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SKILL OVER CHANCE



A COMPARATIVE STUDY OF LEGAL
RECOGNITION OF FANTASY SPORTS IN
INDIA AND USA

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FOREWORD

Dr. SASMIT PATRA
MEMBER OF PARLIAMENT
RAJYA SABHA



Foreword

India is currently the world's largest online fantasy sports market, surpassing the USA, with approximately 230 million users. However, given India's socio-economic fabric, navigating the regulatory landscape of this sector has been complex. This study, therefore, offers a jurisprudential inquiry to delve into this globally significant issue.

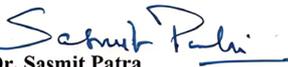
It contributes to the existing literature on fantasy sports and their legal classification and provides a broader perspective on the online gaming regulatory landscape. By comprehensively comparing fantasy sports in the United States and India, the study reveals how courts in both jurisdictions have consistently recognised fantasy sports as games of skill, distinct from gambling, betting and wagering. This review of judicial decisions significantly shapes the legal status of fantasy sports as games of skill.

The study presents a compelling argument supported by an analysis of statistical studies instrumental in U.S. legal determinations. Thus, the exploration of the two jurisdictions unequivocally demonstrates that the outcomes of fantasy sports contests are primarily influenced by the player's skills rather than by chance. Supported by statistical studies, this discourse paves the way for more nuanced and informed legal frameworks, ensuring that determinations are based on evidential and analytical precision.

With fantasy sports' legal status as games of skill firmly established, the need for a well-defined regulatory regime becomes paramount. Such regulations can foster the responsible growth of the fantasy sports sector and unlock its economic and technological potential. They must also be adaptable to the sector's rapid technological advancements, ensuring their relevance and effectiveness in addressing emerging challenges and lack of user safety measures by illegal betting and gambling platforms. The urgent need for an effective policy framework cannot be underscored enough to tackle and eliminate the rising illegal online gambling and betting platforms operating due to the grey regulatory area.

A clear and uniform approach will streamline regulatory oversight and enhance the credibility and growth potential of the fantasy sports industry in India, restricting bad actors. Moreover, efforts should be directed at encouraging further quantitative studies to determine various online games that are offered today are skill or chance.

I congratulate the authors on their outstanding work and trust that this comparative study will be a valuable resource for all those interested in the legal landscape of fantasy sports. This research will contribute to further scholarly inquiry and inform the development of sound regulatory frameworks that balance innovation with legal clarity.


Dr. Sasmit Patra
Member of Parliament
Rajya Sabha

FOREWORD

Online gaming has seen exponential growth in India in the recent past, due to the prevalence of internet users, particularly over mobile phones. On the question of whether these games are legal in India, the answer has largely been favourable for online games involving 'skill', as opposed to games of 'chance', which are regulated by individual states across the country. In this regard, this paper makes a compelling argument in favour of the legality of fantasy sports - a type of online gaming - in India. To this end, the paper looks at judicial developments in India and USA and concludes that fantasy sports is predominantly a game of skill worthy of legal recognition. It also relies on evidence from research employing statistical studies to further affirm this conclusion.

In an area shy of extensive research, the effort is commendable, considering the authors are all students in their early years at National Law School of India University. Though the paper heavily relies on the singular argument in favour of recognition of fantasy sports, without weighing in the counter arguments against such recognition, including the underlying risk inherent in recognising fantasy sports, such as the rising incidence of addiction and allied mental health issues - predominantly among the youth - the judicial authorities the authors conclude is in favour of its recognition. This paper can hence be the answer for anyone interested in finding an overview of the legality of fantasy sports in India and arguments in favour of its recognition.

I take this opportunity to congratulate my students on this research work and look forward to their future contributions.

Dr. Betsy Rajasingh

Assistant Professor of Law

Co-Director, Centre for IP Research and Advocacy

National Law School of India University, Bengaluru

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We would also like to express our heartfelt gratitude to Ms. Kriti Singh and Mr. Pranav Bhaskar Tiwari from The Dialogue for their invaluable guidance and support throughout the development of this study.

EXECUTIVE SUMMARY

Fantasy Sports, evolving from simple sport-based board games in the 1950s to sophisticated online platforms today, have dramatically transformed the sporting and gaming landscapes. The advent of the internet in the 1990s accelerated this transformation, leading to the proliferation of digital games and, subsequently, digital fantasy sports.

