

FIXING THE FIXERS: THE JUSTIFICATION OF CRIMINAL LIABILITY FOR MATCH-FIXING

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Allegations of match-fixing are not new to sport and have been around for a considerable period of time. However, it is still not clear what, if at all anything, can be done by the law, about match-fixing as it is a form of conduct which does not neatly fall into any particular category. However, considering the fact that commercial sport occupies an increasingly important position in society today, it is quite clear that something must be done. The only question is ‘what must be done?’ By looking at the instances and concepts involved in as well as nature of match-fixing as well as the existing framework of penal laws in India and other sanctions which may apply to it, this paper argues that criminal liability should be imposed on match-fixing. While suggesting so, the paper provides justifications for the above, along with the requisite safeguards so as to ensure that the problem of over-criminalization is not caused when there is a criminal liability on match fixing.

I. INTRODUCTION

Sport is an institution or a social behaviour, the core of which is competition based on skill and strategy. The specific behaviour ranges from games of children to the contests of professional athletes. The institute of sport extends into economics, education and mass media; it has been studied by anthropologists, historians, economists and political scientists, social psychologists and authors

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in physical education.¹ On account of the fact that sports is seen as an institution in itself, there have been several attempts to study sports, by authors from the abovementioned fields, from the perspective of the existing body of knowledge in their respective fields. However, with the commercialization of sports, as well as the increasingly high stakes involved, the study of sports has become a lucrative area for the legal profession as well.

The study of sports law or rather the law relating to sports creates an interface to study the relationship between society, the institution of sport and with the laws or legal principles. Through the course of this paper, I shall discuss the relationship of sports with criminal law with respect to match-fixing. I shall also be looking into some examples of ‘fixing’ in sports and the concepts of ‘spoiling’ and ‘cheating’ in sports as well as what conduct is considered to be ‘match-fixing’. Various penal laws in shall also be reviewed India to see whether or not match-fixing qualifies as a criminal offence and I shall also look into the law in the United States of America with respect to match-fixing and related conduct as well as the sanctions regime which is has been put in place by the International Cricket Council (*hereinafter* ICC) and steps taken by the Board of Control for Cricket in India (*hereinafter* BCCI) for the purpose of curbing match-fixing. I shall also discuss the adequacy of disciplinary measures and look into the elements of criminal liability and determine whether or not match-fixing merits a criminal sanction and shall also try to evolve a test for determining the appropriate sanctions to be applied based upon ‘on-field’ and ‘off-field’ factors which influence decisions in sport.

II. IS IT “JUST NOT CRICKET”? SPOILING & CHEATING IN SPORTS

“Honesty is for the most part less profitable than dishonesty.”

-Plato, *The Republic*

The above statement, although forming a part of our ancient wisdom, is probably as applicable today as it was when it was made. Dishonesty in sports is probably as old as sports itself and although the phenomenon of ‘fixing’² in sports has its roots in commercial sports and although various terms such as ‘rigging’, ‘putting in a fix’, ‘throwing’, ‘taking a dive’ have been used to describe it, there is very little doubt that such conduct has been existent in sports for a substantial period of time.³

¹ Gunther Luschen, *Sociology of Sport: Development, Present State, and Prospects* ANNUAL REVIEW OF SOCIOLOGY 315 (1980).

² JOHN FREDERICO, *CRIMINAL LAW AND JUSTICE DICTIONARY* 186 (1992) (Fix: To settle definitely; to determine).

³ ROBERT JARVIS & PHYLLIS COLEMAN, *SPORTS LAW: CASES & MATERIALS* 796 (1999).

It was as early as 1919 in the United States of America (*hereinafter* USA or US), there were allegations that various members of the Chicago 'White Sox' agreed to 'throw' the 1919 Baseball World Series in exchange for money.⁴ The sport of boxing has been long plagued by allegations of 'fixing'. It is widely believed that the 1965 heavyweight championship fight between Sonny Liston and Mohammad Ali (then Cassius Clay) was fixed on orders from the underworld, and that Liston purposely lost when he fell to a 'phantom punch'. In March 1999 the fight between Evander Holyfield and Lennox Lewis ended in a controversial draw and was allegedly fixed by Don King to ensure a lucrative re-match.⁵ This phenomenon has been observed not only in the US, but even in countries such as Japan where serious allegations of 'rigging' of sumo-wrestling matches have been levied, largely due to the structure of the tournaments.⁶ Such incidents of 'fixing' are not only restricted to national or international level sports but even in at the supranational level. An instance of this was seen at the 2002 Olympic Games when a Russian gangster was arrested for trying to use his influence with members of the Russian and French skating federations in order to fix the outcome of the pairs and ice dancing competitions at the 2002 Olympics.⁷ The game of cricket also, has not been spared from this phenomenon and it was in the year 2000 that a controversy arose, which shook the very foundations of the game. This controversy was relating to the fixing of cricket matches and other related malpractices which allegedly involved links with the underworld and the illegal betting syndicates.

