PRIVATE AND YET PUBLIC: THE SCHIZOPHRENIA OF MODERN SPORTS AND JUDICIAL REVIEW

Saurabh Bhattacharjee[*]

Increased monetisation of sports has necessitated greater intervention of formal regulatory instruments of the state, including review of decisions of the governing bodies by courts. But the appropriate doctrinal terrain for such judicial scrutiny has been a matter of profound controversy. This paper looks at the scope of judicial review over sporting bodies as public bodies and argues that in spite of few exceptions, most countries have favoured recognition of sporting bodies as public institutions that are subject to duties higher than those enjoined upon private persons. At the same time, courts have been cautious about equating these bodies with state and have refused to subject these bodies to the entire gamut of constitutional obligations that apply to state or its instrumentalities. Nonetheless, there is a lack of uniformity on the extent of judicial scrutiny over sports bodies with countries and courts differing on the standard and scope of scrutiny. In this regard the Indian experience of judicial review over sports regulators stands out as a particularly activist model which may substantially impinge on the autonomy of sporting bodies.

I. INTRODUCTION

The birth of industrial urbanised communities in the nineteenth and twentieth century spawned the proliferation of sports as modern and organised ventures across the globe. Games that were hitherto played as a form of leisure were transformed into organised activities in different parts of the world.[1]

This emergence of organised sports received a further impetus with globalisation of technology and commerce in the last twenty years. As exemplified by the multinational football leagues and clubs, revolution in modes of communication and liberalisation of rules on movement of capital and labour have transformed sports organisation into billion dollar gigantic global

---

[*] Saurabh Bhattacharjee is an Assistant professor at West Bengal National University of Juridical Sciences. The author is grateful for the editorial assistance of Ms. Abha Nadkarni and Ms. Shreya Mishra.

[1] For a study of the transformation of sports in the wake of industrialisation, *see* J. HARGREAVES, SPORT, CULTURE AND POWER: A SOCIAL AND HISTORICAL ANALYSIS OF POPULAR SPORTS IN BRITAIN (1986).

enterprises.[2] This is illustrated by a Report of the European Union ('EU') which calculated that sports accounted for 3.7 % of the GDP of EU and employed around 5.4 % of the total labour force in EU.[3] Similarly, it was estimated that the total revenue generated by National Football League ('NFL') in United States ('U.S.') was a staggering U.S. $ 3.35 billion.[4]

The increased importance of sports is not restricted to its economic dimensions though. The ubiquitous and pervasive socio-cultural impact of sports cannot be underestimated. As A. Blake wrote:

> "Sport is a crucial component of contemporary society, one very important way through which many of us understand our bodies, our minds and the rest of the world. This is true not only because of mass participation and observation: sports saturates the language that surrounds us. Sporting activity is reported in every newspaper; it forms an important part of the wider literary culture….. Sport is also perpetually audible and visible through the electronic media."[5]

However, this transformation of sports has resulted in the increased need for regulation of sports.

At one level, this has led to increased internal self-regulation whereby newly emerging sports governing bodies, acting as custodians of their games, started to frame rules on how sports must be played and fiercely guarded their regulatory autonomy.[6]

However, as argued by Simon Gardiner, such regulation of sports has not just been restricted to internal self-regulation. Instead, increasing monetisation and economic significance of sports has necessitated increased intervention of formal regulatory instruments of the state, including review of decisions of the governing bodies by courts.[7] Gardiner writes:

> "[t]he activities of the regulatory bodies that control sporting activities have become, and are becoming, increasingly entwined with the law and with lawyers. With the rise in

---

2 *See* Andrei S. Markovits and Lars Rensmann: Gaming the World: How Sports Are Reshaping Global Politics and Culture (2010); Toby Miller et al, *Modifying the Sign*: *Sport and Globalization* 17 (3) Social Text 15-33 (1999).

3 European Commission, *White Paper on Sports*, COM (2007) 391, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007DC0391 (Last visited on August 19, 2016).

4 J. Anderson, Modern Sports Law: A Textbook 1 (2010).

5 A. Blake, The Body Language: The Meaning of Modern Sport 11-12 (1996).

6 Anderson, *supra* note 4, 19.

7 Gardiner et al, Sports Law 97 (2010).

> commercial and economic interests there have been ever greater incentives for those adversely affected by the rules and decisions of the sports governing bodies to make a challenge in law."[8]

But the appropriate doctrinal terrain for such judicial scrutiny has been a matter of profound controversy. Judicial oversight over sporting bodies can be exercised through two axes: a) as breach of contractual duties and b) as subject to judicial review on the ground that they exercise public functions.[9] But should courts examine the decision of sports governing bodies only as possible violation of contractual relationship? Or should these bodies be also considered as public bodies and thus their decisions subjected to the same standards of reasonableness and constitutional rights as other state bodies? These are questions that have not elicited universal answers across jurisdictions. Indeed, as would be discussed later, different courts within the same jurisdiction have struggled to adopt a consistent approach on this thorny issue.

In this paper, I look at the scope of judicial review over sporting bodies as public bodies. While there may indeed be a strong basis for exploring and developing contract-based scrutiny of sporting bodies, this paper looks at the manner in which courts have sought to bring sporting bodies within the purview of judicial review. In this regard, I examine the practical and the normative significance of judicial review of sports governing bodies and the use of public law as a basis for judicial review over these institutions. As part of this, I also examine the cleavages between public law and private law and examine the blurring frontiers between the two, especially in the context of sports. Thereafter, I present a survey of decisions on judicial review of sporting bodies on the anvil of public law principles from few major common law jurisdictions, including India, England, Scotland, Australia, New Zealand, Canada, Kenya and United States. I argue on the basis of this survey that in spite of few exceptions, most countries have favoured recognition of sporting bodies as public institutions that are subject to duties higher than those enjoined upon private persons. At the same time, courts have been cautious about equating these bodies with state and have refused to subject these bodies to the entire gamut of constitutional obligations that apply to state or its instrumentalities. Nonetheless, it is my argument that the Indian experience of judicial review reveals a particularly activist model of judicial review which may substantially impinge on the autonomy of sporting bodies.

---

8 *Id*., 98.

9 ANDERSON, *supra* note 4, 28.

II. JUDICIAL REVIEW AND PUBLIC LAW: AN INTRODUCTION

In its barest sense, judicial review refers to the power of supervision over governmental administrative actions.[10]

Lord Diplock in his seminal opinion on judicial review in *Council of Civil Service Unions* v. *Minister for the Civil Service*,[11] observed that judicial review "provides the means by which judicial control of administrative action is exercised. . . For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions."[12]

In other words, the answer to the question whether a body is subject to judicial review rests on the question whether its activities are subject to rules and principles of public law.

Judicial review in common law has evolved historically around the divide between public law and private law. At a broader level, public law pertains to "the vertical relation between the government and individuals to the extent that government imposes an obligation owed to it on individuals"[13] whereas private law refers to that branch of law that governs the horizontal relations between individuals inter se. As Rosenfeld writes, "the role of government in private law would be purely facilitative of horizontal dealings among private parties" and "providing the means of enforcing whatever bargained for agreement the competent individual contractors had freely entered into."[14]

The normative basis for this dichotomy rests on the liberal theory's separation of the state and the individual. As argued by Akech:

> "liberal theory explicitly recognizes the imbalances in power between public bodies and private individuals, which is then seen to justify the imposition of 'higher order duties' of fair and considerate decision-making on public bodies."[15]

Thus, it is argued that private bodies are entitled to pursue self-regarding interests whereas public bodies are enjoined to act in public interest.

---

[10] Peter Cane, An Introduction to Administrative Law 3 (1996).

