. However with the emergence of fantasy sports, its legality has been in question and there is still confusion regarding the position of Indian law on fantasy sports. This article while explaining the meaning, characteristics and history of fantasy sports also marks the distinction between fantasy sports being a game of skill with that of a game of chance. This article also explains how Indian law regulates the fantasy sports market and what Indian laws are applicable to fantasy sports.

KEYWORDS

Fantasy Sports, skill based games, gambling, Public Gambling Act, 1867, game of chance

1. INTRODUCTION

"It is the first Sunday of the month and the teams are all set. Mr Sharma has also finalized his line-up for the India v Sri Lanka Test series. He has gone through Cricbuzz, Dream11 and many others before deciding this line-up. As the time for his finalization of team reaches near, he also checks for any injuries. He checks on the weather forecast if it is going to rain or not. 'It's a batting pitch, they can keep their heads down and look to bat big' murmurs Mr. Sharma before finalizing his team. Match starts at five in the Evening, he finally submits his team hoping that the players he has chosen will get the best possible result for him. The whole family sits for the match. Mr. Sharma is anxious; as the match begins, he gets more nervous. 'Anjali, don't stand near the TV, after all I have put my money on this match!' Mr Sharma is very serious about this match, he has spent his holidays reading about the players, their past performance and their performance in different conditions with different players. As the match continues, Mr Sharma keeps on flipping between different TV channels and stats websites. And when it's not a match day, he spends most of his time religiously maintaining a diary in which he keeps all the records of his

draft teams and players. India leads the three-match series 1-0 after winning the second test in Mohali by an innings and 151 runs. The first test in Delhi was drawn. It was a good day for Mr Sharma, his hard work paid off."

The above example highlights the daily routine of a fantasy sports player. Fantasy sport has slowly become an indispensable part of the sporting experience that fans can get nowadays. The daily fantasy sports market has been growing in India in the recent times. In fantasy sports, players are positioned with the roles of team managers or coaches and they pick up their teams consisting of professional sport players.[137] The purpose of fantasy sports is to collect the most number of points and defeat the other player's fantasy sports team. The business of fantasy sports has become more rewarding in the past decade. While the market in the United States of America (US) and the United Kingdom (UK) is already well established, India is yet to catch up with the other countries. With a huge population and most of them sports enthusiasts, the future looks promising. In a report by KPMG and Google[138], online gaming market of India in 2016 had 120 million online gamers with an estimated market value to be at around 290 million US Dollars and in the future the same number is expected to rise and reach to about 310 million online gamers and estimated market value to be around 1 Billion US Dollars by the end of 2021.

It's nothing new when India is associated with its love and obsession for cricket. Cricket is seen as a religion in this country. While cricket remains the most played and watched sports in India, the last few years have seen a significant popularity of other sports too, which can be seen by the introduction of several other tournaments apart from the Indian Premier League such as Indian Badminton League (IBL), The Pro Kabaddi League (PKL) and the Indian Super League (ISL).[139] With ISL launching its own Fantasy Football Section, there is a lot more to come. With the number of Internet users increasing day by day, India is emerging as the next Big Fantasy sport destination.

2. MEANING AND CHARACTERISTICS OF FANTASY SPORTS

2.1 MEANING

[137] N. Cameron Leishman, *Daily Fantasy Sports as Game of Chance: Distinction Without a Meaningful Difference?* BYU L. Rev. 1043 (2016).
[138] *A study by KPMG in India and Google, Online gaming in India: Reaching a new pinnacle,* ((Sept 6, 2017, 10:34 AM), https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/online-gaming.pdf .
[139] Ravi Chavan, *The Indian Sports Industry In 2016: Challenges And Opportunities,* Nielsen Sports (Dec. 6, 2017, 12:34 AM) http://nielsensports.com/indian-sports-industry-2016-challenges-and-opportunities/.

There is no specific definition of fantasy sports but it basically allows people to act as managers or coaches of teams and then create their own team involving real world professional sports players. The conscious decision of choosing players on the basis of their past performances and record involves skill and that is what differentiates a fantasy Sports from a game of chance or even gambling. Playing fantasy sports allow participants to step into the shoes of managers of a team and build a team of real professional sport athletes. The real life performances of these athletes are then converted into credits or points which help the participants to choose them. After selection, the aim of the fantasy sports participants is to maximize their points and overthrow the opponents' fantasy sports teams.

This definition according to a report prepared by Pennsylvania Gaming Control Board is as follows -

"a fantasy or simulation sports game or contest involving athletic events in which a participant owns or manages an imaginary team and competes against other participants or a target score for a predetermined prize determined by statistics generated based on performance by individual athletes participating in actual professional athletic events, provided the outcome shall not be based solely on the performance on an individual athlete, or on the score, point spread, and any performance of any single real team or combination of teams."[140]

Although this definition does not clearly gives importance to the pertinent skill required by the participant participating in the fantasy sports game but it does define other characteristics of fantasy sports well.

2.2 CHARACTERISTICS

Generally, all fantasy sports have different characteristics and different gameplays but some of the characteristics still remain the same. Some of the major characteristics shared by almost all of the fantasy sports games are:-

1) Limited Budget in selecting team – The team selection process in a fantasy sport is either restricted to a budget or it's free from any limitations. Restrictions are basically in the form of credits given to each participant before forming a fantasy team and each professional player is assigned with a pre-decided credit score and that credit score is based on the past performance, image value, or a worldwide ranking system. This is done to restrict the participants to choose all the high-credit players in their team and therefore making the whole game unfair.

2) Infinite selection of a single player – Most of the fantasy sports allow a single player to be picked by multiple participants, whereas in exceptional cases the selection of a player is limited to only one i.e. suppose in a fantasy football game, if Lionel Messi is selected by one participant other participant can't

[140] David M. Barasch et al, *Fantasy Sports Report,* PeSCB, (Oct. 8, 2017)), https://gamingcontrolboard.pa.gov/files/communications/PGCB_Fantasy_Sports_Report_2016.pdf

select Lionel Messi to be in his team, this can cause a direct restraint on the number of participants in the game and therefore most of the fantasy sports allow a single player to be selected multiple number of times.

3) Entry Fee – If there is a reward there is a payment too. There is an entry fee which is to be paid before the start of the fantasy sport game. This entry fee varies anywhere from 30 rupees to several thousand.[141] Some fantasy sports also allow participants to hone their skills for free in their practice matches but there is no reward given away to the winners for those practice matches.