As can be rightly seen, although these instances are only indicative, it is quite clear that the phenomenon of fixing of matches is wide-spread irrespective of the country or the nature of the sport. Also, the common feature which can be observed in all of these instances, is the links of the allegations of match-fixing with the underworld as well as betting syndicates. To better understand this phenomenon, it would be helpful to explain what the term 'match-fixing' means. It

⁴ *Id.*, 803. (One of the players, 'Shoeless' Joe Jackson was believed to have been asked by a child outside the courtroom where he was being tried along with five other players for this, to "Say it isn't so, Joe." It is believed that he stated that "I'm afraid it is so." The court however, acquitted him. Although the occurrence of this even may have been doubtful, it has formed a part of sporting folklore in the United States, and is quite interesting for the purposes of this paper wherein the an attempt has been made to see if there is any difference between moral wrongs and criminal wrongs: Lamar Stonecypher, *Say it Ain't So Joe*, available at <http://www.kudzumonthly.com/kudzu/jul01/sayitaintsojoe.html> (Last visited on August 26, 2008)).

⁵ ROBERT JARVIS & PHYLLIS COLEMAN, *supra* note 3, 804.

⁶ In fact, when two former sumo wrestlers, were to publish a book on the rigging of matches in sumo-wrestling competitions, they both died within hours of each other in the same hospital after developing the same symptoms: Mark Duggan & Stephen Levitt, *Winning Isn't Everything: Corruption in Sumo Wrestling*, available at <http://www.nber.org/papers/w7798> (Last visited on August 24, 2008).

⁷ ESPN, *Alleged Russian Mobster Accused of Olympic Skating Fix*, available at <http://espn.go.com/oly/news/2002/0731/1412258.html> (Last visited on August 25, 2008).

is with this view that I would wish to look into the specific allegations which were made with respect to the scandal in the year 2000. There were allegations that some players or groups of players had underperformed and bets were placed on such matches and on such players. Further, it had been alleged that information was passed on to betting syndicates about team composition, pitch conditions etc. and that even the pitches were specifically prepared, by the groundsmen, so as to suit the betting syndicates. It was even alleged that bookies used the influence of national and international cricketers to gain access to foreign players and thereby expand their betting syndicates.⁸ Therefore, although instances of ‘match-fixing’ in every sport may vary from a case-to-case basis, the above stated allegations will at least help build a theoretical framework on which the paper would be able to proceed.

To most people, match-fixing in cricket cannot be said to be an entirely unexpected occurrence because, sport, being at least partially, a reflection of today’s society and therefore, there is little wonder that immorality has reached into sport as well.⁹ However, the extent to which match-fixing had pervaded the game has led even the international regulators of the game, the ICC’s officials to find it ‘most disturbing’.¹⁰ This is because of the fact that cricket has, for long, been seen to be a sport which is a highly suitable model of a moral sport. In fact, the legendary cricket historian and writer, Sir Neville Cardus once stated: “If everything else in this nation of ours is lost but cricket, her Constitution and the Laws of England of Lord Halsbury, it would be possible to reconstruct from the theory and practice of cricket all the eternal Englishness which has gone to the establishment of that Constitution and the laws aforesaid.”¹¹

Therefore, although one might view this conduct of the cricketers indulging in match-fixing to be unbecoming of players of the ‘gentleman’s game’, the question that would arise is whether such allegations, if true, would or should invite anything more than a mere reproach from those who hold high regard for the spirit of the game. It is, for this purpose of seeking an answer to this question, that it is necessary to develop an understanding of the concepts of ‘spoiling’ and ‘cheating’ in sports.¹²

⁸ Ganapathy, M.A., *Central Bureau of Investigation: Report on Cricket Match-fixing and Related Malpractices* (by Superintendent of Police, Central Bureau of Investigation, Special Crimes Branch, New Delhi, October 2000) available at <http://www.rediff.com/cricket/2000/nov/01full.htm> (Last visited on August 25, 2008).

⁹ C. Dubin, *Commission of Inquiry Into The Use of Drugs & Banned Practices Intended To Increase Athletic Performance* (1990) in Grayson, Edward & Gregory Ioannidis, *Drugs, Health & Sporting Values* in JOHN O’LEARY, *DRUGS & DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES* 253 (2001).

¹⁰ Report of the International Cricket Council’s Code of Conduct Commission available at <http://icc-cricket.yahoo.com/icc-initiatives/icc-code-of-conduct.html> (Last visited on August 24, 2008).

¹¹ Sir Cardus, Neville: as in GRAHAM MCFEE, *SPORTS, RULES & VALUES* 186 (2004).

¹² For a more detailed discussion of spoiling and cheating, see *generally*, GRAHAM MCFEE, *SPORTS, RULES & VALUES* (2004).

A. THE ISSUE OF SPOILING IN SPORTS

The term spoiling is used to denote conduct which, while not contrary to the rules of the game, is not how one ought to play it as it undermines the playing of the game according to its spirit.¹³ Although such conduct is not prohibited by the rules, such behaviour is recognised, at least by knowledgeable audiences, as inappropriate ways to play the sport. Here, the sanction may be criticism by the audience, team-mates and the media, but not by referees or other public authorities such as the police or the judiciary.¹⁴

A classic example of the concept of spoiling in sports would be what has infamously gone down in the annals of cricket history as the 'Underarm Incident'.¹⁵ In the third match of a five-match One-Day Series between Australia and New Zealand in 1981, New Zealand was required to score 6 runs off the last ball in order to tie the match. Therefore, in order to prevent New Zealand to score the requisite number of runs, the Australian captain Greg Chappell, instructed his bowler, Trevor Chappell, to deliver the last ball underarm, and along the ground, thereby making it impossible to hit it for a six. This action, although technically not illegal, as it was not against the rules, was widely considered to be against the spirit of the game. It just wasn't cricket!¹⁶

B. CHEATING AND SPORTS: INTROSPECTING THE VARIEGATED CONTOURS

Cheating¹⁷, however, is that conduct which is not only against the spirit of the game, but it is also against the central purpose of the game and undermines the entire institution of sport.¹⁸ Although it is difficult to state precisely what 'cheating' means, it would suffice to state that it is the normative judgment that a person has committed a morally wrongful act and it is this understanding of such morally wrongful behaviour that shapes our moral lives as well as the formulation of various criminal offences.¹⁹ Generally, it may be safe to state that cheating occurs when one acts against specific rules rather than broad principles or policies as someone who violates this principle might be said to be evil or wicked or immoral, but not a cheat. To say that someone has cheated, a more

¹³ *Id.*, 112-113.