[11] Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 WLR 1174.

[12] *Id*., 408.

[13] Michel Rosenfeld, *Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 (1) Int'l J Const L, 125 (2011).

[14] *Id*., 127.

[15] Migai Akech, *The Maurice Odumbe Investigation and the Power of International Sports Organisations*, 6 (2) ESLJ 1 (2008).

Further, public bodies are subject to higher standards of accountability given the asymmetry of power between public officials and individuals. Indeed, it has been claimed that "public law is the law of *res publica* i.e. it is the law of public good."[16] On the one hand, it steers public authorities towards and on another, it imposes restraints on them in their interface with individuals in their duties.[17] As a result, public bodies have always been seen as subject to judicial review of their action.

This is however not true of private bodies. Given that liberal theory treats every individual as equal, private bodies are allowed considerably more latitude in their conduct. Private transactions do not impose on the parties any legal duty to the community. As a result, the same accountability is not available in private law remedies as with public law, and private bodies are not subject to judicial review.[18] As a result, the scope for redress for individuals against abuses of power by private bodies is fairly diminished.[19]

III. PRIVATE AND YET PUBLIC: A DYSFUNCTIONAL DIVIDE AND MODERN SPORTS

The distinction between public law and private law is predicated on the difference in the relationship between the state and individuals and individuals inter se and the consequent need for subjecting activities of governmental agencies to a different legal regime from that applicable to private individuals. But while this dichotomy has been quite influential in shaping the evolution of common law,[20] many have criticised this distinction as archaic and vague. Indeed, Paul Verkuil wrote: "[i]f the law is a jealous mistress, the public-private distinction is like a dysfunctional spouse. . . It has been around forever, but it continues to fail as an organizing principle."[21]

There are some who have emphasised on the liberal fiction of equality of individuality. According to this view, power is not the monopoly of state and is dispersed across multiple agents in an asymmetrical manner. These imbalances of power in the private domain are not considered within the liberal framework of public-private dichotomy.[22]

---

16 Elisabeth Zoller, Introduction to Public Law: A Comparative Study 3 (2007).

17 *Id*., 16.

18 T. Endicott, Administrative Law 602 (2009).

19 M. Mwanza, *The Public/Private Divide: An Outdated Concept of Governance in English Law*, 6 (1) Diffusion 1 (2010), available at http://atp.uclan.ac.uk/buddypress/diffusion/?p=1521 (Last visited on August 9, 2016).

20 Endicott, *supra* note 18, 603.

21 Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About it 78 (2007).

22 Akech, *supra* note 15, 2.

Others argue that this distinction has been rendered archaic and obsolete by the rapid rollback of state and delegation of public functions and power to private entities in the current milieu of globalization and privatization.[23] The transfer of functions, hitherto exercised by the state, to private bodies has meant that the latter now exercise considerable power over the liberties and livelihoods of individuals. Even otherwise, accumulation of wealth and control over means of production has resulted in private bodies wielding immense powers that equally impact upon the liberties and livelihoods of individuals.[24] Therefore, if private power is equally capable of being abused to the detriment of the liberties and livelihoods of individuals, then such exercise of private power must also be regulated in a manner that protects the rights of the individuals. There are bodies that may be private in their constitution and yet perform duties that are public in nature in so far as they affect the livelihood and rights of individuals. And, the rationale for enhanced standards under public law would apply to such private bodies too. If this is so, the basis for the public-private distinction collapses.[25]

This duality of public and private capacity of entities has led scholars to argue that any one that wields institutional power that can affect rights and interests of others, whether public or private, ought to be subject to judicial review.[26] In other words, dispositive consideration should not be the source of the power, but the nature and effect of such power and whether it is capable of adversely affecting the rights of individuals.[27]

Indeed, this is also reflected in the gradual redefinition of 'public function' and the expansion of judicial review that has taken place in many jurisdictions. Courts have recognised that even private bodies can be said to be performing public functions and may be subject to judicial review. In *Binny Ltd.* v. *V. Sadasivan*,[28] the Supreme Court of India recognised this duality of functions and the need for going beyond the source of the power to the nature of the function. The Court observed:

> "It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so.

[23] Cane, *supra* note 10, 19.
[24] Akech, *supra* note 15, 3.
[25] *Id*.
[26] M. Hunt, *Constitutionalism and Contractualisation of Government in the United Kingdom* in The Province of Administrative Law 32-33 (M. Taggart ed., 1997); *See also* Johan Steyn, Constitutionalisation of Public Law (1999).
[27] Akech, *supra* note 15, 3.
[28] Binny Ltd. v. V. Sadasivan, (2005) 6 SCC 657.

> Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."[29]

The Court also quoted with approval from Judicial Review of Administrative Action (Fifth Edn.) by De Smith, Woolf & Jowell:

> "Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions…may in reality also perform some types of public function…Non-governmental bodies such as these are just as capable of abusing their powers as is government."[30]

Similarly, the Court of Appeal in United Kingdom questioned the focus on governmental source of power in drawing the limits of judicial review and held that judicial review cannot be limited to statutory bodies only.[31] The Court held that the source of power should not be the sole test of whether a body is subject to judicial review. The nature of the power is also significant. "If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then this may be sufficient to bring the body within the reach of judicial review."[32]

The same approach has been adopted in Kenya where the judiciary has held that 'bodies performing public duties or exercising power that could be characterized as 'public' may be subject to judicial review even though the powers are not statutory."[33]

These developments reflect the inherent limitations of the dichotomy of public and private that has evolved in common law countries. Given the complex and multifaceted linkages between state and private entities, private and public cannot be seen as surgically defined categories any more. Indeed, as Cane observes: "[F]unctions do not come labelled as 'public' or 'private'. Nor is publicness like redness – a characteristic that can simply be observed."[34] The assessment about whether something is public or private, especially at the margins, is inherently a value judgment. Therefore, it appears that the distinction

---

[29] *Id*., 664.

[30] *Id*., 666 (citing De Smith, Woolf & Jowell, Judicial Review of Administrative Action (1999)).

[31] R. v. Panel on Takeovers & Mergers, ex p Datafin plc, 1987 QB 815 : (1987) 2 WLR 699 : (1987) 1 All ER 564 (CA).

[32] *Id*., 566.

[33] Alnashir Vishram, *Review of Administrative Decisions of Governments by Administrative Courts and Tribunals*, January 12, 2010, available at http://www.aihja.org/images/users/1/files/kenya.en.0.pdf (Last visited on August 12, 2016).

[34] Cane, *supra* note 10, 17.

between public and private is more a continuum than binary dichotomy where even private entities are subject to enhanced judicial review wherever they perform public duties that are imbued with public interest and are capable of affecting the rights of others.

But where are sports-governing bodies situated on this continuum? Have they been considered by courts as imbued with public character? Or have judicial rulings gone by their private constitution to exempt them from public law judicial review? Given the manner in which sports has been enmeshed with nationalist sentiments, sporting bodies do appear to have a distinct public character. Yet, most sporting bodies are structured as private companies or societies or trusts. This schizophrenic nature of sporting bodies has meant that the status of sporting bodies and their amenability to judicial review has been an intractable issue across jurisdictions. The next chapter in this paper attempts a comparative analysis of the status of sporting bodies across certain common law jurisdictions.

IV. SPORTS BODIES AND JUDICIAL REVIEW: A COMPARATIVE MAPPING

A comparative review of the norms on extent of judicial review of sports bodies across major common law jurisdictions reveals a certain diversity of responses. Yet, these countries can be classified into three broad categories. First, countries like England where courts have been reluctant to considering sporting bodies as public bodies and have not subjected them to judicial review. In the stark contrast to the first group, are the countries which have recognised that sporting bodies are imbued with a public character. In the third category, are countries that have refused to extend public law review to sporting bodies and yet have expanded the scope of implied contractual duties for such bodies.