The online gaming sector's economic implications are substantial, particularly in India, where it has grown to encompass a vast user base, making it the second-largest market globally. This sector's exponential growth in India is evident in its significant Compound Annual Growth Rate (CAGR) of 28% from FY20 to FY23, according to an EY report. The projected future expansion presents vast economic opportunities and employment potential. Leading the online gaming industry in India is the fantasy sports sector. A 2023 Deloitte study identified India as the fastest-growing fantasy sports market in the world, with a user base nearly three times larger than North America's and home to over 300 fantasy sports platforms and 18 crore users. The report highlighted that fantasy sports and real-world sports share an innately symbiotic relationship that sets a virtuous cycle of sports development.

This economic growth is further supported by the Indian judiciary, which has played a pivotal role in shaping the legal landscape. Consistent rulings have established that fantasy sports are games of skill, differentiating them from gambling, betting, and wagering. As a result, fantasy sports are a distinct category that is permissible today in India after undergoing judicial scrutiny.

Significant legal precedents have affirmed the skill-based nature and legitimacy of fantasy sports. The Supreme Court of India's application of the "preponderance of skill" test has been crucial in categorising these games. Landmark judgments, such as those in the *R.M.D. Chamarbaugwala* and *K.R. Lakshmanan* have been instrumental in legally defining skill, emphasising the player's superior knowledge, training, attention, experience, and adroitness. Building on this jurisprudence, the Supreme Court and multiple High Courts have evaluated and scrutinised the fantasy sports format. All courts have consistently held such activities to be legitimate under the Constitution of India, thereby solidifying the legal status of fantasy sports in the country.

Parallel to the Indian context, the United States of America, under its federal law in 2006, exempted fantasy sports under the Unlawful Internet Gambling Enforcement Act (UIGEA). However, the legality of fantasy sports in the U.S. was fortified through landmark judgments such as *Dew-Becker v. Wu*, which was then relied upon in the case of *White v. Cuomo*. These cases applied the "preponderance of skill" test to determine that the outcome of a match in fantasy sports depends predominantly on skill, even if there is a presence of a chance element. This legal recognition has been crucial to the growth of fantasy sports in the U.S., where more than 40 states have legalised it. The American legal system employs various tests, such as the chance test, material element test, and the preponderance of skill test, to determine the nature of games involving money. Notably, recent judgements in the U.S. indicate a shift towards favouring the preponderance of skill test, aligning with global trends in the legal recognition of fantasy sports.

Various statistical studies further support the classification of fantasy sports as skill-based games. Reports from institutions like the Indian Institute of Management Bangalore and analyses from the Massachusetts Institute of Technology and Columbia University have statistically highlighted the skill-dominant nature of fantasy sports. Additionally, studies conducted by academics from Kansas State University and the Massachusetts Institute of Technology, respectively, statistically determine the skill-dominance in the fantasy sports offered by FanDuel, which the Supreme Court of Illinois later relied upon.

The comprehensive analysis of Indian and American precedents along with the review of statistical studies, ascertain that fantasy sports are games of skill, distinct from betting, gambling, and wagering. Given this legal clarity, it is crucial to act on NITI Aayog's recommendations for fantasy sports, which emphasise principles such as transparency, accountability, and consumer protection while balancing them with fostering innovation within the sector. By implementing these principles alongside the amended Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules of 2023 (IT Rules), a well-defined regulatory framework can be developed. This will positively impact the sector, promoting responsible growth and unlocking its economic and technological potential.

While the paper has limited itself to a jurisprudential enquiry on the legality of fantasy sports, it is important to note that there are other significant public policy issues pertaining to online gaming, such as addiction and financial loss. These areas warrant further scholarship.

BACKGROUND

Fantasy Sports originated long before they became ubiquitous in the digital era. In the 1950s, fantasy baseball and golf disrupted the sporting landscape by using statistical data to estimate players' performance in a season.¹ What began as sport-based board games evolved into the development of the first fantasy baseball league, known as the "Rotisserie League", where players' statistics gathered throughout a season were assessed to determine results.² In many ways, the league laid the groundwork for succeeding fantasy sports leagues by prescribing the format and introducing a new way to engage with sports.

