

LEGALITY OF POKER AND OTHER GAMES OF SKILL: A CRITICAL ANALYSIS OF INDIA'S GAMING LAWS

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Gambling and wagers have always enthralled people ever since the beginning of civilisation. Instances of gambling can be found in the Mahabharata, Quran and other religious texts. The law and the judiciary, in modern times, have looked at card games as a pernicious and immoral activity. In the last two centuries, sophisticated card games involving a great degree of skill and intellect have become highly popular among the masses. The laws regulating and prohibiting gambling, however, remain ambiguous and archaic. This paper analyses the laws prohibiting gambling in India and discusses the legality of card games involving a substantial degree of skill in the light of international discourse and analysis about the game of poker.

I. INTRODUCTION

“Money won is twice as sweet as money earned.”

From the movie ‘The Color of Money’

For thousands of years people have been enthralled by games of chance and probability. Even in the Mahabharata,¹ the addiction of gambling has been explained in the part where Yudhishtira, the king of *dharma* loses everything, including his brothers and wife to his estranged cousin Duryodhana in a die game.² With the passage of time, the types of wagers have changed from the crude die games and betting on animal fights to sophisticated card games like poker, blackjack, flash, bingo, jackpot, lottery, trade in differences on commodities, stock market speculation, betting on horse-racing and other sports, etc.

Gambling and betting activities have enjoyed enormous popularity amongst Indians. A report by KPMG has estimated India's overall gaming market (most of which is illegal and unaccounted) to be worth Rs. 2,50,000

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¹ An epic considered to be a holy book by Hindus.

² CHATURVEDI BADRINATH, THE MAHABHARATA-AN INQUIRY IN THE HUMAN CONDITION 142 (2006).

crore or US \$ 60 billion,³ which amounts to around 3.5% of India's Gross Domestic Product.⁴

Despite the staggering amount of revenue that gambling and betting have generated and its popularity, laws in India have been unfavourable for any games of chance and probability ever since the advent of the British rule. Even today, pre-independence statutes like the Public Gambling Act, 1867 prohibit any game based on chance or probability except lotteries.⁵ List-II of the seventh schedule of the Constitution,⁶ empowers the state governments to legislate on matters concerning gambling and betting. Almost all states, with the exception of Goa and Sikkim, have prohibited all forms of gambling, betting and wagering or have continued to enforce the pre-independence legislations enacted by the British rulers that banned gambling.⁷ It is interesting to note that while the UK has changed its gambling policy in light of the changing societal norms and now allows almost all forms of gambling under the Gambling Act, 2005, Indian states have continued the erstwhile British policy of banning gaming activities.

The state of Goa has, however, allowed gambling since 1996, after the Goa, Daman and Diu Public Gambling Act, 1976 was amended to allow card-rooms in offshore vessels and slot machines in five star hotels subject to the prior approval and permission of the state government on payment of a specified recurring fee.⁸ The state of Sikkim also decided to legalise and regulate gambling with the passage of the Sikkim Regulation of Gambling (Amendment) Act, 2005.⁹

This gives us an overview of the regulatory regime governing gaming in India. It is evident that there is an expansive restriction on almost all forms of card games and wagering activities. All gambling statutes in India have, however, excluded 'games of skill' from the penal provisions banning

³ KPMG, ONLINE GAMING: A GAMBLE OR SURE BET?, available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/Online-gaming-A-gamble-or-a-sure-bet.pdf> (Last visited on August 13, 2011).

⁴ The World Bank, *Data*, available at <http://data.worldbank.org/country/india> (Last visited on March 25, 2012). (According to the World Bank World Development Indicators, India's GDP is over US \$1.7 trillion. Thus the US \$ 60 billion gaming industry would amount to over 3.5% of the GDP).

⁵ The Seventh Schedule of the Constitution of India, 1950 has differentiated between lotteries and other games of chance as there are different entries concerning the regulation of lotteries and gambling and betting. Entry number 40 of List-I of the Seventh Schedule empowers the Central Government to legislate on regulation of lotteries.

⁶ Constitution of India, 1950, List-II, Entry 34 and Entry 62.

⁷ The Public Gambling Act, 1867; Bombay Prevention of Gambling Act, 1887 (applicable to the State of Maharashtra) and the Tamil Nadu Gaming Act, 1930.

⁸ The Goa, Daman and Diu Public Gambling Act 1976, §13A.

⁹ The Sikkim Regulation of Gambling (Amendment) Act, 2005 authorises the state government to notify specified places where permission for running casinos may be allowed on payment of a specified fee.

gambling activities.¹⁰ There has been a considerable debate in various countries across the world as to which games or activities may be considered to be 'games of skill' and thus not attract the provisions of gaming acts and which games are based predominantly on luck where a person's skill or intellect has little role to play.