A. THE OUTLIERS: SPORTS ASSOCIATION AS PRIVATE BODIES

The first group is exemplified by the position adopted by courts in England. While there have been stray decisions that have suggested that sporting bodies can be brought within the purview of judicial review, the weight of judicial opinions overwhelmingly lies towards exclusion of sporting bodies from such review.

One of the first major case on this question was *Law* v. *National Greyhound Racing Club Ltd*.[35] In this case, a trainer whose licence had been suspended because the greyhound he was in charge of had been found to have

[35] Law v. National Greyhound Racing Club Ltd., (1983) 1 WLR 1302.

prohibited substances in its tissues, sought a declaration that the decision was void and ultra vires because of breach of an implied duty of fairness. The Court refused to accept an implied duty on the basis of which it could it have intervened. Lord Justice Fox held that the authority of the Club "to suspend the licence of the plaintiff derives wholly from a contract between him and the defendants."[36] He observed:

> "I see nothing to suggest that the defendants have rights or duties relating to members of the public as such. What the defendants do in relation to the control of greyhound racing may affect the public, or a section of it, but the defendants' powers in relation to the matters with which this case is concerned are contractual."[37]

Slade LJ added that the Club's "authority to perform judicial or quasi-judicial functions in respect of persons holding licences from it is not derived from statute or statutory instrument or from the Crown. It is derived solely from contract."[38]

Similar stance taken was almost a decade later in *R.* v. *Disciplinary Committee of the Jockey Club, ex p Aga Khan* ('Aga Khan')[39] In this case, the applicant's racehorse was disqualified although it had won a major race whereafter he sought judicial review. The Court of Appeal noted that the Jockey Club, incorporated by Royal Charter, exercised responsibility for the organisation and control of racing and training activities in Great Britain. But it also found that

> "the club's powers and duties did not derive from primary or secondary legislation and its dominance was principally maintained through the issue of licences and permits by which the club's stewards entered into contracts with racecourse managers, owners, trainers and jockeys, who were required to submit to a comprehensive regulatory code, the Rules of Racing, published by the stewards for the conduct of the sport."[40]

Thus, it opined that the Club could not be subjected to judicial review. While it recognised that private power may affect the public interest and livelihood of many individuals, it held that a sporting body would not be subject to public law remedy.

---

[36] *Id*., 1308.
[37] *Id*., 1309.
[38] *Id*., 1313.
[39] R. v. Disciplinary Committee of the Jockey Club, ex p Aga Khan, (1993) 1 WLR 909.
[40] *Id*., 910.

The court also held that its power and duties were in no sense governmental and were derived from contract. Hoffman LJ noted: "[h]owever, there is no public source for any of its powers. It operates directly or indirectly by consent. The power is direct against those who have agreed to be bound by the Rules of Racing and indirect against those who have not."[41]

It is important to note that the Court of Appeal refused to follow the more contemporary and expansive notion of judicial review. As indicated in the previous section, the Court of Appeal had by already ruled in the *Datafin*[42] case that a private body, even without any statutory authority may be subject to judicial review if it performed public duties. The contractual origin of its powers were not treated as a barrier against application of judicial review. In a stark contrast, the Court took a step back in this case and highlighted the contractual basis of the powers exercised by the Jockey Club to rule out judicial review.

This refusal to go for expansion of judicial review in the context of sports was reiterated in the same year in *R.* v. *Football Assn. Ltd., ex p Football League Ltd*.[43] In this case, the Football Association, which was the governing authority for football and all clubs had to be affiliated to it, declared void certain rules of the Football League. The League sought judicial review, primarily based on the argument that the Football Association exercised monopoly over the game in England. However, it was held that the Football Association was not susceptible to judicial review. Rose, J. held that:

> "Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only. I find no sign of underpinning directly or indirectly by any organ or agency of the state or any potential government interest."[44]

It was also observed that there is no evidence to "suggest that if the F.A. did not exist the state would intervene to create a public body to perform its functions."[45] The Court ruled that in light of the commercial interests involved in the professional game, "a far more likely intervener to run football would be a television or similar company rooted in the entertainment business or a commercial company seeking advertising benefits such as presently provides sponsorship in one form or another."[46]

---

41 *Id*., 931.

42 R. v. Panel on Takeovers & Mergers, ex p Datafin plc, 1987 QB 815 : (1987) 2 WLR 699 : (1987) 1 All ER 564 (CA).

43 R. v. Football Assn. Ltd., ex p Football League Ltd., (1993) 2 All ER 833.

44 *Id*., 835.

45 *Id*., 848.

46 *Id*., 836.

Most critically, the Court held that pervasive popular national interest in football will not bring the Association within the ambit of judicial review. It was held that,

> "Although thousands play and millions watch football, although it excites passions and divides families, and although millions of pounds are spent by spectators, sponsors, television companies and also clubs on salaries, wages, transfer fees and the maintenance of grounds, much the same can also be said in relation to cricket, golf, tennis, racing and other sports."[47]

If there were any doubts about possible extension of public law remedies to sporting bodies, they were dispelled by Hoffman LJ who stated, "I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government."[48]

Kenyan Courts have followed an approach that resonates with that of the Court of Appeal in the Aga Khan case. In a case against the Kenyan Cricket Association, the High Court of Kenya held that the Association did not perform any duty of a public nature nor were the consequences of the performance of their duty of a public nature.'[49] It was further held that 'Cricket is a sport and depends on individual interest,' and the Association's "duty to the applicant was strictly within their terms and conditions of membership of the club and did not involve the public."[50] The Court also pointed out that the International Cricket Council and Kenyan Cricket Association are not funded by the public, and get their funding from their own activities

B. SPORTS BODIES AS PUBLIC BODIES

This reluctance is not however shared by other common law courts like Scotland and New Zealand that may be clubbed together in the second group. In Scotland, the decisions of sports governing bodies and individual clubs have been amenable to judicial review for almost fifty years. In *St. Johnstone Football Club Ltd.* v. *Scottish Football Assn. Ltd.*[51], a Scottish Court held that the Football Association would be amenable to judicial review, given its nature of function in so far as it can impose fine or expel a member.[52]

---

47 *Id*., 840.
48 *Id*., 841.
49 Republic v. Kenya Cricket Assn., ex p Maurice, Misc. Appln. No. 1723 of 2004, 7.
50 *Id*., 7.
51 St. Johnstone Football Club Ltd. v. Scottish Football Assn. Ltd., 1965 SLT 171.
52 *Id*., 173.

This was recently reiterated in *Yuill Irvine* v. *Royal Burgess Golfing Society of Edinburgh*[53] where it has been held that "that there was no recognized principle that the court should refrain from exercising the power of judicial review where the body whose decision is under attack is a sporting body."[54] Similarly, it has been observed in *Stuart Crocket* v. *Tantallon Golf Club*,[55] that "unlike England, judicial review remedies are available in Scotland 'in proceedings against public authorities as in proceedings against private individuals."[56]

New Zealand also follows a similar line. Indeed, the position of law in New Zealand on this matter is a clear contrast to the rationale espoused in Aga Khan case by the Court of Appeals. In *Finnigan* v. *New Zealand Rugby Football Union Inc*.,[57] the Court, unlike its English counterparts, specifically alluded to the metaphysical status of sports and its place in a nation's identity. The court held:

> "In its bearing on the image, standing and future of rugby as a national sport, the decision challenged is probably at least as important as if not more important than any other in the history of the game in New Zealand. . . The decision affects the New Zealand community as a whole and so relations between the community and those, like the plaintiffs, specifically and legally associated with the sport. Indeed, judicial notice can be taken of the obvious fact that in the view of a significant number of people, but no doubt contrary to the view of another significant number, the decision affects the international relations or standing of New Zealand."[58]

Therefore, the Court held that the Rugby Football Union would be subject to judicial review. The court also expressly spoke of the blurring lines between private and public in this case. It said that

> "While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance ...therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. . .We are saying simply that it falls into a special area where, in the

[53] Yuill Irvine v. Royal Burgess Golfing Society of Edinburgh, 2004 LLR 334.
[54] *Id*., 344.
[55] Stuart Crocket v. Tantallon Golf Club, 2005 CSOH 37.
[56] *Id*., ¶30.
[57] Finnigan v. New Zealand Rugby Football Union Inc., (1985) 2 NZLR 159.
[58] *Id*., 162.