A. THE RISE OF FANTASY SPORT

The 1990s marked the rise of the Internet, ushering in a new era of online fantasy sports. Organisations like ESPN, CBS Sports, and Yahoo began offering digitised fantasy leagues.³ During this time, associations and publications dedicated to fantasy sports also emerged. The Fantasy Sports Trade Association (now called Fantasy Sports and Gaming Association), based in the USA, was founded in 1998 to advocate for fantasy sports, leagues, and players.⁴ Similarly, RotoWire, a well-known fantasy sports news website, launched around the same period.⁵ The proliferation of digital models expanded the fantasy sports format to include sports like cricket, tennis, NFL, basketball, ice-hockey, and auto-racing.⁶ This digitisation significantly enhanced the consumption of fantasy sports. For instance, features like real-time scoring updates, notifications about player or team changes, and league customisations in ESPN's Fantasy Football allowed users to make more strategic and informed decisions when managing their team lineup.⁷

The Deloitte study of 2022 define fantasy sports platforms as

"digital sports engagement platforms, based entirely on real-life sports matches, where users build virtual teams with proxies of real players participating in an upcoming match (or match-day) and compete on real-world statistical performances of these players, based on one complete officially sanctioned sports match".⁸

Some significant characteristics emerge from this definition. Fantasy sports elevate passive sporting viewership to a participatory experience, allowing users to engage with real-world sporting events by building and managing virtual teams based on their expertise. Since creating and managing a sports team — albeit a virtual one — requires skill, the fantasy sports game experience hinges on a user's analytical abilities. Users compete based on their ability to assess team standings and analyse performance data within a limited timeframe. Unlike traditional zero-sum competitions, where one player's gain equals another's loss, fantasy sports allow participants to win prizes based on their performance and rankings. According to the Deloitte report, a fantasy sports user⁹ typically possesses skills such as (i) digital literacy, (ii) statistical analysis, (iii) knowledge of the strengths and weaknesses

¹ History - Fantasy Sports and Gaming Association. (2021, November 17). Fantasy Sports and Gaming Association. <https://thefsga.org/history/>.

² Rotisserie baseball | game. (n.d.). Encyclopaedia Britannica. <https://www.britannica.com/topic/rotisserie-baseball>.

³ Rotisserie baseball | game. (n.d.). Encyclopaedia Britannica. <https://www.britannica.com/topic/rotisserie-baseball>.

⁴ Home - Fantasy Sports and Gaming Association. (2024, February 22). Fantasy Sports and Gaming Association. <https://thefsga.org/>.

⁵ NBA Daily Lineups | RotoWire.com. (n.d.). <https://www.rotowire.com/basketball/nba-lineups.php>.

⁶ Zegura, N., and Augustyn, A. (2014, August 21). Fantasy sport | Strategies, Rules and Benefits. Encyclopaedia Britannica. <https://www.britannica.com/sports/fantasy-sport>.

⁷ What's New for ESPN Fantasy Football in 2023. ESPN Fan Support, <https://support.espn.com/hc/en-us/articles/360029129952-What-s-New-for-ESPN-Fantasy-Football-in-2023#:~:text=An%20improved%20Players%20tab%2C%20making,their%20league%20throughout%20the%20season>.

⁸ Federation of Indian Fantasy Sports (FIFS), and Deloitte. (2022). Fantasy Sports: Creating a virtuous cycle of sports development. <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-fantasy-sports-industry-report-noexp.pdf>.

⁹ Federation of Indian Fantasy Sports (FIFS), and Deloitte. (2022). Fantasy Sports: Creating a virtuous cycle of sports development. <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-fantasy-sports-industry-report-noexp.pdf>.

of real-world sports person, (iv) awareness of environmental factors like weather and ground conditions, and (v) a deep understanding of the sport itself.