4) Re-Arrangement of Selected Team – Some fantasy sports are season long whereas there are daily fantasy sports too which are for a day and results are known within that day itself. Usually in the daily fantasy sports participants are not allowed to change their team once they have locked it for that game whereas some of the season long fantasy sports allow their participants to make the necessary transfers they deem fit. These transfers can be due to non-performance of a player in the first few matches or injuries.

5) Reward – Rewards at the end of a fantasy sport game may vary depending on the contests and their entry fee. There are some fantasy sports which may only give out prizes at the end of the whole season but the daily fantasy sports give rewards as soon as the match ends. This gives the participants a chance to win consecutively or turn a loss into a win the next time.

3. HISTORY OF FANTASY SPORTS

Fantasy sports was not as big as it is today, it began as a pastime hobby and didn't get much media attention compared to what it gets today.[142] At the initial stages there were only board games & playing cards in the name of fantasy sports.[143] In 1961, Hal Richman, a mathematics scholar devised a complex game named Strat-O-Magic Baseball, which was an instant hit. 144 But the founder of fantasy sports is considered to be Bill Gamson, a psychology professor at Harvard and Michigan University. 145 In 1960s Gamson created a game by the name "The Baseball Seminar", wherein each participants were charged 10 dollars for participating in the game and the participants were given an imaginary budget within which they had to bid on Major League baseball players and draft their teams within that budget. The winner of the game was the participant who selected players that had performed the best and topped

[141] *Dream 11 Home page*, (Nov 6, 2017, 6 PM), https://fantasycricket.dream11.com/in/leagues.
[142] Lomax, Richard G., *Fantasy sports: History, game types, and research*, Handbook of Sports and Media 383-392 (2006).
[143] Sarah Newell, *Optimizing daily fantasy sports contests through stochastic integer programming*, B.S.I.E., Kansas State University, (2017).
[144] Michael W. Michelsen, Jr, *Nothing recreates baseball magic like Strat-O-Mat*, Mature Focus, Apr. (2011).
[145] Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gambling Law*, 31 T. Jefferson L. Rev. 317, 323-24 (2008).

in earning points. Robert Skylar, who was an Assistant Professor at the University of Michigan attended one of these baseball seminars and then passed on the knowledge and to his student Daniel Orkent. Upon learning the rudiments of the game, Skylar formed his own format of baseball seminar and named it Rotisserie Baseball.[146] Okrent's Rotisserie is still the most popular format in which fantasy baseball is played. In the Okrent's Rotisserie, the participant's scores were based on a total of eight statistical categories which were four each for offense and pitchers. At the beginning of each season, a budget was given to the participants through which they would purchase players from a pool of baseball players. After selection, as the season continued, the points were earned by each team based on the real life performances of their selected players. When the season ended, the team with the most earned points would be considered as the winner of the league.

The Internet boom brought a "broad demographic shift in fantasy sports participation"[147]. Development of computers resulted in the introduction of the computerized fantasy sports. The first one being the board games which were converted into computer games. The earlier versions of these games were merely text-based versions of the board games. These games are still prevalent and still cherished by fantasy sports enthusiasts. Over the course of time the technology has improved and so have the ways in which fantasy sports are played. More sophisticated features have been added, advanced graphics have taken place of old graphics. All the older practices have slowly faded away with the advent of internet. The internet made it possible for participants to download all the statistical data of the players in just one click and as such the use of notepads and newspapers to calculate the statistics became useless. Further, as internet can be accessed globally, it became easier for participants to communicate and cope up with each other. This internet boom enticed big media houses to enter into the fantasy sports market and media houses such as ESPN, Yahoo, CBS Sports became the major players.[148]

In today's time there are fantasy sports for any sport you can imagine. Most popular games are fantasy baseball, football, basketball and cricket in case of India. There are other fantasy sports as well such as fantasy golf, track racing, hockey, horse riding etcetera. The market of fantasy sports is growing day by day, be it the increase in number of fantasy sports players per day, the potential rewards or the easy accessibility through mobile phones. It can be expected that this growth will continue in near future as the market takes new twists and turns.

4. GAME OF CHANCE VIS A VIS FANTASY SPORTS

[146] Justin Fielkow, *From Fantasy to Reality: The Evolution and Legality of Fantasy Sports,* The sports esquires, (Dec. 6, 2017, 1:54 AM), http://thesportsesquires.com/from-fantasy-to-reality-the-evolution-and-legality-of-fantasy-sports/.
[147] Nicole Davidson, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited*, 39 San Diego L. Rev. 201, 202 (2002).
[148] Andrew Baerg, *Just a Fantasy? Exploring Fantasy Sports*, 19 Electronic J. Of Comm. (2017).

According to the Public Gambling Act, 1867 (PGA/Act) there is no specific definition of "gambling" but Common gaming-house is defined 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.*"[149]

As per the definition of gambling in the Black's Law Dictionary which has also been used by the Apex Court in one of its decision[150], "gambling" is "the act of risking something of value for a chance to win a prize"[151]

By analysing the above two definitions, there are three elements that are essential for an activity to fall under the purview of gambling. They are consideration, chance and prize. Even if one of these elements are missing that will make that activity out of the scope of gambling.

It is important to note that the provisions of the PGA are not applicable on games of skill. Section 12 of the PGA 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."[152]

Therefore games which are entirely based on the skills and knowledge of the participants and there is little or no role of luck would not be considered illegal as no such statute or law penalises playing of games which involve skill.

As per the legislations on gambling, the game of 'mere skill' does not attract any restrictions. To get a better understanding of the term 'mere skill', we can refer to some of the judgments given by the Supreme Court of India which defines the ambit of the term 'mere skill'.

In the landmark case of **State of Bombay v. R.M.D. Chamarbaugwala[153],** the Court had laid down that the term 'mere skill' will include the games which are primarily games of skill and have interpreted that 'mere skill' will only be restricted to:-

1. "games which are preponderantly of skill and have laid down that: competitions where success depends on substantial degree of skill will not fall into category of gambling"; and;

[149] §12, The Public Gambling Act, 1867.
[150] K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 S.Ç.C 226 (India)
[151] Black's Law Dictionary 750 (4th ed. 2009).
[152] §12, The Public Gambling Act, 1867.
[153] State of Bombay v R.M.D. Chamarbaugwala, A.I.R 1957 S.C 699 (India).