New Zealand context, a sharp boundary between public and private law cannot realistically be drawn."[59]

C. SPORTS BODIES AS PRIVATE BODIES WITH IMPLIED OBLIGATION

Courts in United States have taken an intermediate approach of staying away from public law remedies. U.S. courts generally permit professional sports leagues and associations to establish their respective systems of self-governance and are reluctant to interfere with or second guess their internal decision-making. Courts recognize that private associations must be accorded considerable latitude in rule-making and enforcement in order to accomplish their legitimate objectives.[60] Thus, it has been held that American professional sports leagues and associations are private entities that are not subject to the constraints of the United States Constitution.[61] Further, there is an acknowledgement of the principle that the league or association constitutions and their internal rules represent contractual relationships and constitute binding rights and responsibilities.[62] Thus, the legal relationships among member clubs or individuals of professional sports leagues are primarily governed by contract law and the law of private associations. As a result, generally courts allow suits against sporting bodies for violation of internal bylaws and constitutions.[63]

At the same time, courts have accepted that the profit-orientation and the monopolistic nature of major professional sports and associations call for some limited judicial oversight to prevent exploitation and blatant unfairness.[64] "The US Courts are therefore concerned that these organizations are not simply voluntary social associations, but are profit-making corporations that wield substantial economic power over the careers of athletes."[65] In fact, the Second Circuit Court of Appeals held in *Koszela* v. *National Assn. of Stock Car Auto Racing Inc.*,[66] that when a sports organisation has such a strangle-hold that all teams or individuals desiring to participate in a sport must join it, "rigid adherence to a hands off policy is inappropriate."[67]

---

59 *Id*., 164.

60 Mitten et al, Sports Law and Regulation: Cases, Materials and Problems 610 (2009).

61 Long v. National Football League, 870 F Supp 101 (WD Pa 1994), aff'd, 66 F 3d 311 (3rd Cir 1994).

62 Mitten, *supra* note 60, 611.

63 Walter T. Champion Jr., Sports Law: Cases, Documents and Materials 504 (2005).

64 Mitten, *supra* note 60, 611.

65 Migai Akech, *The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations*, 6 ESLJ ¶ 48 (2008); *See* Rutledge v. Gulian, 93 NJ 113 : 459 A 2d 680 (NJ 1983).

66 Koszela v. National Assn. of Stock Car Auto Racing Inc., 646 F 2d 749 (2nd Cir 1981).

67 *Id*.

As a result, courts have acted as forum for dispute resolution where a sporting organisation has departed from its own prescribed procedures or its actions are in total violation of its own rules and regulations.[68] It has been argued that US courts intervene since the public's trust and confidence in these organizations is undermined where they flout their own rules.[69] Courts have also imposed implied covenants of good faith and fair dealing in contracts governing the internal affairs of professional sports leagues.[70]

Further, it has been recognised that office-bearer of sporting organisations have a fiduciary duty to act in the best interests of the association. In *Gilder* v. *PGA Tour, Inc.*,[71] it was held that touring professional golfers serving on the PGA Board owe a fiduciary duty to act in the best interests of the association and cannot use their position for potential personal gain.[72]

It is pertinent to note that while the implied contract or quasi-contractual duties have been articulated, sports bodies are still considered as private bodies that are primarily governed by contract law and the law of private associations.[73]

These cases show that there has been an increased, if not universal recognition of the public nature of sporting bodies and the need for bringing them within the ambit of public law. Courts in most common law countries have recognised that the decisions of sporting bodies impact the community and they are in a position of major national importance. As such, the mere reason that they are privately managed would not be sufficient to keep them insulated from judicial review.

The preceding analysis forms the vantage point from which this paper examines the Indian approach to increasing public role of sports and judicial review of sporting bodies. Has India, like England, remained an exception to the broader global trend? Or have Indian courts been willing to subject sporting bodies to enhanced scrutiny? These would be explored in the next part of this paper.

V. JUDICIAL REVIEW AND SPORTS IN INDIA

The discourse on sports and judicial review in India has been shaped by its constitutional architecture and its sophisticated jurisprudence

---

68 *See* Axel Schulz v. US Boxing Assn., 105 F 3d 127 (3rd Cir 1997).

69 *Id*., 135.

70 *See* Los Angeles Memorial Coliseum Commission v. National Football League, 791 F 2d 1356 (9th Cir 1986).

71 Gilder v. PGA Tour Inc., 727 F Supp 1333 (D Ariz 1989).

72 *Id*., 1337.

73 Mitten, *supra* note 60, 611.

on Fundamental Rights. Thus, it has revolved around the following question: a) whether sporting bodies can be considered instrumentalities of state under Article 12 of the Constitution and thus be subjected to Fundamental Rights, b) whether they can be subjected to the writ jurisdiction of High Courts under Article 226 and c) whether they can be considered as 'public authorities' under Right to Information Laws and various allied statutes.

A. ARTICLE 12 AND SPORTS ASSOCIATIONS

The question as to whether sports bodies can be considered as 'other authorities' under Article 12 of the Constitution came up for examination in the context of the Board for Control of Cricket in India ('BCCI') in *Zee Telefilms Ltd.* v. *Union of India* ('Zee Telefilms').[74]

Interestingly, the majority verdict of the Court in this case recognised that the phrase "other authorities" would extend to cases where "a private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the government."[75]

But after examination of the manner of functioning of BCCI, the majority held that it cannot be considered an instrumentality of the state. The following facts were highlighted:-[76]

1. The BCCI was not a creation of a statute.

2. No part of its share capital was held by the Government.

3. Practically no financial assistance was given by the Government to the BCCI to meet its expenditure.

4. The monopoly enjoyed by the BCCI in the field of cricket was not State conferred or State protected.

5. There is no existence of a deep and pervasive State control. The control if any was only regulatory in nature as applicable to other similar bodies and was not specifically exercised under any special statute applicable to the Board.

6. All functions of BCCI were not public functions or related to governmental functions.

---

[74] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.
[75] *Id*., 688.
[76] *Id*., 694.

7. The Board was not created by transfer of a Government owned corporation. It is an autonomous body.

Based on these facts, the majority ruled that it could not be said that the Board was financially, functionally or administratively dominated by or is under the control of the Government. The application of the traditional tests for establishing whether a body was an instrumentality of the state as outlined in *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*[77] could not support such an inference.

Critically, the majority ruled that even if there is some element of public duty involved in the discharge of the BCCI's functions that by itself could not bring the Board within the purview of Article 12. The verdict pointed out that State/Union has not assigned these public duties to the BCCI nor has it legally authorised the Board to carry out these functions under any law or agreement. It was observed that: "[I]n the absence of any authorisation, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State."[78] The majority found that there was nothing shown by the Union of India to indicate any de facto or de jure authorisation or grant of recognition to the BCCI. The Court noted that there was indeed some control exercised with relation to grant of permission but that was purely regulatory in nature.