Part-II of the paper briefly traces the history, evolution and rise of the card game of poker. Part-III analyses various Supreme Court decisions on the legal treatment of games of skill. Part-IV examines gaming laws in India, with specific reference to West Bengal, which has exempted poker from the ambit of gambling. Part-V looks into international case laws and treatises on the degree of skill involved in the game of poker. Finally, Part-VI concludes on the legality of 'live' or 'offline' poker in the current legal and regulatory environment.¹¹

II. HISTORY AND EVOLUTION OF POKER

The evolution of the modern version of poker can be traced back to the early nineteenth century where comments of authors and columnists of that time were to be found about a card game called 'poker'.¹² Poker was then one of the many card games to be played in the US. Poker, however, became exponentially popular only after 1970 when poker tournaments were started under the banner of the World Series of Poker.¹³ Since 1970, the growth of poker has accelerated making it one of the most popular card games in the world with billions of dollars being staked every year on it.¹⁴ It is estimated that around forty million people across the globe play poker on a regular basis of which fifteen million are American citizens.¹⁵

While *teenpatti* or flush has traditionally been one of the most popular card games in India since ancient times, the exponential increase of

¹⁰ See *infra* Part-III.

¹¹ Though online or internet poker has also become increasingly popular in the last few years, an entirely different set of laws framed under the Information Technology Act, 2000 regulate online gambling. This paper does not delve into the legality of online gambling in this paper. The central argument of this paper is premised on the question of whether poker should be excluded from the ambit of 'gambling'. If this argument succeeds in courts, there would be no restriction on online as well as offline poker.

¹² Cardplayer Magazine, *The Story of America's National Pastime*, December 6, 2006, available at <http://www.cardplayer.com/cardplayer-magazines/65649-linda-johnson-19-24/articles/16384-poker-the-story-of-america-39-s-national-pastime> (Last visited on August 13, 2011).

¹³ See Official website of the World Series of Poker, available at <http://www.wsop.com/> (Last visited on August 16, 2011) (World Series of Poker or WSOP is an annual poker tournament involving thousands of participants from across the world who have to excel in multiple knock-out stages to win millions of dollars in prize money).

¹⁴ See Poker Player's Alliance, *Statistics about Poker in the U.S.A.*, available at <http://theppa.org/resources/facts/> (Last visited on August 13, 2011).

¹⁵ *Id.*

poker in the US has also resulted in the rise of the poker cult amongst India's youth.¹⁶ Poker was first introduced in licensed casinos in Goa in 2000, which is four years after Goa's legislature permitted the opening of casinos.¹⁷ In the last few years, poker tournaments in licensed casinos have become more and more appealing to the youth as people from different parts of India are flocking to casinos in Goa to play poker.¹⁸

Even though poker is currently permitted only in casinos which means that it can be equated to gambling, academicians and poker players in India and across the world argue that poker is a mind sport involving the study of statistics, probability, game theory and psychology, which makes it a 'game of skill' akin to chess or bridge.¹⁹

III. GAMES OF SKILL AND THE INDIAN JUDICIARY

Black's Law Dictionary defines gambling or gaming as "the act of risking something of value for a chance to win a prize",²⁰ while a wager is defined as "money or other consideration risked to an uncertain activity."²¹

Indian gaming statutes have also drafted a similar definition of 'common gaming house.' According to the Public Gambling Act, 1867 ('Public Gambling Act'):²²

"Common gaming-house" means 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,

¹⁶ Arindam Mukherjee, *Grinders in the ATM*, June 18, 2011, available at <http://www.openthemagazine.com/article/living/the-grinders-and-the-atms> (Last visited on August 14, 2011). See also Tara Kilachand, *Big Stakes*, October 23, 2008, available at <http://www.livemint.com/2008/10/23232833/Big-Stakes.html> (Last visited on August 14, 2011) (describing the increasing craze of poker in India and how the exponential rise of poker in the US has led to a 'trickledown' effect in India with card lovers increasingly opting for poker over *teenpatti*).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The Economist, *At War with Luck*, July 8, 2010, available at <http://www.economist.com/node/16507710> (Last visited on August 14, 2011).

²⁰ BLACK'S LAW DICTIONARY 701 (2004).

²¹ *Id.*, 1610.