2. “despite there being an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of mere skill”.

4.1 GAME OF SKILL V. GAME OF CHANCE IN CASE OF HORSE RACING

In ***K.R. Lakshmanan v. State of Tamil Nadu***[154], a three judge bench of the Supreme Court held horse racing to be a game of skill in which the result depends on the special training given to the horses as well as jockeys. What is important for the outcome, is whether the horse has acquired the required stamina and speed by the way of training or not. The Court also observed that:-

"Betting on horse racing or athletic contests involves the assessment of a contestant's physical capacity and the use of other evaluative skills. Horse racing is an organized institution. There is nothing illegal in horse racing: it is a lawful sport.

We have no hesitation in reaching the conclusion that the horse-racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained jockey can touch the winning-post.

In view of the discussion and the authorities referred to by us, we hold that the horse-racing is a game where the winning depends substantially and preponderantly on skill."

4.2 GAME OF SKILL V. GAME OF CHANCE IN CASE OF RUMMY

In the case of ***Andhra Pradesh v. K. Satyanarayana***[155], the court held that Rummy is a game of skill, even though there is a slight luck involved, but it is predominantly based on the skill of the player playing the game. The court held that:-

“The “three card” game which goes under different names such as “flush”, “brag” etc., is a game of pure chance. Rummy, on the other hand requires a certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We, cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill.”

4.3 GAME OF SKILL TEST V. FANTASY SPORTS

In fantasy sports, when a participant enters into a game, he/she is at par with the other participants. He has to select his fantasy team and that undoubtedly requires skill. Selection of athletes requires a meticulous study of their past performance and their present status in the game. Moreover, the

[154] K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 S.C.C 226 (India)
[155] Andhra Pradesh v K. Satyanarayana, A.I.R 1968 S.C 825 (India).

participants also have to meet all the additional requirements like a limited budget, limited number of player selections from a particular team and then form a fantasy sport team accordingly and this requires a certain degree of skill. The participants should be well versed with the rules as well as all the updates of the game. Before selecting players, the participants also have to gauge the weather conditions, pitch conditions, whether it is a home or away ground, injured players, current form of the players' etcetera. Considering all these factors, it requires a substantial amount of skill to form a team that will bring the best results. Therefore, fantasy sports are a game of skill and do not come under the ambit of gambling.

To back up the above stated reasoning, in a recent judgment by the Punjab & Haryana High Court, it was ruled that online playing of fantasy sports is a game of skill and it does not come under the ambit of gambling. The petition was filed by a participant who contended that he had deposited some money with Dream11, a fantasy sports website and lost it after playing in two matches. As per his contentions in the petition, the fantasy game was a mere game of chance and there was no luck involved whatsoever.[156] However, the company Dream11 did not accept this contention and stated that they were legally registered with the Ministry of Commerce.

The high court after hearing all the contentions observed that:-

"*petitioner himself created a virtual team of a cricket match between two countries by choosing players, who were to play for two countries collectively and after forming a virtual team as per his own selection, knowledge and judgment, which is thoughtful will, he joined various leagues and after registration which was declared before participating, was not about possibility of winning or losing like horse riding not every bettor is winner."*[157]

Therefore, the latest position of fantasy sports was held to be legal although no specific law has still come into existence.

5. LEGAL STATUS AND REGULATORY ENVIRONMENT

According to the State list, in the seventh schedule of the Constitution of India, the power to formulate laws on gambling and betting are provided to the state government. Entry number 32 of the State List provides for the state to make laws on betting and gambling and Entry Number 62 on taxes on entertainments, amusements, betting and gambling.[158] The main legislation dealing with gaming in India is the PGA. Now, most of the states have adopted their own legislation dealing with gambling mostly based on the central legislation i.e. Public Gambling Act, 1867. To mention a few, some of them are Kerala Gambling Act; Sikkim Regulation of Gambling Act, 2005; Goa, Daman and Diu Public

[156] Ajay Sural, *Playing fantasy games online not betting: High court*, TOI, Aug 5, 2017.
[157] *Id.*
[158] INDIA CONST., List II, Entry No. 32 and 62.

Gambling Act; West Bengal Gambling and Prize Competition Act etc. Except Sikkim and Goa, majority of the states have enacted laws prohibiting betting and gambling. Sikkim and Goa with prior permission of the state government and with a prior license allows some table games on board in offshore vessels.[159]

5.1 PUBLIC GAMBLING ACT, 1867

There is no particular law in India dealing with fantasy sports or for that matter internet gambling. However, activities like online lottery and gambling come under the ambit of PGA as per the current judicial position. Any game that is a game of chance is considered to be a gambling activity and that is prohibited under the said Act. Section 3 of the PGA specifies the "punishment for owning or keeping, or having charge of a gaming house". Further section 9 states that it is not necessary under the said Act to be found playing in a gaming house, mere presence makes you guilty for committing the crime of gambling. Other than this, Section 12 of the Act makes an exception and keeps certain activities out of the scope of the Act. This section states that the provisions of the Act will not be applicable on the games of 'mere skill'. All those games, which involve substantial skill, will be out of the purview of this Act. As stated above, fantasy sports are in fact a game of skill and not a game of chance. Therefore, fantasy sports will not be considered to be an activity of betting or gambling under the PGA.

5.2 SIKKIM ONLINE GAMING REGULATION ACT, 2008

After an amendment in August 2009 to the Sikkim Online Gaming (Regulation) Rules, online sports betting was legalized by the State of Sikkim. This Act regulates online gaming in the State of Sikkim. Previously games such as poker, black jack, bingo, baccarat etc. were allowed but after the amendment, online gaming was also included. These rules allow betting or wagering on games played online such as cricket, football, lawn tennis and other games that require a prediction of the result and a bet on the outcome.

5.3 THE NAGALAND PROHIBITION OF GAMBLING AND PROMOTION AND REGULATION OF ONLINE GAMES OF SKILL ACT, 2015

Nagaland government gives out license for games of skill under the Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act. The definition of a gambling activity under the said act does not include games of skill; it only includes betting on games of chance. The Nagaland act makes it clear that, games of skill are not a form of gambling and in fact, they require a particular set of skill to be successful in them. Games such as rummy, poker, virtual golf, virtual boxing, virtual team selection games and sport fantasy league games etc. are considered games of skill.