The Court also used the slippery slope argument to state that if BCCI is held to be a state under Article 12, there is very little reason for not extending the same to other sporting bodies too. Any differentiation on the basis of the popularity and the financial scale of scale of cricket could not be sustained under Article 14 of the Constitution. Thus, the Court concluded that BCCI could not be characterised as a state for the purpose of Article 12. This finding has later been reiterated by the Supreme Court in *Board of Control for Cricket in India* v. *Cricket Assn. of Bihar* ('BCCI case')[79] in 2015.

It is pertinent to note however that the majority opinion in Zee Telefilms cannot be construed as a summary rejection of the possibility of sporting bodies be considered as instrumentalities of state. This opinion was founded on the factual matrix applicable to BCCI and the absence of deep and pervasive state control and any de jure authorisation on part of the state. It is possible to argue therefore that other sporting bodies in India, whose internal governance is closely controlled by the Ministry of Sports may be brought within the purview of Article 12 on the basis that there does exist pervasive state control.

---

77 Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.

78 Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649, 681.

79 Board of Control for Cricket in India v. Cricket Assn. of Bihar, (2015) 3 SCC 251.

That this is not an illusory promise is substantiated by the observation of the Rajasthan High Court in *Madan Singh* v. *Rajasthan State Sports Council* ('Madan case')[80] where it hinted that there is no difference between the status of Rajasthan State Sports Council and that of the state. As the court noted in that case:

> "it is clear that though it [Rajasthan State Sports Council] is not created by a statute but is certainly created under a statute. It is 100% financed by the Government of Rajasthan and it enjoy a monopoly status by the force of statute i.e. the act of 2005. As per the provisions of the memorandum of the Council, Article of the Council and the provisions of the Act of 2005, there is a deep and pervasive State Administrative Control over the Sports Council. Thus, I do not find any dividing line between the Sports Council and the State on basis of that it may not be called as a State enterprise."[81]

It can be argued that this was a mere obiter and not a part of the binding ratio, since the admissibility of a petition under Article 32 was not a material issue in that case. Nonetheless, it is a tacit admission of the possibility that some sports bodies may be brought within the ambit of state under Article 12 of the Constitution.

B. ARTICLE 226 AND INTERNAL GOVERNANCE OF SPORTS

Even as the judiciary has refused to include sporting bodies within the purview of Article 12, it has simultaneously attempted to acknowledge the public character of sports and expand judicial review to sports. In a series of cases in the last decade, a number of courts have looked at the public character of the functions discharged by sporting bodies and affirmed that they can be brought within the purview of writ jurisdiction under Article 226 of the Constitution.

In *Ajay Jadeja* v. *Union of India* ('Ajay Jadeja case')[82] Justice Mudgal of the Delhi High Court pointed out that BCCI is the sole representative of India as a country at all levels of cricket in the international arena; that domestically all representative cricket can only be under its aegis; that it has been recognized by the Government of India as the regulatory authority for the game of cricket in India; and that its affiliates i.e., the State Boards have access to vast tracts of prime urban land at highly concessional and indeed nominal

[80] Madan Singh v. Rajasthan State Sports Council, SB Civil Writ Petition No. 4650 of 2008, decided on 1-8-2008 (Raj).

[81] *Id*., ¶ 13.

[82] Ajay Jadeja v. Union of India, 2001 SCC OnLine Del 1024 : (2002) 95 DLT 14.

rates. Further in an interesting parallel with the approach of the Courts in New Zealand, he alluded to the popularity of cricket and observed "[n]o event including even the Republic Day parade and other events ancillary thereto get the kind of media coverage in the country as an International Cricket Match particularly that involving India."[83]

The court emphasised on the role of the BCCI as the sole representative of India in international fora and observed that "it necessarily imbues BCCI with the public functions at least in or far as the selection of the team to represent India and India's representation in International Cricket fora and regulation of Cricket in India is concerned"[84] and that on this own, it would be amenable to writ jurisdiction.

This principle was reiterated in *Rahul Mehra* v. *Union of India* ('Rahul Mehra')[85] The Division Bench of Delhi High Court endorsed the principle laid down in the Ajay Jadeja case and postulated:

> "Many in India, play cricket not just for the love of the game but for to their own survival. The BCCI performs the vital public duty and function of providing this opportunity […] Its objects are the functions and duties it has arrogated to itself […] therefore, BCCI cannot be said to be beyond the sweep of Article 226 in all eventualities."[86]

The strongest assertion of the principle that BCCI is a body that is amenable to writ jurisdiction has come from the Supreme Court in *Board of Control for Cricket in India* v. *Cricket Assn. of Bihar*.[87] Confronted with failure of BCCI to take effective remedial action against allegations of match-fixing in the Indian Premier League ('IPL'), reiterated that the BCCI exercises public functions and is therefore, answerable on the standards generally applicable to judicial review of State action. Particularly, the Court observed that the BCCI "regulates and controls the game to the exclusion of all others" and "formulates rules, regulations norms and standards covering all aspect of the game."[88] The Court also referred to the tacit support of the state that BCCI enjoyed and opined that:

> "The State has not chosen to bring any law or taken any other step that would either deprive or dilute the BCCI's monopoly in the field of cricket. […] If the Govt. not only allows an

---

83 *Id*., ¶ 31.
84 *Id*., ¶ 32.
85 Rahul Mehra v. Union of India, 2004 SCC OnLine Del 837 : (2004) 114 DLT 323.
86 *Id*., ¶ 17.
87 Board of Control for Cricket in India v. Cricket Assn. of Bihar, (2015) 3 SCC 251.
88 *Id*., 281, ¶ 33.

> autonomous/private body to discharge functions which it could in law takeover or regulate but even lends its assistance to such a non-Govt. body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions."[89]

That sports bodies can be considered subject to judicial review is proposition that has not been accepted only in the context of cricket but also with respect to other sports associations too. In *Narinder Batra* v. *Union of India* ('IHF'),[90] where the IHF was held to be amenable to judicial review too. As it was held in the context of the BCCI, it was observed by the Court that "the Indian Hockey Federation regulates the sport of hockey for the entire country. The Federation represents India in international bodies, agencies, associations and forums; appoints India's representative thereto and maintains control and regulation over coaches, umpires, players and managers etc."[91]

Therefore, it performs public functions and can be subject to judicial review under Article 226. Earlier, the Rajasthan High Court in Madan case had held that the Rajasthan State Sports Council could be subject to writ jurisdiction of the High Court under Article 226.

Inclusion of sports bodies under the purview of Article 226 has been recognised in other sports beyond hockey and cricket too. In *Amit Kumar Dhankhar* v. *Union of India*,[92] the High Court of Delhi acknowledged that a writ of mandamus can be issued for holding of selection trials for the Asian Games.

C. SPORTS BODIES AS PUBLIC INSTITUTIONS UNDER STATUTORY LAW

As mentioned earlier, the question of public character of sporting bodies has been brought to forefront under a couple of special enactments too. One such enactment is the Right to Information Act 2005 ('RTI Act').

In *Indian Olympic Assn.* v. *Veeresh Malik*,[93] the Delhi High Court had to examine whether the Indian Olympic Association ('IOA') and the Organizing Committee of the Commonwealth Games 2010 ('OC') could be considered public authorities for the purpose of the RTI Act.[94]

---

89 *Id*., ¶ 34.
90 Narinder Batra v. Union of India, 2009 SCC OnLine Del 480 : ILR (2009) 4 Del 280.
91 *Id*., ¶ 48.
92 Amit Kumar Dhankhar v. Union of India, 2014 SCC OnLine Del 3451 : 2014 Indlaw Del 2115.
93 Indian Olympic Assn. v. Veeresh Malik, 2010 SCC OnLine Del 35 : ILR (2010) 4 Del 1.
94 *Id*., ¶ 68.