¹⁴ *Id.*

¹⁵ *Underarm Incident*, available at <http://www.pressmart.net/blog/2007/04/underarm-bowling-incident.html> (Last visited on July 24, 2008).

¹⁶ SIMON GARDINER, *SPORTS LAW* 74 (2006).

¹⁷ For a more in-depth understanding as to cheating in different contexts, *see generally*, Stuart Green, *Cheating*, 23 *LAW & PHILOSOPHY* 137-185 (2004).

¹⁸ GRAHAM MCFEE, *SPORTS, RULES & VALUES* 121 (2004) (Cheating would undermine the institution of sports just as lying undermines the implication of our meaning what we say).

¹⁹ Green, *supra* note 17, 139.

specific rule is expected to have been violated.²⁰ Examples of cheating in sports would be those of doping where the rules made by the World Anti-Doping Agency²¹ are violated or ball-tampering wherein rule 42 of the Laws of Cricket²² is violated.

I have so far discussed several instances of match-fixing in sports and have tried to identify some of its common features. Further, I have tried to look at what amounts to match-fixing in cricket as well as the concepts of spoiling and cheating in sports. As the paper proceeds, I shall further develop this theme subsequently.

II. CRIMINAL & DISCIPLINARY PROCEEDINGS FOR MATCH-FIXING: SANCTIONING DEVIANCE OR SANCTIONING DEVIANCE?

“There is in all of us a strong disposition to believe that anything lawful is also legitimate. This belief is so widespread that many persons have erroneously held that things are ‘just’ because law makes them so.”²³

In this section of the paper, I shall be looking at the existing regime of criminal and disciplinary sanctions which may be applicable to match-fixing as described before. Before discussing the specific provisions of criminal law which might apply to match-fixing, it is important to understand to whom these provisions are likely to apply. Three categories of persons may be identified to whom these provisions could apply. Firstly, the players; secondly, the persons involved in the betting syndicates; and thirdly, the officials who regulate the game, which in India, is largely the officials of the BCCI, a private society registered under the Tamil Nadu Societies Act and not set up under a statute.²⁴ I shall therefore, study the provisions of criminal law and try to find out how they may possibly apply to these three categories of persons.

However, before setting off on this journey of reviewing the law as it may apply to match-fixing, it is important to keep in mind that it is a settled position of law that as well as a general rule of statutory interpretation that penal statutes are to be strictly construed.²⁵ Hence, I will largely rely on a textual study of these provisions of the laws in order to see whether or not they cover match fixing.²⁶

²⁰ *Id.*, 152.

²¹ World Anti-Doping Agency Code available at www.wada-ama.org/rtecontent/document/code_v3.pdf (Last visited on August 24, 2008).

²² See Green, *supra* note 17, 79.

²³ Frederich Bastiat, *The Law*, available at http://www.fee.org/pdf/books/The_Law.pdf (Last visited on August 26, 2008).

²⁴ Per Sinha, J. (dissenting), *Zee Telefilms v. Union of India*, AIR 2005 SC 2677, ¶ 223.

²⁵ GLANVILLE WILLIAMS, *TEXTBOOK ON CRIMINAL LAW* 12-13 (2003).

²⁶ GANAPATHY, *supra* note 8.

A. THE INDIAN PENAL CODE, 1860

The first law I shall be looking into is the Indian Penal Code, 1860 (*hereinafter* the Code) which is the foremost statute dealing with the general concepts and principles of substantive penal law in India. This Act has defined several acts or omissions to be offences and has prescribed specific penalties for each of them. Within the Code, *prima facie*, it may appear that the two offences of ‘cheating’²⁷ and ‘criminal conspiracy’ would apply to match-fixing.

Cheating has been defined in Section 415 of the Indian Penal Code, 1860. I submit that this Section does not apply to match-fixing because, of the fact that this involves deceiving ‘a person’. Therefore, cheating is not an offence which can be committed *in rem*, but rather must be against a specific person. What match-fixing involves is the deception of the public in general into thinking that the match is not fixed. Where the offence is one where the public at large is affected, the framers of the Code have either mentioned that it affects the ‘public or people in general’²⁸ or the specific victim has not been mentioned.²⁹ Further, this Section requires the transfer of property to take place between the accused and the victim. In match-fixing, there is no clear transfer of property from the alleged perpetrator to the victim. Therefore, it is submitted that this offence would not be made out.³⁰

The second offence which may, *prima facie*, seem to be made out is that of criminal conspiracy. This is defined in Section 120-A of the Code. Prosecutions for criminal conspiracy have become the ‘darling of the modern prosecutor’s nursery’³¹ on account of the popularity that they enjoy in the prosecution for organised criminal activity. For there to exist a criminal conspiracy, two or more persons must agree to do either an illegal act or a legal act by illegal means. Now, match-fixing is not a *per se* illegal act as there is nothing in the Code which makes it an offence. Therefore, an agreement to fix a match would not be covered under the provisions of criminal conspiracy. Also, the means involved in order to fix matches may not necessarily be illegal and therefore, the ingredients would not be fulfilled and the offence would not be made out. Therefore, it is submitted that the offence of criminal conspiracy will not be made out with respect to match-fixing.