²² The Public Gambling Act, 1867 is a Central legislation adopted by states such as Uttar Pradesh, Uttarakhand, Madhya Pradesh, Haryana, Manipur and Punjab with minor variations. Most state gaming acts are, however, modeled around this Act and the definition of "common gaming house" remains mostly uniform across India. It is, however, important to note that the states of Assam and Orissa are exceptions to this proposition. Both the Assam Game and Betting Act, 1970 and the Orissa Prevention of Gambling Act, 1955 have no exception for game of skill. Any game played for stakes whether of skill or chance is punishable in these two states.

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.”²³

From the above definitions, it is apparent that chance, mutual consideration and prize are essential for an activity to be considered gambling. The absence of any one of these elements may mean that the activity is not of a gambling nature.

§12 of the Public Gambling Act exempts games of skill from the penal provisions against gambling.²⁴ It thus becomes clear that playing games where luck has little or no role to play and the winner is entirely determined by the player’s intellect and skill would be permissible as there is no other statute that criminalises or punishes playing of such games of skill.

The Indian judiciary has also concluded that while prize competitions (with a pre-determined ambiguous solution) and competitions where the winner is determined by draw of lotteries are of a gambling nature and cannot be afforded protection of freedom of trade and commerce under Art. 19(1)(g) of the Constitution, games of skill may be afforded such protection.²⁵

In 1967, the Supreme Court held that the thirteen card game of rummy was a game and thus the game of rummy may be allowed in clubs where the organisation is not making a profit or gain out of the stakes involved.²⁶ The division bench, while allowing the game of rummy to be played in clubs, observed:

“The game of Rummy is not a game entirely of chance like the ‘three-card’ game mentioned in the Madras case to which we were referred. 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

²³ The Public Gambling Act, 1867, §1.

²⁴ Public Gaming Act, 1867, §12: “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.”

²⁵ State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699. *See also* M.J. Sivani v. State of Karnataka, (1995) 6 SCC 289; AIR 1995 SC 1770 (In the M.J. Sivani case, the Supreme Court confirmed the Chamarbaugwala judgment to the extent that freedom of trade and commerce is available to games of skill. The Supreme Court however clarified that reasonable restrictions or conditions may be imposed on video games based on chance and the constitutional protection under Art. 19(1) (g) does not apply to owners of video game parlours).

²⁶ State of Andhra Pradesh v. K Satyanarayana, AIR 1968 SC 825.

the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill.”²⁷

In 1996, the Supreme Court further elaborated upon its two earlier decisions to conclude that games involving a ‘substantial or preponderant’ degree of skill would amount to games of ‘mere skill’ as laid down by §12 of the Public Gambling Act and similar relevant sections of the various other state gaming acts.²⁸ The Supreme Court further maintained that betting on horse-racing by owners for a prize was a game of skill and cannot be included under the ambit of gambling. The Court added that such a sport of horse-racing and the betting carried on by owners would be granted the fundamental right of freedom of trade guaranteed under Art. 19(1) (g) of the constitution.²⁹

While interpreting the case of *State of Andhra Pradesh v. K Satyanarayana*,³⁰ the Andhra Pradesh High Court recently allowed games of rummy to be conducted, even when there are stakes involved and the concerned organisers are making profits out of the game of rummy.³¹

In 2005, the Madras High Court has also declared that playing games like chess and carom even on payment of fees to the clubs, *i.e.*, on payment of a consideration would not amount to gambling as the games are predominantly games of skill and thus the Public Gambling Act is not applicable in any manner.³² In the absence of any direct decision of the Supreme Court or any of the High Courts on the game of poker, any analysis of the legality of poker for any state in India³³ would have to be given in light of the objects of different state acts, international case laws and statistical analysis concerning the game of poker.

²⁷ *Id.*, ¶15.

²⁸ Dr. K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226: AIR 1996 SC 1153.

²⁹ *Id.*

³⁰ AIR 1968 SC 825.

³¹ D. Krishna Kumar v. State of Andhra Pradesh, 2002(5) ALT 806, ¶15.

³² Manakadu Elainger Nala Sports, Narpani Mandram v. State of Tamil Nadu, 2005 (1) CTC 245.

³³ Any verdict of the Supreme Court on the legality of poker in any state would be applicable uniformly to all states across India as the wordings of all state gaming acts with the exception of Assam and Orissa are similar in their objects and wordings. §2(a) of the Assam Game and Betting Act 1970 defines ‘betting’ as staking of money on any game or stake. No differentiation has been made between any game of skill or chance in this Act. Similarly, §2(a) of the Orissa Prevention of Gaming Act, 1955 defines ‘gambling or gaming’ as any game for money or other stake. This Act has also not made any distinction between games of skill and chance. The Public Gambling Act, 1867 and all other state gaming laws have exempted ‘games of skill’ from the purview of gambling and any liability attached with the offence of gambling.