The Court held that both the bodies were substantially financed by the Union Government and hence would be considered public authorities. It stated that:

> "the funding by the government consistently is part of its balance sheet, and IOA depends on such amounts to aid and assist travel, transportation of sportsmen and sports managers alike, serves to underline its public, or predominant position. Without such funding, the IOA would perhaps not be able to work effectively."[95]

Thus, it held that the IOA is "public authority."[96] Similarly, it noted that the Union Government was providing financial assistance in various forms to the Organising Committee of the Commonwealth Games 2010 including "writing off - even on contingent basis- interest on loans, of such scale, and agreeing not to demand any use charges or license fee for infrastructure, as well as agreeing not to take any part of the surplus generated, is not an ordinary loan transaction."[97] The Court ruled that such financing was substantial and therefore, the OC is a public authority. A different note was struck by the Bombay High Court in *Goa Cricket Assn.* v. *State of Goa*[98] where it quashed a decision of the State Information Commission which had ruled that the GCA was a public authority for the purpose of the RTI Act.[99] However, the decision of the High Court was based on a procedural ground that there was a direct appeal to the State Information Commission.[100] As such, the decision did not preclude the possibility of GCA being considered a 'public authority.'[101]

Apart from the RTI Act, this issue has also been implicated in a recent order of the Kerala High Court under the Prevention of Corruption Act. The Court ruled that elected honorary office bearers of the Kerala Cricket Association and others like players, coaches, managers, members of various committees etc. are public servants within the meaning of § 2 (c) of the RTI Act.[102] A Special Leave Petition (Crl.) was filed challenging the judgment of the Kerala High Court but the petition was dismissed in limine.[103]

Together, these cases along with the cases on amenability of sports bodies to judicial review under Article 226 have coalesced to create a new jurisprudence of sports associations and their office bearers as public

---

95 *Id*., ¶ 64.
96 *Id*., ¶ 65.
97 *Id*., ¶ 68.
98 Goa Cricket Assn. v. State of Goa, 2013 SCC OnLine Bom 506 : 2013 Indlaw Mum 1465.
99 *Id*., ¶ 10.
100 *Id*., ¶¶ 6, 7.
101 *Id*., ¶ 10.
102 K. Balaji Iyengar v. State of Kerala, 2010 SCC OnLine Ker 4969.
103 T.C. Mathew v. K. Balajiiyengar, SLP (Cri) No. 10107 of 2010, decided on 31-1-2011 (SC).

functionaries that can be subjected to standards of public law review. But can we identify some deeper patterns from these cases? Do these cases herald the death of public-private distinction in sports? What do these cases say about the standard of review? Do these cases herald complete elimination of autonomy of sporting bodies? These are some of the questions that would be explored in the next section of the paper.

VI. JUDICIAL REVIEW OF SPORTS: A TOMBSTONE FOR PUBLIC-PRIVATE DUALITY AND AUTONOMY OF SPORTS?

Indian courts have recognised that sporting bodies, even when not creation of statutes, would be amenable to writ jurisdiction. As the preceding section indicated, that debate has been conclusively settled in favour of judicial review. Yet, a deeper look at the cases on the subject reveal certain common strands of reasoning and some points of substantial disagreement on the boundaries and extent of judicial review.

Significantly, none of the cases which say that sports associations like BCCI and IHF are subject to judicial review said that they, as a result of their public functions, become state for the purpose of Article 12. This distinction, as pointed out in the preceding section, was highlighted by the Supreme Court in the Zee Telefilms case. Even as the majority rejected the argument that BCCI is governed by fundamental rights, it noted:

> "Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32."[104]

Courts have tried to bring these bodies within the ambit of judicial review on the basis of their regulatory role, monopoly status, prominence

[104] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649, 683.

in national consciousness and direct or indirect state support. Yet, they have also been hesitant about considering them state for the purpose of Part III of the Constitution.

It is also pertinent to note that the High Courts have not said that every facet of sports bodies would be amenable to judicial review. Indeed, some of the above-discussed decisions have called for a functional test that would look at the particular features of a decision before resolving its amenability to judicial review. As the Delhi High Court said in Rahul Mehra:

> "the whole "amenability" issue is misplaced. A body, public or private, cannot be categorised as "amenable" or "not amenable" to writ jurisdiction. The "function" test is the correct one to test maintainability. If a public duty or public function is involved, anybody, public or private, qua that duty or function, and limited to that, would be subject to judicial scrutiny...Disputes or acts in the sphere of pure private law having no traces of public law would not be the subject matter of writs, directions or order to be issued under Article 226." [105]

This limitation is illustrated by the decision of the Bombay High Court (Nagpur Bench) in *Anil Chintaman Khare* v. *Vidarbha Cricket Assn.*[106] where it was held that payment of ex gratia sum to former cricketers and interruption in such payment "cannot be said to be in discharge of any public function or duty."[107] While the Court did not give an exhaustive framework for identification of public duties, it did hint that selection of players would be one such public duty.[108]

Therefore, it is evident that while courts have redefined the concept of public duty, thus bringing sports bodies within its scope, they have fallen short of dispensing with the distinction altogether. In other words, those decisions of sports bodies that lack a public character would still remain outside the pail of judicial scrutiny under Article 226.

While the judicial position on the dichotomy between public and private functions in sports has been fairly consistent, similar uniformity has been elusive in the context of standard of review. In a large number of cases, courts have been alive to the fact that expansion of judicial review to sporting bodies should not lead to extensive judicial interference and strict scrutiny of every action of these bodies. Indeed, in Ajay Jadeja case the Delhi High Court

[105] *Id*., ¶ 17.
[106] Anil Chintaman Khare v. Vidarbha Cricket Assn., 2012 SCC OnLine Bom 1564 : 2012 Indlaw Mum 1101.
[107] *Id*., ¶ 33.
[108] *Id*., ¶ 41.

advocated a cautious approach to oversight over decisions of sports bodies like BCCI. The Court opined:

> "The very potency and reach of the writ jurisdiction requires caution to be exercised and it is not meant to resolve all mundane and internecine controversies arising in such bodies. It is only when the impugned action infringes on a fundamental right or is so shocking and arbitrary so as to be unconscionable in addition to having wide ramifications of a public nature, that the writ Court may interfere."[109]

This indicates a very high threshold for judicial interference with the prerogative of sports administrators and recognises the institutional limitations of the Court in adjudicating over sporting disputes.

In the same vein, Courts have been vigilant about protecting the autonomy of sporting bodies and insulating them from sweeping governmental interference. In Rahul Mehra, the Delhi High Court warned:

> "Without making any value judgment on quality of Governmental intervention, we may straight away say that amenability to judicial review is in no way connected with Governmental interference in the affairs of the BCCI which is a self-regulated body and will continue to be one. The only difference being, that its discharge of public duties and public functions (as distinct from private duties and functions) would be open to judicial review under Article 226 of the Constitution. This does not, ipso facto, translate into governmental intervention in the internal affairs of BCCI which would remain a private body."[110]

Bombay High Court reiterated the need for restraint in *Sagar Prakash Chhabria* v. *Board of Control for Cricket in India*,[111] where the use of radiological scan for age-determination at the junior level was challenged. It held that method of determination of age is a policy decision with cannot be interfered with in writ jurisdiction.[112] More critically, the Court held that one cannot equate a sport activity with a right to obtain a Passport or other certificates certifying the age, place of residence, occupation etc., thus hinting at greater latitude for sporting bodies.[113]

---

[109] Ajay Jadeja v. Union of India, 2001 SCC OnLine Del 1024 : (2002) 95 DLT 14, ¶ 33.
[110] Rahul Mehra v. Union of India, 2004 SCC OnLine Del 837 : (2004) 114 DLT 323, ¶ 16.
[111] Sagar Prakash Chhabria v. Board of Control for Cricket in India, 2015 SCC OnLine Bom 6649 : 2015 Indlaw Mum 1606.
[112] *Id*., ¶ 25.
[113] *Id*., ¶ 26.