B. ECONOMIC OPPORTUNITIES IN THE SUNRISE SECTOR

The digital medium and easy access to games via smartphones have driven exponential growth in the online gaming sector. In India alone, the online gaming landscape included 42.5 crore players in FY23, making it the second-largest market after China.¹⁰ The sector in India is experiencing a massive surge, with a notable CAGR of 28%, reaching a market size of INR 16,428 crore in FY23.¹¹ With investments exceeding INR 22,931 crore, the industry has the potential to boost Foreign Direct Investment (FDI) inflows and create new jobs.¹² The global online gaming landscape is equally promising, with over 3.13 billion players in 2023, growing at a 4.3% CAGR globally and at 9% in the U.S, generating USD 184 billion in revenue in 2023.¹³ According to a 2023 Deloitte study, India is the fastest-growing fantasy sports market in the world, with a user base nearly three times that of North America and home to over 300 fantasy sports platforms (FSPs) and 18 crore users.¹⁴ Online games, particularly fantasy sports, enhance real-world sports viewership, fan engagement and infrastructure investment in India. They also strengthen sports culture through significant corporate social responsibility investments in grassroots-level athletes, creating a self-reinforcing cycle of sports development.¹⁵

Fantasy sports in India grew by 31% to INR 6800 crore in FY22 and is expected to reach INR 25,240 crore by FY27, with its current valuation at INR 75,000 crore.¹⁶ Increased fan engagement drives this growth, as a Kantar Media study concludes that 60% of fantasy sports users now watch more sports due to deeper active engagement.¹⁷ Additionally, Capgemini's report on Emerging Technologies in Sports reveals that nearly 90% of sports fans in India believe emerging technologies have enhanced their overall viewing experience.¹⁸

This paper explores this phenomenon, focussing on the impact of legal and regulatory landscape on the sector's economic potential. It is structured into six chapters, beginning with an overview of fantasy sports and their economic potential. The first chapter examines Indian jurisprudence on fantasy sports as a game of skill, drawing insights from landmark judgements. The second chapter then explores American jurisprudence on fantasy sports. After analysing the legal frameworks in India and the USA, the third chapter reviews statistical studies on the skill-based nature of fantasy sports. This exploration underscores the need to regulate fantasy sports in India, as a game of skill. Chapters four and five address the necessity for regulatory certainty in the operation of fantasy sports in India and provide recommendations to achieve it, respectively.

¹⁰ 'New frontiers: Navigating the evolving landscape for online gaming in India' (Ernst and Young, December 2023)

https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/news/2023/12/ey-new-frontier-online-gaming-report.pdf

¹¹ 'New frontiers: Navigating the evolving landscape for online gaming in India' (Ernst and Young, December 2023)

https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/news/2023/12/ey-new-frontier-online-gaming-report.pdf

¹² 'Global Games Market Report' (Newzoo, January 2024).

https://resources.newzoo.com/hubfs/Reports/Games/2023_Newzoo_Free_Global_Games_Market_Report.pdf?utm_campaign=2023-08-GMRF-GGMR%202023%20free%20report&utm_medium=email&_hsmi=269284764&utm_content=269284764&utm_source=hs_automation.

¹³ Anand, R. (2023). New frontiers Navigating the evolving landscape for online gaming in India.

https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/news/2023/12/ey-new-frontier-online-gaming-report.pdf.

¹⁴ NBA Daily Lineups | RotoWire.com. (n.d.). <https://www.rotowire.com/basketball/nba-lineups.php>.

¹⁵ Federation of Indian Fantasy Sports and Deloitte. (2023). Fantasy Sports: A catalyst for the sports economy.

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/in-tmt-FIFS-Fantasy-Sports-Industry-Report-noexp.pdf>

¹⁶ Federation of Indian Fantasy Sports and Deloitte. (2023). Fantasy Sports: A catalyst for the sports economy.

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/in-tmt-FIFS-Fantasy-Sports-Industry-Report-noexp.pdf>

¹⁷ Tewari, S. (2020, August 28). 60% of fantasy sports users follow sports more now: Survey. LiveMint.

<https://www.livemint.com/sports/news/60-of-fantasy-sports-users-follow-sports-more-now-survey-11598615859192.html>