²⁷ The meaning of cheating in this chapter, is the legalistic definition of cheating which has been given in § 415, India Penal Code, 1860. This definition is different from the concepts as explained in the preceding or the following parts of the present paper.

²⁸ See also § 268, Indian Penal Code, 1860.

²⁹ *Id.*, § 272.

³⁰ In fact, the position of law is quite peculiar, because, if a player takes money to underperform, and fails to do so, then the person who paid him the money may have a criminal action of cheating against the player. This will apply to information relating to playing conditions. See also § 415, Indian Penal Code, 1860 along with its explanation.

³¹ Justice Learned Hand in *Harrison v. United States*, 7 F. 2d 259 in MATTHEW LIPPMAN, CONTEMPORARY CRIMINAL LAW 211 (2007).

In order to preclude the application of any other sections of the Code, I shall determine whether or not the ingredients of wrongful gain, wrongful loss, dishonestly, fraudulently or injury are made out. These ingredients are essential with respect to any offence which may require conduct similar to match-fixing. Wrongful gain requires the gain of property by unlawful means to which that person is not legally entitled. Wrongful loss requires the loss of property by unlawful means by a person who is legally entitled to the same.³² These ingredients would not be made out as there is a requirement for 'unlawful action' in order to gain or cause the loss of the property. Dishonestly is an intention to cause wrongful gain and wrongful loss to any person. This also would not apply as it merely builds upon Section 23 which itself does not apply.³³ Fraudulently is something which is done with the intent to defraud but not otherwise.³⁴ This therefore, necessitates that the conduct of a person involved in match-fixing must be with the intent to defraud. This however may not always be the case. Therefore, it is difficult to say that this ingredient is made out. Injury is any harm which is illegally caused to any person, in body, mind, reputation or property.³⁵ Therefore, the element of illegality of the harm makes it inapplicable to the conduct which has been stated to match-fixing.

I therefore submits that considering that the abovementioned offences and ingredients mentioned in the Code, being the relevant ones for the purposes of this discussion, are not made out, and therefore, the Code would not apply to match-fixing. As a measure of caution however, I submit that if the Code, were to be in some way applicable, then, it these would apply against all the three categories of persons mentioned above as its ambit is wide enough to cover those persons who mastermind the fixing of matches, the persons who actually fix them as well as those persons who abet them or otherwise gain from the behaviour of the persons who indulge in such activities.

B. THE PUBLIC GAMBLING ACT, 1867 & STATE GAMBLING LAWS

The Public Gambling Act of 1867, although a central legislation having application only in a limited number of territories, is the model for most of the state laws and therefore, forms the basis for the study on the applicability of Indian gambling laws to match-fixing. One of the first hurdles which were encountered by these laws was cleared in the year 1875 itself wherein it was clarified in the English case of *Haigh v. Sheffield*,³⁶ that the term 'other place' in the English Gaming Acts, on which the Public Gambling Act of 1867 is based, includes ground used for

³² § 23, Indian Penal Code, 1860.

³³ *Id.*, § 24.

³⁴ *Id.*, § 25.

³⁵ *Id.*, § 44.

³⁶ 1875, L. R. 10, QB 102 in S.G. VELINKER, *THE LAW OF GAMING & WAGERING* 64 (1922).

cricket, cycling and athletics.³⁷ However, a more imposing hurdle stands in the way of the application of the Public Gambling Act, 1867. Section 12 states that the Act shall not apply to a game involving mere skill. This is a provision which has been seen in all of the state gambling acts as well. However, the question would arise as to whether cricket is a game of skill. This problem had arisen with respect to the game of poker. The English Court of Appeal has in its decision held that poker is a game of chance and involves absolutely no element of skill and only pure chance.³⁸ The courts in Denmark and Russia have, however, taken a different approach and have said that poker is a game of skill.³⁹ Therefore, without any judicial decision on the status of whether cricket is a game of skill or chance it remains to be seen whether or not the provisions of these laws would apply to match-fixing. Further, the application of these laws becomes even more questionable, when the Central Bureau of Investigation, in its Preliminary Report in 2000 itself admitted that theoretically, cricket could be considered to be a game of skill.⁴⁰

Another hurdle which this application of gambling laws might face is that the laws in different states vary with respect to the punishment which can be imposed and some of the states only prescribe a fine which is so insignificant in comparison to the amount of money that bookies earn through their business.⁴¹ Further, the period of limitation in these cases is one year. Therefore, by the time the allegations of match-fixing have been investigated, the period of limitation may be over, thereby effectively precluding any criminal action which may have been possible. I therefore submit that the Public Gambling Act, 1867 and the corresponding state laws would not apply to match-fixing. However, even if these laws were to apply, their application would generally be limited only to the persons involved in or with the betting syndicates and not the players or the officials of the BCCI unless, they were in any way involved in the betting syndicates.