Similarly, in *Shubh Gulati* v. *Union of India*,[114] the Delhi High Court refused to interfere with exclusion of soft ball from the contingent for the Asian Games by holding that the decision not to participate in certain disciplines is a policy matter and courts cannot supplant the decision of their authorities with their decision.[115]

These cases reflect a very nuanced appreciation of the dialectical interplay between public role and private constitution of sporting bodies. This reluctance is indicative of the recognition of the need to respect the institutional autonomy of sporting bodies and the long-term dangers of governmental interference and insistence on strict conformity with fundamental rights. Yet, the narrative on extent of judicial interference with sporting bodies has not been uniform. While some cases have retained the aforesaid spirit of restraint and respect for autonomy of sporting bodies, a few recent decisions seem to articulate a model of more assertive judicial review wherein courts reframe the internal governance structure of sporting bodies. This inconsistency is illustrated best by the series of judicial decisions on governance of BCCI and the IPL.

The first major case was *A.C. Muthiah* v. *Board of Control for Cricket in India* ('Muthiah')[116] where amendments to byelaws of BCCI allowing BCCI officials to own IPL franchises was challenged. Supreme Court refused to quash the amended bye-laws and asserted that the interest of a private society has to be primarily decided by the society alone and such a question is not left for determination of an outside agency.[117] With this note of endorsement of internal autonomy, the Court refused to intervene.[118]

The same spirit of restraint animated the Bombay High Court decision in BCCI case where the legality of the Probe Commission constituted by the BCCI for inquiry into allegations of match-fixing in IPL was questioned on the ground of breach of the IPL Operational Rules.[119] Even as the High Court declared that the Probe Commission was not validly constituted, it refused to constitute a panel for conducting an enquiry under its supervision. The Division Bench based its restraint on the ground that constitution of an Inquiry Committee was the prerogative of the BCCI under the IPL Operational Rules and not that of the judiciary.[120]

However, as this decision was appealed against before the Supreme Court, the tone and tenor of scrutiny changed. In a stark contrast to the High Court's forbearance, the Apex Court constituted its own Probe

[114] Shubh Gulati v. Union of India, 2014 SCC OnLine Del 4941 : 2014 Indlaw Del 2831.
[115] *Id*., ¶ 13.
[116] A.C. Muthiah v. Board of Control for Cricket in India, (2011) 6 SCC 617.
[117] *Id*., 637, ¶ 55.
[118] *Id*., 652, ¶ 95.
[119] *Id*., 1897.
[120] *Id*., 1921.

Committee instead of deferring to the IPL Operational Rules.[121] The Court asserted that even the BCCI had not followed its own prescribed procedure according to the IPL Rules.[122] Further, the Court invoked its powers under Article 142 and asserted that the Committee was constituted to "to serve a larger public good viz. to find out the veracity of the serious allegations of sporting frauds… adversely affecting the game so popular in this country that any fraud as suggested was bound to shake the confidence of the public in general."[123] Therefore, the Court opined that "it is futile to set up the "disciplinary procedure" under the Rules."[124]

Further, the Supreme Court revisited the issue of amended byelaws of the BCCI allowed BCCI administrators to have commercial interests in the game. Whereas in Muthiah case[125] the Court had ruled that the interest of a private society has to be primarily decided by the society alone, the Court jettisoned its restraint this time. It was held that all such actions which BCCI takes while discharging public functions are open to scrutiny.[126] As such, the amendments to the byelaws to the extent that they violated the tenet that no one can be a judge in his own cause were declared by the Court to be against the principles of natural justice that must permeate every action that BBC takes in pursuance of its public functions.[127]

The most intrusive and far-reaching aspect of the Supreme Court's intervention in this case however was the constitution of a Committee of three former Supreme Court judges, now better-known as Justice Lodha Committee. The Committee was tasked with a three-fold mandate: a) decide the quantum of punishment for officials and franchises found to be guilty of betting-related violation of the IPL Rules, b) investigate allegations against the IPL CEO, Sundar Raman and c) make suitable recommendations to the BCCI for reforms in its Memorandum of Association, Rules and Regulations.[128]

The first two mandates were an extension of the powers delegated to the Probe Committee. It may also be argued that there has been a long tradition of the Indian Supreme Court to reply on investigative litigation that is constituting special bodies for investigations allegations of rights violations.[129] The third task, however, in its use of Article 142 to modify the internal rules of a registered society, represented an unprecedented expansion of court's power.

---

[121] Board of Control for Cricket in India v. Cricket Assn. of Bihar, (2015) 3 SCC 251.
[122] *Id*., 287, ¶ 46.
[123] *Id*., 291, ¶ 52.
[124] *Id*.
[125] Rahul Mehra v. Union of India, 2004 SCC OnLine Del 837 : (2004) 114 DLT 323.
[126] Board of Control for Cricket in India v. Cricket Assn. of Bihar, (2015) 3 SCC 251, 305, ¶ 74.
[127] *Id*., ¶ 75.
[128] *Id*., 326, ¶ 120.
[129] Parmanand Singh, *Public Interest Litigation* in Towards Legal Literacy 21 (Kamala Sankaran and Ujjwal Kuma Singh eds., 2008).

The use of inherent powers to do complete justice to modify the composition of a private registered body incorporate, albeit one exercising public function, in disregard of the relevant byelaws and internal regulations, can potentially render otiose the core distinction between public and private bodies. Indeed, such intrusion into internal governance structure of a sporting body may also undermine the spirit and purpose of the power to do complete justice under Article 142. The Supreme Court has observed in earlier cases that the power under Article 142 is meant to supplement and not supplant substantive law and ruled that this power is "not to be exercised in a case *where there is no basis in law* which can *form an edifice for building up a super structure*."[130] From this perspective, the expansive use of Article 142 in face of statutory provisions and regulations governing registered societies in order to overhaul the governance structure of BCCI appears very suspect.

Admittedly, the Court has in the past used its inherent powers to frame guidelines to redress legal vacuum[131] and violation of fundamental rights.[132] Yet, the mandate of the Lodha Committee is a particularly striking example of use of judicial power given that the case neither involved any violation of fundamental rights, nor absence of statutory guidelines. It may indeed be argued that given the seriousness of the allegations and brazen indifference of BCCI, an interventionist stance was a necessity on part of the Court. Nonetheless, the Court's delegation of the power to modify BCCI's internal regulations to the Lodha Committee does represent a substantial augmenting of its power to intervene with sports bodies; more so due to the sweeping nature of the recommendations of the Committee.[133] The impact of this delegation has been heightened by the observations of the Supreme Court in the last hearing in this case where the Bench directed the BCCI to accept all the recommendations of the Lodha Committee.[134] In its most recent order, the Court noted that it saw no compelling reason "to reject the recommendation made by the Committee, especially when the objective underlying the said recommendation is not only laudable but achievable" too.[135] As a result, it appears that the BCCI

[130] *See* Supreme Court Bar Assn. v. Union of India, (1998) 4 SCC 409 : AIR 1998 SC 1895, ¶ 49. *See also* E.S.P. Rajaram v. Union of India, (2001) 2 SCC 186, ¶ 9.