¹⁸ Capgemini Research Institute. (n.d.). Emerging technologies in sports: Reimagining the fan experience. Capgemini. Retrieved from

https://www.capgemini.com/wp-content/uploads/2020/07/CRI-Tech-in-Sports_V1.pdf

1 REGULATORY LANDSCAPE IN INDIA

1.1 CONSTITUTIONAL FRAMEWORK

The fantasy sports sector has experienced considerable growth, driven by significant technological advancements in India.¹⁹ However, this expansion has drawn legal scrutiny due to its rapid rise in the market. The core judicial debate revolves is the debate between defining fantasy sports as a game of skill or chance. This issue has recurrently been subjected to scrutiny by the Indian judiciary, which has consistently rendered determinations categorising fantasy sports as a ‘game of skill’, thereby distinguishing it from activities constituting gambling, betting, and wagering. The courts have consistently held that fantasy sports are legitimate business activities protected under Article 19(1)(g) of the Constitution of India. However, despite judicial approval of fantasy sports being a game of skill and a legitimate business activity, it still faces regulatory uncertainty in some States because, by way of their State legislation, they have prohibited games of skill when played for money. This dissonance creates a complex and uncertain regulatory environment, hampering the sector’s full potential.

Before enacting and enforcing the Constitution of India was enacted in 1950, the legislative framework governing gambling was encapsulated in the Public Gambling Act of 1867. This Act proscribed gambling activities in public establishments across India. Notably, Section 12 of this Act delineates an exception for games classified under the category of ‘mere skill.’ After Indian independence, the Constitution of India incorporated the matter of betting and gambling within Entry 34 of the State List delineated in Schedule VII, thereby vesting exclusive jurisdictional authority over these matters within the purview of the State Governments. The Public Gambling Act of 1867, thus, served as the foundational legislative instrument regulating various aspects of gambling, betting, and wagering activities, encompassing, among other provisions, the prohibition of public gaming and the operation, ownership, or facilitation of “common gaming-houses.”²⁰

By way of powers under Entry 34 of the State List, individual States formulated their legislative frameworks concerning betting and gambling. Several States either adopted the Public Gambling Act of 1867 in its entirety or enacted derivatives thereof.²¹ Most States have implemented a comprehensive prohibition on these activities.

However, the regulatory landscape across the States has exhibited a marked lack of uniformity, particularly impacting online skill-based games such as fantasy sports. The disparate regulatory approaches adopted by the States, ranging from regulation by way of a licensing framework to outright prohibition, have led to a fragmented and disjointed industry. This inconsistent regulation has notably impacted the operations of fantasy sports platforms, with some States imposing total prohibitions. This heterogeneous regulatory environment has consequently posed significant challenges to the cohesive growth and development of the fantasy sports industry in India.

¹⁹ NITI Aayog ‘Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India: Draft for Discussion’ (2020),

<https://www.niti.gov.in/sites/default/files/2023-03/Guiding-Principles-for-the-Uniform-National-Level-Regulation-of-Online-Fantasy.pdf>.

²⁰ The Public Gambling Act, 1867. The Public Gaming Act 1867 defined “common gaming-houses” to mean any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place, or otherwise howsoever.

²¹ Law Commission of India. (2018). Legal framework: Gambling and sports betting including in cricket in India (Report No. 276). Government of India. Retrieved from <https://images.assettype.com/barandbench/import/2018/07/Report276.pdf> (pp. 57-63).

1.2 EXECUTIVE EFFORTS

The Government of India has consistently engaged in extensive consultations on online gaming to protect Indian citizens and harness this sector's potential for the digital economy. These discussions have led various government departments to produce reports outlining the legal framework for online gaming in the country.

1.2.1 NITI Aayog's 'Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India'

In 2020, NITI Aayog prepared a discussion paper addressing the fantasy sports market and the potential for India to become a market leader in this sector.²² The paper proposes guiding principles for a regulatory framework promoting consistent growth of the fantasy sports industry. It addresses legal ambiguities and advocates for a national safe harbour framework, emphasising principles-based guidelines, light-touch self-regulation, and effective grievance mechanisms. The guidelines included fundamental principles that require Online Fantasy Sports Platforms (OFSP) to comply with Indian laws and ensure their contests are skill-based. OFSPs that want to offer new pay-to-play variants differing from judicially established skill-based formats must get them evaluated for skill dominance by an independent evaluation committee. This framework mandates protection for minors, transparency in contest terms, and prohibits gambling promotions. It also requires that advertising ethically represents fantasy sports as entertainment, not as guaranteed income. Lastly, a self-regulatory organisation should seek state-level immunity for compliant OFSPs, aiming to create a regulated, equitable, and prosperous fantasy sports environment in India.

Notably, the paper acknowledged that while OFSPs have been judicially recognised as a game of skill, their regulation still depends on state-specific regulatory regimes. This variability in the regulatory framework adversely impacts user interest in transparency and restricts the industry's full potential.