C. THE PREVENTION OF CORRUPTION ACT, 1988

The Prevention of Corruption Act, 1988 is intended to prosecute corrupt public servants as well as those persons who offer bribe. The term 'public duty' has been defined to mean a duty in the discharge of which the State, the public or the community at large has an interest.⁴² The first obstacle in the application of

³⁷ *Id.*

³⁸ BBC, *Man Guilty in Poker Skills Case*, available at <http://news.bbc.co.uk/1/hi/england/london/6267603.stm> (Last visited on August 24, 2008).

³⁹ Pokerlog, *Poker is A Game of Skill Rules Danish Court*, available at <http://www.pokerlog.co.uk/forum/Poker-is-A-Game-of-Skill-Rules-Danish-Court-t-87.html> (Last visited on August 24, 2008).

⁴⁰ Ganapathy, *supra* note 8.

⁴¹ Ganapathy, *supra* note 8 (For example in Delhi, for a first offence is imprisonment for six months and a fine of Rs 1000 and for subsequent offences, a maximum punishment of imprisonment of one year and a fine of Rs 2000. Hence, for a bookie or punter dealing in crores of rupees, the provisions of this Act are no major cause of worry).

⁴² § 2(b), Prevention of Corruption Act, 1988.

this Act, however is encountered as it applies only in relation to public servants. This means that for a prosecution to be initiated under this Act, it is necessary that the person who takes the bribe is a public servant; or in order to prosecute a person for offering a bribe, it is necessary to show that the bribe was offered to a public servant. The term 'public servant' has been defined under several heads under Section 3 of this Act. For the purposes of this paper however, it is only the definition 'any person who holds an office by virtue of which he is authorised or required to perform any public duty',⁴³ which has far-reaching relevance.

On a very strict construction of the Act, these definitions would not apply to match-fixing. However, these constructions, if viewed in light of the decisions of the Supreme Court, in which it has been held that the BCCI performs enormous public functions and therefore, has a duty to act fairly, in good faith and reasonably,⁴⁴ might serve to suggest otherwise. Therefore, it may be possible to state that the BCCI performs a public function or what may otherwise be said to amount to a public duty. As such, it may be possible that officials of the BCCI as well as the players may be accommodated within the meaning of the word 'public servant' under Section 3(viii) of the Act if it is further possible to construe membership of the BCCI or its team representing India as a 'public office'.

It is however submitted that this is a very weak argument and I may be accused of straining the words of the statute. However, given the fact that there is no other effective remedy seemingly available within the framework of the penal laws in India, this interpretation may be the best alternative which may be available to prosecute persons for match-fixing. This Act, if applicable, would apply to any person giving or receiving the gratification which may include either of the three categories of persons stated above. Therefore, having discussed the regime of relevant penal laws in India, I cannot say with certainty if any of them will apply to match-fixing.

D. LAWS DEALING WITH ORGANISED CRIME

After seeing that the ordinary penal laws in India would not apply to match-fixing, I shall now look to the US laws where this problem has been encountered for a much longer period of time. I shall make a comparative analysis of the laws in the US as well as the law in India to see whether match-fixing can be brought within the purview of the laws which deal with organised crime. In the USA, the act which is relevant for the purposes of this paper is the Racketeer Influenced & Corrupt Organizations Act of 1970. This law is intended to provide prosecutors with a powerful and potent weapon against organised crime as it eliminates the need to prove that individuals are part of a single conspiracy and instead holds defendants liable for all acts of racketeering undertaken 'as part of

⁴³ *Id.*, § 3(viii).

⁴⁴ Board of Control for Cricket in India v. Netaji Cricket Club, AIR 2005 SC 592, ¶ 81.

an enterprise'.⁴⁵ It is required to show that there exists a pattern of criminal behaviour, and not merely a single instance of conduct which has been made punishable under this Act. This Act has been successfully used against the offences of bribery, extortion, fraud, kickbacks etc. This Act also provides for civil claims for recovery alongside criminal action against the persons sought to be made liable.⁴⁶ A prosecution and a suit for civil recoveries was once launched under the Racketeer Influenced & Corrupt Organizations Act, 1970 against Major League Baseball.⁴⁷ These recovery claims have been successfully used in a boxing-related case involving boxers Julio Cesar Chavez and Craig Houk regarding allegations of bribery and match-fixing.⁴⁸ Therefore, liability has been imposed in the US on match-fixing and sports regulatory authorities under a legislation which is meant to tackle organised crime.

In India, there are certain state legislations which have been enacted to combat organised crime such as the Maharashtra Control of Organised Crime Act, 1999 (*hereinafter* MCOCA).⁴⁹ However, MCOCA would not ordinarily apply to match-fixing because of the fact that Section 2(d) requires that for the application of this Act to a particular person, at least one charge-sheet should have been filed by the police against that person within a period of ten years before the time that the provisions of this Act are sought to be applied. Therefore, unless the bookies, players or officials of the Board have had a charge-sheet filed against them ten years preceding the date on which this act is sought to be applied, MCOCA or the other state acts will not apply. Further, it is necessary to show that these persons against whom this Act is sought to be applied are engaged in a 'continuing unlawful activity'⁵⁰ and that they are part of an 'organised crime syndicate'.⁵¹ Thus, after having discussed the existing regime of penal laws which may apply to match-fixing, I submit that, it is only the law in the United States, in the form of Racketeer Influenced & Corrupt Organizations Act, 1970 which certainly recognises match-fixing to be part of organised criminal activity. In the absence of a similar law in India, I submit that there exists no penal law in India which would cover match-fixing.

⁴⁵ See *supra* note 30.