[159] Heena Chheda & Mirat Patel et al., *Gambling And Betting Laws In India,* Hariani & Co. (Aug. 7, 2014).

However, an application for conducting online gaming must be made under the Act and a license is necessary for the same.

5.4 ASSAM, ODISHA AND TELANGANA

There is no clear picture whether fantasy sports can be played or not for money in the States of Assam, Odisha and Telangana. Therefore, most of the fantasy sports websites in India do not let the residents of these three States participate in the paid category. [160]

6. CONCLUSION

A fantasy sports website in India is legal if complied with certain restrictions. These restrictions are due to the types of games played online and if monetary transaction is involved, it becomes more difficult and the level of requirements increases. Section 12 of the PGA exempts game of skill from the provisions of that Act and therefore fantasy sports are not a gambling activity. Fantasy sports such as cricket, tennis or soccer requires knowledge and in depth research of the game as well and the players thus making it a game of skill over chance. As long as the activity is not gambling, fantasy games can continue online after acquiring the required permission of the respective States. A major challenge before Indian legislature is the need for a uniform legislation for the regulation of fantasy games. As far as the judiciary is concerned, the status quo as per the Indian court rulings is that by the courts that playing online fantasy games is not illegal and these activities are to be treated as any other normal online business activity. Therefore, until there is a central legislation governing all the fantasy sports in India, fantasy sports can be legally played and operated in India

[160] Dream 11, *Dream 11 Legality,* (December 10, 2017), https://fantasycricket.dream11.com/in/ legality.

THE ANGUISH OF BEING EXTRA-ORDINARY- HYPERANDROGENISM AND THE NEED TO 'VERIFY' GENDER

Malhar Desai [1]

[1] Gujarat National Law University, Gandhinagar

malhard10@gmail.com

ABSTRACT

While Sports Law deals with a broad variety of subjects, most in the field would agree that the primary objective of the law is to ensure that sport is fair. Sport is valuable economically, only till it is perceived as fair. To ensure that fans of the game do not get disillusioned with the game, the authorities governing the game have to take every step they can, to guarantee a level playing field. Hyperandrogenism tests are one such step taken by the authorities. The tests which have attracted controversy in India and on a global level, seek to ascertain that a female athlete competing with other female athletes is a female- genetically.

The essay seeks to objectively analyze these tests both objectively (from a scientific perspective, and from the viewpoint of equity in sport) and subjectively (from the perspective of female athletes like Dutee Chand). After going through the history of gender testing in sport, the essay will deal with recent examples of female athletes whose lives were torn apart because of the indifferent attitude of sporting authorities and the media.

The essay will highlight the importance of identity to an athlete, attempt to understand the struggles that female athletes have faced because of the tests in the background of the law governing such tests and conclude by suggesting how the governance of these tests (if they're proven to be necessary) can be improved, so as to further the cause of sport.

KEYWORDS

Gender testing, Hyperandrogenism, CAS

1. INTRODUCTION

If you are asked to think about the 'origin of sport', the first image that may come into your mind will probably be of a Greek muscular man with a laurel wreath on his head. In all probability, no women will come to your mind. This is likely on account of how late women came into the sporting arena. Additionally, when they did finally arrive, they faced constant opposition from some who believed that women would lose their attractiveness quotient if they became muscular and some others who held the opinion that engaging in sports would adversely affect the reproductive capacity of female athletes.

Nevertheless, like in all fields, women have pushed through towards success and this journey of female athletes serves as an inspiration to people across the globe. Although prominent sportswomen have over time carved a niche for themselves in the field of sports, the struggle is far from over, with various issues continuing to create hurdles for female athletes. One such important issue which has plagued female involvement within sports in recent years is the attacking the female identity on account of the medical condition of hyperandrogenism.

2. The Modalities of Identity and Gender Testing

A person's identity is perhaps his or her most prized possession. Every incident in a person's life jointly contributes in forming their identity. Everything they have been told to do, everything they have been told not to do, every moment that gave them pleasure, as well every moment that caused them pain, makes a people who they are. While countless books and poems have been written about the concept of 'identity', perhaps none have described it so aptly than Dorothy West stating *"Identity is not inherent. It is shaped by circumstance and sensitivity and resistance to self-pity"*. The author endorses West's view since a person's identity is formed over a lifetime and is not a scientific construct or a test result. Instead, it is a continuous process that cannot be restricted by a person's physical appearance or their genetic make-up.

So, what makes a woman, a woman? Is nature to be given credit for this delicate process, or is it nurture which plays the bigger role? These questions have plagued the sporting fraternity as well the legal community ever since the case of Caster Semanya, South African middle-distance runner and 2016 Olympic gold medalist came into prominence. It was in light of this case that the issues of testing of gender identity and the condition of hyperandrogenism gained global attention.

2.1. A Brief History of Gender Testing

However, prior to discussing the issues concerning 'gender-testing' and 'hyperandrogenism', it is important to first understand the history of gender-testing. Gender-testing came to be seen as a necessity in the mid 20th century because of the apprehension that men masquerading as women would participate in female events, thereby completely destroying the sanctity of different sports. Infamous events including when Dora Ratjen had to return his medal(s) won in women's high jump when his actual gender was revealed, coupled with the global resentment at USSR's stellar performance in the 1952 Helsinki Summer Olympics as far as women were concerned prompted the authorities to make sex-testing mandatory.

The International Association of Athletic Federations ('IAAF') and International Olympic Committee ('IOC') started with crude procedures like the 'Nude Parade' as the method to verify gender.[161] Due to public outcry against such a practice, they had to switch to hyperandrogenism testing as the chosen method to ascertain gender, with the process being governed by the "The IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition" (2011)[162] ('IAAF Regulations').