1.2.2 Inter-Ministerial Task Force

The Government of India, recognising the imperative need for regulatory oversight in the domain of online gaming, instituted an Inter-ministerial Task Force (IMTF) in 2022. This task force, comprising Secretaries from key ministries including the Ministry of Finance (Department of Revenue), alongside the CEO of NITI Aayog, and representatives from the Ministries of Home Affairs, Electronics & Information Technology, Youth Affairs and Sports, Department for Promotion of Industries & Internal Trade, Department of Consumer Affairs, and Ministry of Information & Broadcasting, was assigned the critical mandate of formulating regulations tailored for the online gaming industry and designating a nodal ministry for its governance.

In its report, the task force suggested various reforms to regulate the online gaming sector. Firstly, it suggested the creation of a national regulatory body which would clearly define the games as that of skill-based or chance-based, certify different formats, and ensure compliance. Secondly, it suggested a central law for online gaming that would be applicable to paid and free games of skill, and include online fantasy sports games, e-sports, and other card games. It would exclude free to play casual games from its ambit unless under some specific circumstances. Thirdly, it proposes a three-tier dispute resolution system comprising a grievance redressal mechanism, a self-regulatory organisation, and a government-led oversight committee. Fourth, it recommended classifying paid online gaming platforms as 'reporting entities' under the Prevention of Money Laundering Act, 2002, thereby bringing them under the act's purview. Finally, the task force suggested designating the Ministry of Electronics and Information Technology (MeitY) as the nodal ministry for online gaming, with other aspects such as advertisements and trade practices regulated by other ministries.

²² NITI Aayog 'Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India: Draft for Discussion' (2020), <https://www.niti.gov.in/sites/default/files/2023-03/Guiding-Principles-for-the-Uniform-National-Level-Regulation-of-Online-Fantasy.pdf>.

1.3 DISTINCTION BETWEEN GAME OF SKILL AND CHANCE

The legal distinction between games of skill from games of chance has garnered significant attention, primarily through landmark judgments from before the digital era. The current Indian legislative framework does not explicitly define a 'game of mere skill'. After the Indian Constitution was enacted in the 1950s, the Supreme Court of India interpreted 'games of mere skill' as those predominantly influenced by skill. A foundational precedent was set in the 1957 decision of *R.M.D. Chamarbaugwala*,²³ where a constitutional bench of the Supreme Court clarified that competitions heavily reliant on skill do not constitute gambling but are instead considered commercial enterprises protected under Article 19(1)(g) of the Indian Constitution.²⁴ This ruling introduced the 'preponderance of skill' legal test, which has become a cornerstone for subsequent judicial analyses. Courts have since evaluated, on a case-by-case basis, whether skill or chance is the primary element in the contested game. This evaluation is similar to the test used by courts in the U.S.²⁵

This distinction was further clarified in *Dr. K. R. Lakshmanan v. State of Tamil Nadu and Anr*,²⁶ where the Supreme Court stated:

*"A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards are all modes of chance. In these games, the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution or the dealer has dealt with the cards. A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated - is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. Golf, chess and even Rummy are considered to be games of skill. The courts have reasoned that there are few games, if any, which consist purely of chance or skill, and as such, a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. It is the dominant element - 'skill' or 'chance' - which determines the character of the game (emphasis supplied)."*²⁷

The Court's discourse highlights that few games rely solely on skill or chance. The dominant factor—whether 'skill' or 'chance'—determines the game's nature.

Indian Courts have consistently applied the 'preponderance of skill' test to distinguish skill-based and chance-based games. The Supreme Court, in *K. Satyanarayana*²⁸ and *K.R. Lakshmanan*,²⁹ emphasised this principle, declaring games like rummy and horse racing as skill-based. Following this legal precedent, several Courts have similarly classified games such as Scrabble as predominantly skill-based.³⁰

Additionally, the judiciary recognises that as games evolve, elements of chance may emerge, yet this alone does not make them gambling, betting, or wagering.³¹ A recent Karnataka High Court judgement reaffirmed this established precedent.³² It concluded that any game meeting the 'preponderance of skill' criterion is lawful, and the facilitation of such games is a constitutionally protected right under Article 19(1)(g). Crucially, this ruling extends legal protections to online gaming platforms, reinforcing the classification of fantasy sports as a game of skill.