⁴⁶ *Id.*

⁴⁷ Murray Chass, *Baseball: A Group's Racketeering Suit Brings Baseball to Full Bristle*, available at <http://query.nytimes.com/gst/fullpage.html?res=9505E5D61539F934A25754C0A9649C8B63&sec=&spon=&pagewanted=1> (Last visited on August 23, 2008).

⁴⁸ *Venzor v. Gonzales* 936 F. Supp. 445 JARVIS, ROBERT & PHYLLIS COLEMAN, SPORTS LAW: CASES & MATERIALS 796-803 (1999).

⁴⁹ This Act has also been adopted by the Delhi Government and its provisions made applicable there as well. Recently, the state of Uttar Pradesh also recently enacted an act on similar lines: Express India, *UPCOA passed amid walkout by opposition*, available at <http://www.expressindia.com/latest-news/UPCOA-passed-amid-walkout-by-Opposition/236309/> (Last visited on August 28, 2008).

⁵⁰ § 2 (d) Maharashtra Control of Organised Crime Act, 1999.

⁵¹ *Id.*, § 2 (f).

E. DISCIPLINARY MEASURES

I shall now very briefly discuss the existing regime of disciplinary sanctions which exist under the 'Code of Conduct for Players and Team Officials' of the International Cricket Council (*hereinafter* ICC Code).⁵² Although there did not exist any such measures when the match-fixing scandal surfaced in 2000, the International Cricket Council in February 2001 enacted certain provisions in the ICC Code to prohibit gambling, betting, underperformance and inducement or encouragement to gamble, bet on or under-perform in a match or a series of matches. Further, suppression of information from the Anti-Corruption and Security Unit of the International Cricket Council has also been made actionable conduct under this Code. Further still, providing information about playing conditions or team compositions which have not been disclosed to the media in advance also amount to a violation of the Code of Conduct. The sanctions prescribed range from a fine, or a ban for a period of one year, to a life ban and an unlimited fine which must be determined on the basis of the facts and the circumstances of the case.⁵³

The BCCI, as a result of the scandal of 2000, conducted its own disciplinary enquiry into the allegations of match-fixing and suspended several players and the then team physiotherapist from playing or participating in any events or matches conducted by the BCCI or the ICC for periods ranging from a life ban to a ban for a period of five years. In addition to this, the BCCI also stated that neither the BCCI nor any of its affiliated bodies would conduct or allot any benefit matches for these players. Further, the contribution of the BCCI towards the Benevolent Fund for these persons would stand forfeited.⁵⁴ Thus in the absence of a strict legal provision, there has been ad-hoc disciplinary actions which have filled the void.

⁵² International Cricket Council, *Code of Conduct for Players and Team Officials*, available at <http://in.yimg.com/icccricket/pdfs/code-of-conduct-for-players-and-officials.pdf> (Last visited on August 24, 2008).

(I have relied on this Code and has very briefly given an overview of its provisions relating to match-fixing and related malpractices).

⁵³ *Id.*, ¶ 4.

⁵⁴ The full statement of the result of the disciplinary enquiry conducted by the BCCI is available at http://www.yehhaicricket.com/news/fulltext_boardstatement.html (Last visited on August 20, 2008).

III. IS IT WRONG OR JUST NOT RIGHT?: CRICKET, MORALITY & CRIMINAL LAW

“Cricket requires one to assume indecent postures.”

- Oscar Wilde

In the preceding parts of this paper, I have reviewed the penal laws which may have application to instances of match-fixing as well as the regime of disciplinary sanctions which exist and which may be taken recourse to by the sports regulatory authorities in this regard. Therefore, in light of the fact that disciplinary sanctions have been imposed as and when the need has arisen as well as the fact that there is a difference in legal position with respect to the criminality of match-fixing in different jurisdictions, the question that arises is, “Whether or not there is really any justification to have criminal sanctions for match-fixing?” For this purpose, it is important to understand firstly, whether match-fixing would fall under ‘spoiling’ or whether it can be classified under ‘cheating’. If match-fixing is classified under ‘spoiling’, then, the action of the BCCI to impose disciplinary sanctions without the violation of a specific rule in 2000 would be contrary to the understanding of ‘spoiling’. This is because, there existed no specific rule which was violated by the players who were believed to have indulged in match-fixing as there were no ICC or BCCI rules which were in place to be violated by these players and further, spoiling would not entail any sanction by the governing authorities. However, if such an incident were to happen today, then it would clearly be ‘cheating’ as it is in violation of the specific rules which were enacted by the ICC in the year 2001.⁵⁵

Disciplinary sanctions, however, may alone not be sufficient to tackle match-fixing as the effectiveness of the disciplinary sanctions is based on two assumptions. Firstly, it is assumed that ICC and the BCCI exercise a *de facto* monopoly with respect to the game of cricket in the international sphere as well as the national sphere in India, respectively. Therefore, the effectiveness of the sanctions of these bodies is derived from the fact that they may effectively control their membership and the conduct of the members by regulating the admission to, or exclusion from membership.⁵⁶ Therefore, a life ban or even a ban for a few years may have severe repercussions on the players and will cause others to think, probably more than twice, about indulging in match-fixing. The problem however arises because of the fact that there is and may be a further possibility of the proliferation of leagues such as the Indian Cricket League (*hereinafter* ICL) which are outside the purview of the BCCI or even the ICC. Therefore, any disciplinary sanctions taken by the ICC or the BCCI would be ineffective with respect to the players or officials of the ICL or other such leagues.