The opinion that hyperandrogenism testing is still a gender verification test is shared by Madeleine Pape[163] who stated before the Court of Arbitration for Sport ('CAS') that "*the act of drawing a line between the endogenous testosterone levels of male and female athletes, in combination with scrutinizing other bodily and behavioral characteristics of women, is unmistakably an attempt to define those who are not women for the purposes of athletic competition even if they are not explicitly being defined as women*".[164]

2.2. The Issue with Gender Testing

Madeleine Pape's statement is indicative of the existence of a bigger problem with the current regulatory regime and compels us to consider whether a scientific test is the correct method to ascertain gender. It is argued that gender is more than the biological and genetic constitution of a person and relates to the identity of a person. A person brought up as a boy will think of himself as a boy, and will, generally align his interests and motives as per the societal norms of his time. Imagine, he grows up as a boy, is trained to take part in a sporting event in the male category, and to his dismay is told one day that he cannot participate in said event, because he is not a boy. This illustration demonstrates the precise tragedy of gender-testing. Unfortunately, the tragedy of this system of testing is not limited to this illustration and has been witnessed in several cases. The story of Santhi Soundrajan, a young sprinter from Southern India embodies the extent of this tragedy. Media outlets noted that certain features of her body were not 'feminine', and when results of her gender test were leaked, certain segments of the media irresponsibly spread word that she had 'failed her gender test'.[165] Embarrassed and harassed by this scrutiny, the promising female athlete attempted suicide.

---

[161] Katie Thomas, *Gender Test for Olympians: A relic that persists*, THE NEW YORK TIMES (July 30, 2008), https://www.nytimes.com/2008/07/30/sports/30iht-GENDER.1.14880817.html.

[162] *IAAF to introduce eligibility rules for females with hyperandrogenism*, IAAF (April 12, 2011), https://www.iaaf.org/news/iaaf-news/iaaf-to-introduce-eligibility-rules-for-femal-1.
In India, the Ministry of Youth Affairs & Sports promulgated the *"Standard Operative Procedure to identify circumstances (female Hyperandrogenism) in which a particular sports person will not be eligible to participate in competitions in the female category"* to govern the same.

[163] An Australian Olympian who admitted to being bitter after losing to Caster Semanya, later on an understanding of the issue, appeared for Dutee Chand, as a witness at her CAS trial.

[164] Dutee Chand v. AFI & the IAAF, CAS 2014/A/3759, ¶352.

[165] K.P. Mohan, *Santhi fails gender test*, THE HINDU (Dec 18, 2006), http://www.thehindu.com/todays-paper/tp-sports/santhi-fails-gender-test/article3035198.ece.

2.3. The Nexus between Gender Testing and Hyperandrogenism

In light of this incident and other related occurrences, it is important to understand the root cause behind the pursuance of such a practice. The basis of pursuing gender-testing is considered to be the existence of the condition of hyperandrogenism. Hyperandrogenism is a medical condition where a woman's body produces more testosterone than normal production in healthy women. Since testosterone is known to boost physical performance, if a woman is found to have a higher level of testosterone than her competitors, an argument can be made that it can give her an unfair advantage over her competitors.

It is based on this consideration that concerned authorities refuse to change their stance on the practice of 'gender testing'. However, it is argued that such a stance is unnecessarily harsh since there are various other genetic and natural factors like height, arm span, lung capacity, foot size or visual acuity (Michael Phelps and Usain Bolt being the perfect examples in this case) that play a huge role in determining who emerges victorious in the arena. According to Dr. Ian Bezodis,[166] *"all elite athletes are freaks of nature, especially once you get to this level*".[167] In addition to this, there are factors such as a person's upbringing which affects the person's nutrition, access to training facilities, emotional maturity and mind frame [168] which affects an athlete. Therefore, the questions remains as to when it is accepted that there are bound to be variables, and an ideal equal starting point is considered to be almost fictional, why is gender testing still insisted on by authorities. Further, it is worth deliberating on the reason why this particular factor faces such resistance, when other factors that make an athlete extra-ordinary are largely celebrated.

3. STANCE OF SPORTING BODIES AND THE EXPERIENCE OF ATHLETES

When experts point out the aforementioned factors[169] in the context of this debate, bodies like the International Association of Athletics Federations and the International Olympic Committee argue that the primary difference between hyperandrogenism and other highlighted factors is that gender difference creates a new category itself. They argue that letting women with extra testosterone compete with other women is like a man competing with a woman, which is different than an instance of say, a tall woman competing with a relatively shorter woman. However, it is argued that the rules of the authorities are inconsistent with their stand, since to maintain that natural testosterone in

[166] Dr. Bezodis is the Sports Biomechanics Laboratory Director at Cardiff Metropolitan University.
[167] Claire Thomas, *Built for speed: what makes Usain Bolt so fast?*, THE TELEGRAPH (Aug 20, 2016), http://www.telegraph.co.uk/usain-bolt-worlds-fastest-man/0/built-for-speed-what-makes-usain-bolt-so-fast/.
[168]Mohan, *supra* note 4, ¶184. Experts state testosterone influences certain behavioral patterns, such as the drive to compete. The same could also be influenced by the way an athlete is brought up. The question that arises is when a person's bringing up is allowed to be a variable, why not testosterone?
[169]Mohan, *supra* note 4. Professor Richard Holt, University of Southampton pointed out specific genetic factors that advantage an athlete in sport (like an inherited genetic defect in the EPO receptor, which results in high haemoglobin levels) at Dutee Chand's trial.

excess quantities is an anti-competitive element, the testosterone levels of male athletes should also be regulated,[170] which is not done under the current regime.

Pertinent questions in this relation were raised in the Dutee Chand case, where an Indian professional sprinter who had to face the same embarrassment as Santhi Soundrajan, including undergoing gender tests without her knowledge or consent and subsequent disqualification from all competitive events, which was later challenged by the athlete before the CAS.[171] The CAS ruled in favor of Dutee Chand, overturning her disqualification, and effectively staying the IAAF Regulations till July 2017, by which time the IAAF was required to conduct necessary scientific research. In July 2017, the IAAF published its research findings in the British Journal of Sports Medicine.[172]

While those involved in the sporting world are prone to plunge into the debate of whether a causal impact is proven or not, the issue of identity is usually forgotten in such cases. The case of Maria José Martínez Patiño, the Spanish hurdler who was disqualified from hurdling at the 1985 World University Games, Kobe and socially ostracized because of abnormal chromosome results, serves as an apt illustration for the same. Almost 3 years after her disqualification, the IAAF agreed that her condition meant that her body could not use the testosterone, and rescinded her disqualification. Unfortunately, by then she had no hope of making it to the next Summer Olympic Games.