²³ *State of Bombay v. R.M.D. Chamarbaugwala*, 1957 SCC Online SC 11.

²⁴ *Id.* at Paras 5 and 23.

²⁵ See Chapter 2.

²⁶ *Dr. K. R. Lakshmanan v. State of Tamil Nadu and Anr*, AIR 1996 SC 1153.

²⁷ *Id.* at Para 3.

²⁸ *State of Andhra Pradesh v. K. Satyanarayana and Ors.*, AIR 1968 SC 825.

²⁹ *Dr. K. R. Lakshmanan v. State of Tamil Nadu and Anr*, AIR 1996 SC 1153.

³⁰ See *Pleasantime Products v. Commissioner of Central Excise, Mumbai-I*, (2010) 1 SCC 265.

³¹ Para 12, *State of Andhra Pradesh v. K. Satyanarayana and Ors.*, AIR 1968 SC 825.

³² *All India Gaming Federation v. State of Karnataka*, 2022 SCC OnLine Kar 435.

A comprehensive examination of legal precedents delineates a clear legal position: competitions predominantly reliant on skill rather than chance are excluded from the definitions of ‘gambling,’ ‘betting,’ and ‘wagering.’ This demarcation emphasises the primacy of skill as a crucial determinant in legal assessments. It also underscores the significance of the ‘preponderance of skill’ test in Indian Courts, where the dominant factor influencing game outcomes dictates their legal categorisation.

Therefore, it is crucial to carefully assess the context in which an online game is played to determine its classification as skill-based or chance-based. This contextual analysis allows for a more precise approach to game categorisation, taking into account each game’s unique mechanics and the role of skill as a critical component.

1.4 LEGALITY OF FANTASY SPORTS IN INDIA

In recent years, the jurisprudence on the legality of fantasy sports has developed over a series of cases before the High Courts and the Supreme Court in India. Courts have conclusively held that fantasy sports are games of skill that satisfy the “preponderance of skill” test.

1.4.1 Varun Gumber v. Union Territory, Chandigarh

The Punjab and Haryana High Court was whether Dream11’s fantasy sports constituted illegal gambling under The Public Gambling Act, 1867.³³ The plaintiff alleged that the platform’s games were based on chance, leading to consistent losses. The plaintiff accordingly prayed for a suo-moto blocking of the company’s website and a refund of the amount lost by the plaintiff.

The legal assessment in this case revolved around distinguishing between games of skill and games of chance under Indian law. The Public Gambling Act of 1867 typically prohibits games of chance but not games of skill. Furthermore, Article 19(1)(g) of the Indian Constitution protects the right to practise any profession or to carry on any occupation, trade, or business, which includes skill-based games.

The High Court, referencing the K.R. Lakshmanan case, evaluated the mechanics of Dream11’s fantasy sports. The Court noted that the creation of virtual teams by participants in these games requires considerable skill, judgement, and discretion. Further, the Court observed that the “playing of fantasy game by any participant user involves virtual team by him which would certainly require a considerable skill, judgement and discretion. The participant has to assess the relative worth of each athlete/sportsperson as against all athlete/sports persons available for selection. He is required to study the rules and regulations of strength of athlete or player and weakness also...the several factors...would definitely affect the result of the game...”³⁴

Notably, a special leave petition was preferred against the High Court judgement, which was dismissed by the Supreme Court in 2017.³⁵ A review petition against the dismissed special leave petition was also subsequently dismissed in 2022 on the merits of the case and delay in preferring the revision.³⁶ The High Court concluded that the fantasy sports offered by Dream11 are games of skill, not gambling, under the prevailing legal definitions. This conclusion protects Dream11’s activities under Article 19(1)(g) of the Constitution of India, allowing it to continue its business operations. The Supreme Court’s dismissal of appeals against this decision further solidified the legal status of fantasy sports as skill-based games.

³³ Varun Gumber v. Union Territory, Chandigarh 2017 SCC OnLine P&H 5372.

³⁴ Page 28, Gumber, v. Union Territory of Chandigarh 2017 SCC OnLine P&H 5372.

³⁵ Varun Gumber v. Union of India 2017 SCC OnLine SC 2170.