⁵⁵ INTERNATIONAL CRICKET COUNCIL, *supra* note 52.

⁵⁶ W. FRIEDMAN, *LAW IN A CHANGING SOCIETY*, 233-234 (2001).

The second assumption with respect to the effectiveness of the sanctions is that the policies of the ICC and the BCCI are in conformity with each other. The ICC Executive Board's decision on June 26, 2002 here is of importance, which states that any person found guilty of any offences under the ICC Code and banned from international cricket for any period should also be banned by the relevant Board for that period from all domestic first class and one day cricket.⁵⁷ This poses a tricky problem when one looks at the position of the Indian Premier League (*hereinafter* IPL). The IPL is a league started by the BCCI but did not have recognition from the ICC. Therefore, a problem would arise if the ICC bans a person from international cricket, the BCCI may not prohibit him from playing in their own leagues which are outside the purview of the ICC. These are merely some basic hypothetical examples which I have given only in order to illustrate the problems which are may be encountered while evaluating the effectiveness of the disciplinary sanctions in today's changing sports environment.

The other factors, which deserve consideration, and which highlight the inadequacy of disciplinary sanctions for match-fixing are that it is necessary to understand the place that sport enjoys in the societal and legal framework. Sporting activities have sometimes carved out a special niche in law when it comes to affixing criminal responsibility. The discussion of boxing in the case of *R. v. Brown*⁵⁸ and Section 87 of the Code⁵⁹ along with its illustrations are examples of this special position. I however submit that this is not a blanket protection from criminal liability. A distinction must be made between sports in which certain prohibited conduct, which would otherwise be considered to be criminal, but is permitted by virtue of its being an inherent part of the sporting activity, and those sports wherein there is no relation between the nature of the sport and the criminality involved in its performance. As sport such as boxing is one wherein the use of physical force and assault is an inherent part of the sport, whereas in a game like cricket, the receiving of some immoral gratification in order to underperform is not an inherent part of the sport.

Further, it is submitted that persons associated with sports enjoy several benefit on account of their association with the sport such as going on foreign tours, tax exemptions, awards from the government, quotas, etc. However, if there is any acquisition of property on account of malpractices in sports then, there is no effective mechanism which is in place to make these persons part with their ill-gotten gain. Disciplinary sanctions alone will fall short of the requisite sanctions

⁵⁷ INTERNATIONAL CRICKET COUNCIL, *supra* note 52.

⁵⁸ [1993] 2 All ER 75.

⁵⁹ Illustration to Section 87, Indian Penal Code, 1860- Act not intended and not known to be likely to cause death or grievous hurt, done by consent -A and Z agrees to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

which are otherwise available to ordinary persons. This is because of the fact that disciplinary sanctions do not provide for any sort of forfeiture of such property. Therefore, it will result in unfairness to those who abide by the law if those who break the law or bend it horribly out of shape are allowed to enjoy the benefits of their misdeeds.⁶⁰ Sportspersons also enjoy a very high status in society. Their achievements are symbolic of a nation's prowess and persons all over the country, and in this age, all over the world try to emulate their achievements and thereby, set an example for others to follow.⁶¹ Whatsoever a great man does, the same is done by others as well. Whatever standard he sets, the world follows.⁶² Therefore, it is possible that if a mere disciplinary sanction is imposed on the person involved in sporting malpractices, then, it may not be sufficient to set an example for the persons who idolize him.

After having discussed some of the inadequacies of disciplinary sanctions, there appears the need to impose criminal sanctions against these erring persons. I shall briefly look at the essential elements necessary to invoke criminal liability and see if match-fixing fulfils them. These elements can briefly be classified into three, namely, culpability, harmfulness and moral wrongfulness. Culpability reflects the mental element with which an offence is committed, such as intent, knowledge, or belief.⁶³ In the case of match-fixing, the player, the official or the bookie all engage in the activity knowingly. Therefore, the element of culpability is satisfied. Harmfulness reflects the degree to which a criminal act causes, or risks causing, harm to others or self.⁶⁴ With respect to match-fixing, the harm caused is manifold. The spectators lose the value of the money that they have paid to watch the match at the stadium or on television. There is also a possibility that this may result in their loss of interest in the game. This in turn will affect the body conducting the match as a result of lower ticket sales, as well as the broadcasters on account of lower viewership. This may result in the holding of fewer matches. Therefore, match-fixing satisfies the criteria of harmfulness as well. Moral wrongfulness is the violation of a specific moral norm or set of norms, which has effect of wronging a victim. This has only recently started to be acknowledged as a necessary element in determining whether or not criminal liability should be imposed. Although it is dangerous to criminalize behaviour only on account of the fact that it is immoral, one must not be quick to dismiss it.⁶⁵ To test whether the immorality is sufficient to constitute a criminal offence, it is necessary to ascertain whether there exists a

⁶⁰ PAUL ROBINSON, *FUNDAMENTALS OF CRIMINAL LAW* 35 (1995).

⁶¹ Pat Forde, *Doping? This Time Around, No Olympian is Above Suspicion*, available at http://sports.espn.go.com/oly/summer08/columns/story?columnist=forde_pat&id=3521169 (Last visited on August 27, 2008).

⁶² Ganapathy, *supra* note 8.

⁶³ SIMON GARDINER, *supra* note 16.