Now, whether hyperandrogenism disrupts the equity of the playing field or not, and to what extent is a separate question. The real issue for consideration is the level of insensitivity displayed by the authorities and various media outlets in so far as the athlete's tests are concerned, as is evident from the cases mentioned previously. Further, it is notworthy that the rules framed for governing such testing clearly mandate that the investigation initiated by the IAAF Medical Manager must be confidential in nature.[173] Keeping the athlete's tests in confidence is therefore, not only demanded by respect and fair play, but by the law also.[174] Interestingly, it was admitted by IAAF's expert witness at Dutee Chand's trial that until recently the history of sex-testing has been "*characterized by poor science and insufficient, often grossly insufficient, in respect for women athletes*."[175]

---

[170] This was conceded by experts retained by IAAF at Dutee Chand's trial. Mohan, *supra* note 4, ¶¶192, 213.
[171] Mohan *supra* note 4.
[172] Press Release, *Levelling the playing field in female sport: new research published in the British journal of sports medicine*, IAAF (Jul 3, 2017), https://www.iaaf.org/news/press-release/hyperandrogenism-research.
[173] Regulation 2.2, IAAF Regulations.
[174] As per Regulation 3.1 of the IAAF Regulations, all cases managed must be treated in *"strict confidence".* The provision under Regulation 3.2 also mandates that the athlete being investigated *"shall consent to the disclosure of her medical information to such person as may be required to review such information in accordance with these Regulations."* Neither was followed in Dutee Chand's case.
[175] Mohan, *supra* note 4, ¶286

Caster Semanya is one of the most high profile athletes to be subjected "*to unwarranted and invasive scrutiny of the most intimate and private details of her being*".[176] The athlete's muscular physique and her deep voice accompanied by her pose with flexed biceps as well as her brilliant performance in the 800 meter race at the 2009 African Junior Championships led to suspicions as to her gender. The fact that the athlete was subjected to gender testing was leaked to the media. On the basis of this news, the athlete's peers reacted adversely,[177] adding to the negative portrayal in the media.[178] It is argued that the problematic experiences of Semanya and Patiño show that the real problem is not hyperandrogenism and its debatable effects, but the manner in which an athlete's life is affected. In both these cases, the athletes were cleared to participate, but the incidents left permanent marks on their reputation and shortened their promising athletic careers.

The real issue with hyperandrogenism tests is thus, that the ones who suffer from it are women who do not 'look like women'. Experts like Dr. Katrina Karkazis[179] apprehends that the gender tests administered in this regard create a risk that exceptionally talented athletes whom others deem to be insufficiently 'feminine' will be subject to intense scrutiny[180] and this is particularly worrying as these tests are *"illogical and unfair*".[181] it is argued that while testing the gender profile of every athlete in the past was embarrassing due to the crudity of its procedure, it was not discriminatory in nature. In contrast, empowering the IAAF Medical Manager to undertake investigation if there are *"reasonable grounds for believing"*[182] that a female has hyperandrogenism projects arbitrariness in the Regulations. Under the Regulations, therefore, women who do not conform to societal norms of what is 'feminine', will be targeted. It is feared that on account of the continuance of such a practice, the sporting grounds where merit and endeavour are the only things that have mattered over the years, will become stages where form will overshadow substance. Thus, the question that we have to ask ourselves is whether we should allow the removal of sport from the high pedestals of passion, endeavour and glory only on account of appearance and perceived feminity of hardworking sportswomen.

---

[176] Associated Press, *'Caster Semenya's comeback statement in full'*, THE GUARDIAN (Mar 30 2010), https://www.theguardian.com/sport/2010/mar/30/caster-semenya-comeback-statement.
[177] *Id*.
[178] The title of the article by 'Time' represents the way the issue was dealt with by the media—William Lee Adams, '*Could This Women's World Champ Be a Man?',* TIME (Aug 29, 2009), http://content.time.com/time/world/article/0,8599,1917767,00.html.
[179] Dr. Katrina Karkazis is a Medical anthropologist and bioethicist at the Stanford Center for Biomedical Ethics, and was an expert witness retained by the Chand at her trial.
[180] *S* Mohan, *supra* note 4, ¶254.
[181] Dr. Karkazis, *Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, 12(7) AJOB, 3-16 (2012).
[182] Regulation 2.2, IAAF R(egulations.

It is argued that the IOC's reaction to the controversy in 2012, stating that high-testosterone women could participate as men[183] highlights the ignorance of the authorities regarding the perspective of the women athletes and is only a hurried step to mitigate the uproar, since asking someone who has been brought up as a woman to compete as a man, because of their genetic make-up castigates the very identity of a woman.

4. CONCLUSION

It is clear that from the discussion that the emphasis in the realm of must be on the athlete. As a result, it has been argued that athletes should not be punished for naturally being extra-ordinary, when in fact, the spirit of sports and competition dictate that this extra-ordinariness be rewarded. Further, even if science clarifies beyond all doubt, that this one particular natural factor is more advantageous than other factors, thereby justifying hyperandrogenism tests, it is clear that the privacy of the athlete must be protected at all costs. For this, it is suggested that new regulations must be introduced under which sanctions must be imposed on the regulating organizations, conducting such tests for any breach of privacy in respect of the test results. As far as the sensitivity of the media is concerned, it is clear that no sanction can affect that since it is a matter of attitude and approach, which the author is hopeful will eventually change. Additionally, it is emphasized that international sporting organizations must understand that their activities, howsoever pure their intentions might be, continuously affect athletes, both socially and personally. Therefore, the time has come for these organizations to embrace their responsibilities towards athletes and accept that their duty of protecting athletes and their interests go beyond the field. After all, it is one thing to strive for the arena to be fair, quite another to want it to 'look fair'.

[183] IOC Regulations on Female Hyperandrogenism Games of the XXX Olympiad in London, 2012 stated that *"In the event that the athlete has been declared ineligible to compete in the female category, the athlete may be eligible to compete as a male athlete, if the athlete qualifies for the male event of the sport."*

UNDER-UTILISATION OF TALENT POOL IN THE LOCAL CIRCUITS IN INDIA

Rishvik Pandra[1]

[1] VIT School of Law, Chennai
rishvik.pandra@gmail.com

ABSTRACT

Being in a country of 1.2 billion people, it is extremely painful to acknowledge that Indians stand nowhere in majority of sports at the world stage. Even after sending its largest-ever contingent to the 2016 Olympics, India had a substandard return in terms of medals. In spite of immense human diversity in India, which is ideal in the different streamlines of sports, results have not been up to the level expected. The vital role that sports play in our life can never be understated and undermined. One of the fastest-growing economies in the world, India indeed has a poor track record when it comes to competition at the highest level.