IV. THE WEST BENGAL GAMBLING AND PRIZE COMPETITION ACT, 1957

West Bengal is the only state in India which has specifically exempted card games from the definition of gambling. The West Bengal Gambling and Prize Competition Act, 1957 ('the West Bengal Act') has specifically exempted poker, rummy and other card games from the ambit of gambling. This exemption of card games of skill was done in 1979 when the West Bengal government added the definition of gambling to the West Bengal Act through the West Bengal Gambling and Prize Competition (Amendment) Act, 1979.³⁴ §2(b) of the West Bengal Act now defines 'betting or gambling' to include wagering or betting but exempts lotteries or games of cards like poker, rummy, bridge and nap from the ambit of gambling. Owing to the constitutional difference between lotteries and other forms of wagering, there is a separate set of rules for the draw of lotteries in West Bengal.³⁵

If one observes the exemption of specific card games from the ambit of gambling, however, it would be apparent that the card games have been specifically excluded from the definition and subsequently penal provisions of gambling in light of the Supreme Court's decision in *State of Andhra Pradesh v. K. Satyanarayana*,³⁶ which classified rummy as a game of skill.

Thus, due to the exemption of the game of poker from the definition of gambling in the West Bengal Act and decisions of the Supreme Court discussed above, it may be concluded that playing poker and other similar card games for money or other forms of consideration would be permitted presumably due to the preponderance of skill involved in these games. It may be further added that in the absence of any specific exemption of card games from the ambit of gambling by any state gaming acts, it is very likely that the Supreme Court would consider the definition of gambling, as envisaged by the West Bengal Legislative Assembly, in ascertaining the degree of skill involved in card games like poker.

³⁴ Act No. V of 1979.

³⁵ West Bengal promotes the sale of lottery tickets under the provisions of the West Bengal State Lottery Rules, 1968. It may also be noted that Parliament has laid down guidelines in the Lotteries (Regulation) Act, 1998, which have to be followed by every state allowing the sale of lotteries.

³⁶ AIR 1968 SC 825.

V. INTERNATIONAL CASE LAW AND STATISTICAL ANALYSIS ON THE GAME OF POKER

There is no conclusive decision on the legality of poker or the degree of skill involved in poker in any common law country, though courts across the world have been tempted to perceive poker predominantly as a game of chance rather than skill.³⁷ An analysis by Kelly, Dhar and Verbeist indicates that the laws and judiciary in the UK, Germany, Canada, Northern Ireland, Australia, Netherlands and Romania have considered poker to be a game of chance, which would make organisers and participants in poker games liable to criminal charges.³⁸

In England, courts have held that poker is not a game of skill as per the Gaming Act, 1845 and subsequently the Gaming Act, 1968.³⁹ With the passage of the Gambling Act, 2005, which is a comprehensive legislation applicable across the UK (except Northern Ireland) covering all forms and aspects of wagering and gaming, games which have a superlative and substantial degree of skill have also been included under the definition of ‘games of chance’,⁴⁰ which may not be played and organised without the prior permission of the Gambling Commission.

Thus poker may now be considered to be a wagering activity and can be covered under the definition of gambling due to which, poker rooms cannot be started without the permission and license from the UK Gambling Commission.⁴¹ It is, however, interesting to note that certain courts in the US⁴² have held poker to be a game of skill, thereby permitting games of poker to be conducted even outside casinos. In this context, it also acquitted persons arrested for violation of gaming law.

In recent developments in Europe, the Swedish Supreme Court ruled that the tournament style Texas Hold ’em poker (where participants deposit a fixed amount of fee as ‘buy-in’ or entry fees and the top few players win prizes), is a game of skill and not in violation of Swedish gaming laws, whereas

³⁷ Joseph M. Kelly, Zeeshan Dhar & Thibault Verbeist, *Is it a Game of Skill or Chance and Legally Does it Matter*, 11 GAMING LAW REVIEW 190 (2007).

³⁸ *Id.*

³⁹ *Id.*, 194.

⁴⁰ The Gambling Act, 2005, §6, available at http://www.legislation.gov.uk/ukpga/2005/19/pdfs/ukpga_20050019_en.pdf (Last visited on August 16, 2011).