[131] Vishaka v. State of Rajasthan, (1997) 6 SCC 241 : AIR 1997 SC 3011.

[132] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

[133] *See generally*, ESPN Cricinfo, *The Lodha Committee's Recommendations on the BCCI*, January 5, 2016, available at http://www.espncricinfo.com/india/content/story/958339.html (Last visited on August 16, 2016); Vedam Jaishanker, *Reading the Fine Print: Here's why the Lodha Committee Report is not the panacea for BCCI's ills*, January 14, 2016, available at http://www.firstpost.com/sports/reading-the-fine-print-heres-why-lodha-committee-report-is-not-a-panacea-from-bccis-ills-2582714.html (Last visited on August 16, 2016).

[134] Krishna Das Rajagopal, *Accept Lodha Report: Fall in Line, Supreme Court tells BCCI*, The Hindu (New Delhi) February 4, 2016; Shreeja Sen, *Supreme Court accepts Lodha Committee Report, asks BCCI to Fall in Line*, February 4, 2016, available at http://www.livemint.com/Politics/0nZ8TxMYwyfFv86WHe4l9I/SC-asks-BCCI-to-fall-in-line-with-Lodha-panel-recommendation.html (Last visited on August 16, 2016).

[135] Board of Control for Cricket in India v. Cricket Assn. of Bihar, 2016 SCC OnLine SC 709 : 2016 Indlaw SC 553, ¶ 90.

will have no choice but to accept and incorporate most of these recommendations in its regulations and policies. While the import of these recommendations may indeed be largely beneficial and infuse a modicum of transparency, fairness and professionalism into governance of cricket in India,[136] the stance of the Supreme Court in chalking out the mandate of Lodha Committee and endorsing its recommendation do test the recognised limits of judicial review.[137]

Undoubtedly, the expansion of standard of judicial scrutiny into the governance of BCCI raises certain conceptual issues about the scope of judicial review and the ambit of powers under Article 142. But in addition, it also throws up questions about the scope of autonomy to be enjoyed by sports bodies. Would the form and manner of intervention with BCCI become the standard to be emulated with other sports; or would these standards be treated as limited to the specificity of governance of cricket in India? Given that those sports bodies that have maintained a certain degree of distance from the state have generally been successful in India, what would judicial intervention mean to professional competence of sports bodies? Further, since the charter of many international governing bodies like FIFA and IOC forbid state intervention,[138] what would such judicial intervention mean for international recognition of national bodies? As the dust settles on the Supreme Court intervention in the BCCI case, these aspects await resolution.[139]

---

[136] Suhrith Parthasarathy, *Finding a Boundary*, August 13, 2016, available at http://www.thehindu.com/opinion/lead/lodha-panel-bcci-and-markandey-katju/article8981805.ece (Last visited on August 16, 2016).

[137] Apprehensions about overzealousness on part of the Supreme Court and transgression of institutional limits have been expressed in the form of call for review petition against the order of the Supreme Court on the Lodha Committee. *See* Krishna Das Rajagopal and Rakesh Rao, *SC Ruling on Lodha Panel Unconstitutional*, *says Katju*, The Hindu (New Delhi) August 8, 2016; *See also* Alok Prasanna Kumar, *A Long Arm Swing*, May 23, 2016, available at http://www.outlookindia.com/magazine/story/a-long-arm-swing/297147 (Last visited on August 16, 2016).

[138] Rule 27 of the Olympic Charter states that National Olympic Committees (NOCs) must preserve their autonomy. It is further mandated by Rule 28 that "governments or other public authorities shall not designate any members of an NOC." *See* International Olympic Committee, *Olympic Charter*, available at https://stillmed.olympic.org/Documents/olympic_charter_en.pdf (Last visited on August 16, 2016) (The Charter has been in force from 2015).

In addition, Article 17 of FIFA Statutes state that members "shall manage its affairs independently and with no influence from third parties." The same provision also asserts that "decisions passed by bodies that have not been elected or appointed" in compliance with the Statutes shall not be recognised by FIFA. *See* FIFA, *FIFA Statutes: Regulations Governing Application of the Statutes (2015),* available at http://www.fifa.com/mm/Document/AFFederation/Generic/02/58/14/48/2015FIFAStatutesEN_Neutral.pdf (Last visited on August 16, 2016).

[139] BCCI's response to the Lodha Committee recommendations and Apex Court's endorsement has been uneven. On the one hand, its officials have asserted that they have begun implementing the recommendations. *See* Arun Venugopal, *BCCI has begun implementing Lodha Reforms: Shirke*, August 9, 2016, available at http://www.espncricinfo.com/india/content/story/1044321.html (Last visited on August 16, 2016). On the other hand, BCCI has appointed Justice (Retd.) Markandey Katju as the head of a four-member panel tasked with interacting with Lodha Committee. *See* Indian Express, *BCCI Appoints Markandey Katju to Interact with Lodha Panel*, August 3, 2016, available at http://indianexpress.com/article/

VII. CONCLUSION

This paper is an endeavour towards demonstrating how sports bodies straddle across public and private law. Indeed, the duality of sports bodies as private as well as public bodies illustrates the shifting margins of public law and the expansion of judicial review. Privatisations of state instrumentalities, increased concentration of socio-economic and political power in the hands of private bodies and imperatives of globalisation have made the traditional dichotomy between public law and private law untenable. This has necessitated an expansion of the frontiers of administrative law and judicial review. Gradual recognition and consolidation of judicial review over professional sports associations in Scotland, New Zealand, Canada, Australia and India reflect this transformation. Yet, the stubborn resistance of British Courts to public law review of sports bodies suggest that this is not a universal pattern.

Further, as the Indian experience reveals, there is a lack of uniformity on the extent of judicial scrutiny over sports bodies. On one hand, courts have acknowledged that extension of judicial review to sports bodies has not turned them into state or quasi-state agencies or public bodies for all purposes and not every action of a sports association would be subject to scrutiny. Such differentiation is in conformity with many theorists who argue that possession of institutional power by private bodies 'should not lead inexorably to the conclusion that all principles of a public nature should be equally applicable to such bodies.'[140] On the other hand, the aggressive intervention of the Supreme Court into governance of BCCI suggests that wall of restraint that the judiciary had created may be on the verge of collapse. Whereas such a shift to a more assertive judicial review has an immediate appeal in view of the shenanigans of cricket administrators in India, its long-term doctrinal and policy impact remains to be seen.

---

sports/cricket/bcci-appoints-markandey-katju-to-interact-with-lodha-panel-2950544/ (Last visited on August 16, 2016). Justice Katju, in turn, has made statements questioning the constitutional basis and legitimacy of the decision of the Supreme Court and recommendations of the Lodha Committee. *See* NDTV Sports, *Justice Markandey Katju Says Supreme Court Can't Force Reforms on BCCI*, August 8, 2016, available at http://sports.ndtv.com/cricket/news/261560-justice-markandey-katju-says-supreme-court-can-t-force-reforms-on-bcci (Last visited on August 16, 2016). In an indication that the last word has not been yet heard on this issue, Lodha Committee has also recently withdrawn one of its recommendations. *See* Nagraj Gollapudi, *Lodha Committee Amends IPL Governing Council Recommendation*, August 31, 2016, available at http://www.espncricinfo.com/india/content/story/1052731.html (Last visited on September 5, 2016).

[140] P.P. CRAIG, ADMINISTRATIVE LAW 211 (1997).