The purpose of this study is to throw light upon the root-cause of an issue, which has been lingering in our minds for decades. There is a certain amount of substantive interpretation of the role that the parents, the government, and other agencies need to play in order to improve the state of our sporting culture. Further, various other factors ranging from academics to administrative sectors are also focussed upon in this paper.

KEYWORDS

Sporting culture, talent pool, integrated programmes, corporate social responsibility

1. INTRODUCTION

Sports is a vital thread in the fabric of society, which enhances our daily lives. Sports also teaches us about the honest endeavour, commitment, and fair play; the ethics we need to inculcate in all walks of life. Further, sports encourages us to excel in all fields of our life such as studies, job, social relations. The very word 'sports' unites the nation through various international sporting events; it has the element of being curious about the performance of national teams and sportspersons and showing support to them so that they can bring the best out of them on the field to make their fellow countrymen proud. One of the foremost examples of how sports influences the masses is the South African revolution. At a peak period of racial tensions between the Black and the White sections of society in South Africa, sports changed the dynamics of the issues in the country. Although the apartheid policies were eradicated from the country, yet the negative morale and tensions in the nation were prevalent. In the midst of this, a masterstroke played by Nelson Mandela at that point of time was South Africa hosting the 1995 Rugby World Cup. Mr. Mandela realized that a good performance by the South Africans in

the World Cup can enhance racial harmony and went on to actively support the team in all their matches. This act united a whole nation at a critical juncture, which completely changed the dynamics and created a harmony in the nation.

2. THE INDIAN SPORTING SCENARIO

Working on similar lines, Indian Cricket Team's performance changes the mood of the people present in the country at different points of time. In the age of technological advancements and globalization, the attention towards other sports has also increased to a substantial level. Naturally, hopes prior to the Rio Olympics in 2016 were at an all-time high, as India had won six medals in London Olympics (2012). However, the medals tally did not improve in the 2016 edition of Olympics, leading to frustration and the feeling of anguish.

India has been participating in the Olympics since 1920 but has won only 28 medals. At the 2016 Summer Olympics in Rio de Janeiro, India had sent 117 athletes in fifteen sports and brought back only two medals—a silver and a bronze. While the two medals in Olympics 2016 placed India in the 67th position at the medal tally. If the number of medals against the total population of India is considered, India ranks last among all the medal-winning countries.[184]

"*The nation boasts immense human diversity, with limbs and muscles of all sizes, so race or genetic characteristics aren't a valid explanation*", said Anirudh Krishna, Professor at Duke University when asked about the performance of India at the Olympics.[185] In the omnipresent arguments related to the advantages of strong genetic characteristics in sports, both the scientific and sporting communities acknowledge that genetic factors undoubtedly contribute to athletic performance.[186] To a certain extent, our nation can indeed consider genetic characteristics as a reason for the substandard performances at the athletic events which involve strength and endurance levels. However, the expert analysis in such matters clearly denotes different issues altogether.

Prof. Krishna also co-authored a paper in 2008 called 'Why do some countries win more Olympic medals?' The conclusions derived from such a study clearly enunciate the reasons that go behind the failure to deliver on the biggest occasions.

---

[184]*How to start a sports culture in India*, JAAGORE!,(Dec. 8, 2017)https://www.jaagore.com/pre-activism/issues/sports/how-start-sports-culture-india/.

[185]Nyshka Chandran, *Why is India so bad at sports?*,CNBC(Aug. 20, 2016), http://www.cnbc.com/2016/08/19/lack-of-sporting-culture-institutional-support-and-inequality-blamed-for-indias-poor-olympic-record.html/.

[186]Lisa M. Guth& Stephen M. Roth, *Genetic influence on athletic performance*, 25(6)CurrOpinPediatr. 653,653-658 (2013).

3. ISSUES RELATED TO INDIAN SPORTING PERFORMANCES

One of the primary issues in our society is the notion of 'following the masses'. As per this trend prevalent in our society, parents are busy forcing their children to take up the routine subjects of engineering and medicine, which ends up killing the creative spirit present in them. Let alone sports, any alternative career choices as dancing, acting, choreography, singing and music are often condemned by Indian parents. Besides, if anyone excels in these career choices, they are branded as 'lucky' and born with an 'extraordinary' talent. Parents fail to see these talents in their own progenies.

In India and Pakistan alone, cricket has a monopolistic hold on the sporting affections of over a billion people. According to a survey, 80% of Indians under the age of 25 followed cricket and few other sports 'to a great extent' or 'somewhat'.[187] However, the involvement of professionalism in such sports has tailed off as the time has progressed because of the orthodox mentality. A popular Hindi saying sums it up: "if you study hard you will live like a king but if you play sports you will ruin your life". In such a scenario, many neglected athletes quit sports and most others do not get their due recognition. Sports as a career opportunity is still frowned upon as in India, earning a means of livelihood from sports is unusual. Hence, the results are evident in the overall medal tallies.

Indians, over the decades, have been mostly involved in climbing the socio-economic ladder and that is why India might be slightly below par when it comes to sporting achievements. Even factors such as high poverty levels are arguably not sufficient reason for Indians failing at the highest level because countries with lower levels of per-capita income, such as Kenya and Jamaica unswervingly produce great results. From this, it is apprehended that the talent pool present at the local level is not given its due importance because of the lack of sporting culture. "*India does not have a sports culture*", explained Boria Majumdar, a leading Indian sports scholar who has authored numerous books on this topic, stating that "*Indian athletes who have achieved international success are exceptions rather than products of the country's sports system*". He further mentioned that "*(u)nless there is a synergized sports culture you will never win a string of medals. A fundamental overhaul is needed and urgently so.*"[188]

For sporting culture to exist there is an exigent need for the involvement of all the stakeholders in sports. Due recognition and encouragement are of utmost necessity. Only recently had prominent parliamentarians joined the Mass Awareness Programme for Sports Culture in the country, especially football asa part of the Mission XI Million, to popularise football across India in the run-up to the FIFA U-17 Football World Cup (Kolkata, October 2017). The programme aimed to propagate football to 11

[187]*Is having a large talent pool really that important?*, PAKISTAN CRICKET FORUM,(May 24, 2017)http://www.pakpassion.net/ppforum/archive/index.php/t-218221.html/.
[188]Chandran, *supra* note 2.

million children through 15,000 schools and mass contact programmes, and guaranteed that every child has the opportunity to play the world's most popular sport.[189]

Absence of sports hierarchy[190] from grassroots to national level is another concern in Indian sports. There is no pertinent mechanism to nurture the talent at school, block, and district levels and then encourage the talented athletes to state and national levels. As a result, many gifted athletes are not able to reach the highest echelons of sports and are gradually lost. Olympics necessitate long-term investment in players, with best training and facilities. The old rehearsal system in India of preparing only two years before the Games needs to be scraped off. There must be a methodical selection and nurturing of players in the under-14 and under-16 categories.