⁶⁴ *Id.*

⁶⁵ HERBERT PACKER, *THE LIMITS OF CRIMINAL SANCTION* 264 (1968); Chapter XIV of the Indian Penal Code, 1860 deals with Offences Affecting the Public Health, Safety, Convenience, Decency and *Morals* (*emphasis supplied*).

significant body of dissent from the proposition that the conduct in question is immoral.⁶⁶ With respect to match-fixing, there appears to be no such significant body of persons who would dissent from the proposition that this conduct is immoral. Since match-fixing involves the breach of the trust in the institution of sport, as well as the subversion of the special position that it enjoys in order to meet vested interests and immoral ends, it is sufficiently demonstrated that it satisfies the criteria of moral wrongfulness.

I have therefore established that the conduct of match-fixing fulfils the necessary criteria which are required to deem this sort of behaviour to be criminal. The question which now arises is that although there may be a theoretical justification for criminal liability for match-fixing, whether there a law, if enacted, will be effective. The first part of the answer to this question can be found in the statement of Woodrow Wilson is a speech in 1951. He said that “the law that will work is merely the summing up in legislative form of the moral judgment that the community has already reached.”⁶⁷ The second part of this answer can be seen in the concept of ‘over-criminalization’. This essentially means that criminal sanctions lose their effectiveness and potency if they are used too frequently and therefore, being convicted of a crime may be no worse than coming down with a bad cold.⁶⁸ Therefore, there need to be limitations which need to be built into any theory which requires the imposition of criminal liability.

In order to determine whether or not criminal sanctions should be imposed in a particular event where it is alleged that match-fixing may have taken place; in my opinion, a very elementary test may be applied. There is a need to distinguish between behaviour that is merely unethical and behaviour which is unethical and there is a possibility of the involvement of the underworld or with betting syndicates. A distinction must therefore be drawn between “on-field factors which influence decisions in sports” and “off-field factors which influence decisions in sports”. Some examples of the on-field factors are the refusal to enforce a follow-on if the bowlers of the team are exhausted and want time to rest. Another example is deliberately batting at a slow pace in order to better your own average. Examples of the off-field factors are telephone calls made to numbers which are known to be used by bookies and members of the underworld before or during a match, as well as leaking information about the team-composition, player fitness, player morale other such sensitive details before the start of the match. Where it is shown that only ‘on-field factors’ influenced the decision, and if the decision is in contravention to the rules or the spirit of the game, then disciplinary sanctions alone may suffice. However, where it is apparent that ‘off-field factors’ have

⁶⁶ *Id.*

⁶⁷ FROST-KNAPPAN, ELIZABETH AND DAVID S.SHRAGER, *THE QUOTABLE LAWYER* (quoting Woodrow Wilson) 256 (1999).

⁶⁸ HERBERT PACKER, *supra* note 65, 261.

influenced the decision, and the decision is in contravention to the rules or the spirit of the game, then criminal sanctions along with disciplinary sanctions should be applied. In my opinion, although this test may be subject to several criticisms and limitations, at least it is a start.

Therefore, through the course of this chapter, I have looked at whether disciplinary sanctions will suffice for tackling match-fixing, whether match-fixing satisfies the criteria for being labelled as criminal conduct and has also tried to deal with the problem of over-criminalization by the development of the 'on-field' and 'off-field' factors test.

IV. CONCLUSION

Through the course of this paper, I have established that sport has acquired a unique place in the societal structure and therefore, it must also occupy a distinct niche in the legal discourse. While match-fixing has been a phenomenon which has been prevalent for a very long time irrespective of nation or sport and most of the incidents thereof have inexorable links to the underworld and illegal betting syndicates, precious little has been done about it especially in the legal field. Disciplinary sanctions which have been put in place by the governing body of the sport, have often proved to be inadequate to deal with match-fixing as it addresses only specific instances of misconduct within the control of the governing body, whereas the problem is of much larger proportions and extends far beyond the specific sport. While it has been established that match-fixing satisfies the criteria of culpability, harmfulness and moral wrongfulness which are necessary to impose criminal liability, there is no penal statute in India which can be certainly said to address or be legitimately extended to apply to match-fixing.

The Racketeer Influenced Corrupt Organisations Act, 1970 of the USA is the only penal statute which seems to have some application in conduct similar to match-fixing. In theory at least, it can be stated that match-fixing should be criminalized and there is sufficient justification for the same. However, while translating this into practice, it must be seen that there is a proper enforcement and control mechanism which is put in place to ensure that imposing criminal liability on match-fixing does not cause the problem of over-criminalization. For this purpose, it is necessary that new tests such as the test of 'on-field factors' and 'off-field factors' be developed so that criminal sanctions can be applied only in the appropriate cases which would, at least to some extent, reduce the possibility of over-criminalization.

Therefore, through the course of this paper, I have shown that there exist several justifications for criminal liability for match-fixing. However, caution must be exercised while enacting and enforcing criminal laws with respect to this behaviour, because of the fact that the criminal law acts with a heavy hand and it is possible that the sanctions, if imposed over-zealously may turn out to be counter-productive. However, this is not to say that the persons who indulge in match-fixing should be dealt with using kid gloves. What is important is to ensure that the

criminal sanctions are imposed to an extent to which they are effective and not to an extent to which they are oppressive. Through sport, a balance must be found between the morals, societal values and ideals that it embodies in order to refine and make more precise, our understanding of criminal law which albeit a blunt instrument, is as good as the person in whom the power to use the same is vested.