⁴¹ *Id.*

⁴² See e.g., *Gallatin County v. D & R Music & Vending, Inc.*, 208 Mont. 138 (1984); *State v. Barnett*, 488 P.2d 255 (Wash. 1971). (Courts in Pennsylvania, Montana and Washington have held poker to be a game of skill). See also Professor I. Nelson Rose, *Pennsylvania Court Rules Poker is a Game of Skill*, available at <http://www.gamblingandthelaw.com/columns/171-pennsylvania-court-rules-poker-is-a-game-of-skill.html> (Last visited on August 16, 2011).

'cash games' in which there is no pre-determined amount of money to be staked was deemed to be a game of chance.⁴³ A French criminal court has also held that poker is a game of skill while dismissing charges involving the running of an illegal poker room without a license.⁴⁴

The raging debate on the degree of skill involved in the enormously popular game of poker has also led to a lot of statistical analysis on the game. Israeli mathematician and professor at Tel Aviv University, Noga Alon analysed the probabilities and odds involved in the hands that each player would be dealt and concluded that a good poker player would be able to analyse the probabilities of the cards dealt to him and community cards available with him and further analyse the reactions and betting patterns of fellow players to only play the winning hand.⁴⁵ Alon further argues that the absence of any computer software on poker that can match a good poker player indicates the preponderance of skill in poker.⁴⁶ Alon concludes that skill is definitely a predominant and substantial element of poker and that the game of poker involves an in-depth study of quantum mechanics, statistical physics, game theory and human psychology.⁴⁷

Renowned economists Steven Levitt and Thomas Miles have similarly analysed the statistics and average winnings of skilled and un-skilled players in the multiple stage tournament World Series of Poker and concluded that the players known to be 'highly skilled players' have achieved a return of investment of 30% as compared to the 1.5% return of investment for all other players.⁴⁸ Similarly, renowned poker player and gambling expert David Sklansky, in his book *The Theory of Poker*, describes how the element of luck can be minimised in poker by a combination of statistics and game theory.⁴⁹ Sklansky goes on to discuss elaborate techniques and strategies to excel in the game of poker.⁵⁰

⁴³ Poker News Daily, *Swedish Supreme Court Makes Controversial Poker Ruling*, April 10, 2011, available at <http://www.pokernewsdaily.com/swedish-supreme-court-makes-controversial-poker-ruling-18704/> (Last visited on August 16, 2011).

⁴⁴ International Federation of Poker, *Court in France Declares Poker a Skill Game*, August 11, 2011, available at <http://www.ifpoker.org/news/court-in-france-declares-poker-a-skill-game> (Last visited on August 16, 2011).

⁴⁵ Noga Alon, *Poker, Chance and Skill*, available at <http://www.cs.tau.ac.il/~nogaa/PDFS/skill4.pdf> (Last visited on August 16, 2011).

⁴⁶ *Id.*,16.

⁴⁷ *Id.*,17.

⁴⁸ Steven D. Levitt & Thomas J. Miles, *The Role of Skill versus Luck in Poker: Evidence from the World Series of Poker*, April 2011, available at <http://pricetheory.uchicago.edu/levitt/Papers/WSOP2011.pdf> (Last visited on March 25, 2012).

⁴⁹ DAVID SKLANSKY, *THE THEORY OF POKER 2* (2005).

⁵⁰ *Id.*

VI. CONCLUSION

While there has been no conclusive verdict on the legality of poker in any common law country, recent decisions by French and Swedish courts and analytical literature on the skill involved in poker may be seen as a sign of a change of perspective of people towards card games. Millions of poker lovers across the globe are still hoping for a conclusive verdict from the highest courts of their countries on the game of poker. In the next few years, one may see a change in the attitude of courts across the world as they will have to keep in mind the overwhelming statistical evidence in favour of classifying poker as a game of skill.

At this stage, an analogy of poker with any physical sport like cricket may be drawn. In a cricket match, generally the more talented or skilled team wins the match. The element of luck involved in the sport cannot, however, entirely be discounted. Despite cricket being a sport where talent or skill is the most important aspect in deciding the winning side, some element of misfortune or luck, such as the dismissal of a batsman due to faulty pitch or a poor umpiring decision is considered to be part of the game. Similarly, while even a highly talented professional poker player, may lose a couple of hands to a beginner, the skilled player would certainly be expected to overcome such misfortunes and eventually win the game.

In conclusion, one can infer from the authorities and data cited in the paper that even though there has not been any specific discourse on the legality of poker in India, the decisions of Supreme Court in classifying rummy as a game of skill and statistical evidence on the preponderance of skill in poker coupled with the specific exemption of poker from the West Bengal Gambling and Prize Competition Act should aid the Indian judiciary in recognising the game of poker (especially the tournament variant of Texas Hold 'em poker, one of the most widely played and most challenging versions of poker) to be a game of skill separate from gambling.