Dearth of sports infrastructure and investment at the grassrootsmakes things even more difficult for individuals to pursue sports. Despite substantial governmental support, quality-launching programmes are not hosted because of various issues such as misallocation of funds, lack of transparency, poor asset management, and an absence of regular evaluatory programmes. Thus, much of India's talent remains unnoticed; "*it takes a degree of privilege to be a serious competitor*."[191] Beijing Olympics gold-medallist Abhinav Bindra has extensively blamed the system for the country's poor state in the medals tally at the Rio Olympics.Citing Britain's example, Mr. Bindra, who missed the bronze in the 10-metre Air Rifle category by a whisker, said medals could only be expected if there is an adequate investment on athletes in India. "Each medal costs the UK, a £5.5 million ($7.13 million). That is the sort of investment needed. Let us not expect much until we put systems in place at home", Bindra said on Twitter. Bindra's tweet was in reference to an article published by *The Guardian*, which reported how the country was investing heavily in its athletes to achieve glory at the Olympics.[192]

To add further fuel to the already existing fire, administrative issues play a detrimental role in sporting development in India. In 2012, the Indian Olympic Association (IOA) was put off from the International Olympic Committee (IOC) for electing leaders with pending criminal charges; compelling Indian athletes to participate at the Sochi Winter Games under the IOC flag instead of the Indian banner. Though, in the instance of Cricket, the issue is being resolved by appointment of COA (Council of Administrators) to look after the administration of BCCI by the Judiciary, it is still prevalent in the fields of Hockey, Archery, and other less-followed sports. For instance, just after the FIFA U-17 World Cup, the All India Football Federation (AIFF) was hit by a gigantic roadblock when the Delhi High Court set aside its President Praful Patel's elections in December 2016, citing the violation of the

[189]Sandhya Jain, *Developing a sports culture in India*, VIJAYVAANI(Apr. 18, 2017),http://www.vijayvaani.com/ArticleDisplay.aspx?aid=4283/.
[190]Sat Pal, *Indian Sports: Problems and Prospects*,5(1)International Journal of Research in Engineering, Social Sciences 59, 58-62(2015).
[191]Chandran, *supra* note 2.
[192]*Rio 2016: Abhinav Bindra Blames System for India's Failure to Open Medals Tally*, NEWS18 (Aug. 16, 2016), http://www.news18.com/news/olympics/rio-2016-abhinav-bindra-blames-system-for-indias-failure-to-open-medals-tally-1282241.html/.

National Sports Development Code of India (2011).[193] Patel was elected unopposed and unanimously for a third successive term (2017-2020). However, advocate and well-known sports activist Rahul Mehra filed a Public Interest Litigation (PIL) against the same, with the Delhi High Court ruling the election illegal. After immense success in the footballing world, which saw an all-time high stadium attendance figures, such an issue was again a huge blow to the sporting scenario of India.

4. CONCLUSION

The time has come for integrated programmes to be established in order to accrue positive results. Involvement of corporates should be emphasized upon, as their assistance can potentially boost the position of the underprivileged and provide programmes for athletes to thrive in this competitive world. Public-private partnerships for sports should be established to provide the best facilities for the athletes to thrive in. This would also provide transparency to a certain level, which can lead to reduction in corruption in the sporting field.

Monetary benefits have to be provided to the athletes who are endeavouring for success in Sports. In India, sports is not seen as a feasible career option due to lack of remuneration and job security for athletes. As a result, parents are hesitate to choose sports as a profession for their child and prefer to focus more on their academic excellence. Since India is a developing nation, the government's focus should be on economic development in all spheres of life. For a start, elite athletes preparing for Tokyo Olympics, Asian Games, and Commonwealth Games are to receive a stipend of Rs 50,000 per month to meet their pocket expenses, announced by sports minister Rajyavardhan Rathore.

Education also being an important aspect of life, educational institutions should endeavour to provide sports quota. In the top-most institutions present in India, there is no sports quota, which is against the practice followed worldwide. For instance, the best and most prestigious institutions in the world are hubs of sporting excellence along with academic brilliance. They produce many Olympians and international sports champions every year. However, this is not the case with the educational institutions of our country as IITs, IIMs, and NLUs in India have focussed only on academics. As a resolution, governmental enterprises including 'Public Sector Units' should also be engaged in regular recruitment of sportspersons for vacancies. Besides, the private sector can be incentivized to employ more and more sportspersons.

Long-term investments have to be relied upon in order to provide long-term results as emphasized by Abhinav Bindra. Instead of expecting miracles and being result-oriented, it is important for India to turn

[193]Swapnaneel Parasar, *AIFF election row: Rahul Mehra - Praful Patel's election was a hoax!*,GOAL(Oct. 31, 2017), http://www.goal.com/en-in/news/aiff-election-row-rahul-mehra-praful-patel-election-hoax/1g22fujyo3t2i1bi4qjjsls753/.

into a process-oriented society so that the results which are expected from India in the Sporting scenario can be achieved. The ‘Khelo India’ initiative by the Sports Ministry can be viewed as positive step for sports in India. A massive overhaul of the existing system has been proposed in the course of this paper and should be given extensive support in order for it to succeed.

NATIONAL LAW UNIVERSITY AND JUDICIAL ACADEMY, ASSAM

HAJO ROAD, AMINGAON

GUWAHATI – 781031, ASSAM (INDIA)

+91-361-2738891 / +91-361-2738651 / +91-361-2738652

www.nluassam.ac.in