³⁶ Varun Gumber v. Union of India 2022 SCC OnLine SC 1953; Varun Gumber v. Union of India, in SLP (Criminal) Diary No. 35191/2019.

1.4.2 Gurdeep Singh Sachar v. Union of India

The issue before the Bombay High Court was whether the activities of Dream11, a Fantasy Sports platform, amounted to ‘gambling,’ thus necessitating a prohibition on its business operations under Indian gambling laws.³⁷

The legal framework for this case involves distinguishing between games of skill and games of chance, with Indian gambling laws typically prohibiting games of chance but not games of skill. The Constitution of India, under Article 19(1)(g), protects the right to practice any profession or to carry on any occupation, trade, or business. The Court’s role was to determine if Dream11’s activities fell under protected business activities as games of skill or were akin to gambling activities.

The Bombay High Court, referencing *Varun Gumber*, determined that Dream11’s business model did not qualify as ‘gambling,’ ‘betting,’ or ‘wagering.’ It was further observed that the result of the fantasy game ‘is not at all dependent on winning or losing of any particular team in the real world game.’³⁸ The High Court’s orders were appealed to the Supreme Court in a batch of petitions, which were dismissed in favour of the fantasy sports platform after that.³⁹

The Court concluded that Dream11’s operations as a fantasy sports platform are predominantly games of skill, not constituting gambling,’ ‘betting,’ or ‘wagering.’ This conclusion aligns with established legal precedents that differentiate skill-based activities from gambling. As such, the platform’s activities are protected under Article 19(1)(g) of the Constitution of India. The Supreme Court’s refusal to reconsider this stance, except for the aspect related to Goods and Services Tax, solidifies this interpretation. Consequently, fantasy sports, as operated by platforms like Dream11, are legally recognised as skill-based activities and are permissible under Indian law.

1.4.3 Precedents and Fantasy Sports

Legally, wagering, betting, and gambling are construed as activities wherein participants are afforded equal chances to win or lose based on future uncertain or past unknown events outside their control.⁴⁰ Drawing from cumulative legal precedents and doctrines, it is established that fantasy sports do not constitute gambling, betting, or wagering activities. The element of chance does not predominantly dictate outcomes in fantasy sports, positioning them outside the legal definition of gambling, betting, and wagering. Furthermore, chance elements do not ipso facto categorise a game as one of chance. Therefore, it is legally clear that fantasy sports are skill-based games and, hence permissible as online real-money games.

1.5 FANTASY SPORTS AND THE DOCTRINE OF MERGER

The judicial rulings on fantasy sports have further cemented their legal standing. Extending from landmark decisions such as *K. Satyanarayana* and *K.R. Lakshmanan*, various Courts have consistently applied the ‘preponderance of skill’ test to fantasy sports, invariably classifying them as skill-based games.⁴¹ The doctrine of merger lends additional legal fortitude to this position. This doctrine articulates that when a superior court resolves a dispute, whether by affirming, modifying, or overturning the lower court’s decision, it is the judgement of the superior Court that stands as the final and operative decree.⁴²

The doctrine is based on logic that at one point of time, there cannot be more than one legally valid operative order governing the same subject-matter. The doctrine helps in maintaining the hierarchy of the courts and

³⁷ Gurdeep Singh Sachar v. Union of India, 2019 SCC OnLine Bom 13059.

³⁸ Ibid at Page 14.

³⁹ Gurdeep Singh Sachar v. Union of India and Ors. in SLP(Crl) No. 11445/2019; Gurdeep Singh Sachar v. Union of India, Criminal Public Interest Litigation (St.) No. 22 of 2019.

⁴⁰ Gherulal Parakh v. Mahadeodas Maiya and Others 1959 AIR SC 781.

⁴¹ State of Andhra Pradesh v. K. Satyanarayana and Ors. 1968 SCR (2) 387.

⁴² Experion Developers Pvt. Ltd. v. Himanshu Dewan and Sonali Dewan, Civil Appeal No. 1434 of 2023.

ensures coherency in a judicial system. It ensures that the decision of the higher forum is conclusive in a matter and any judgement or order by any lower court is without any effect and is considered merged with the decision of higher court. In *CIT v. Amritlal Bhogilal & Co.*⁴³ and *Gojer Bros. (P) Ltd. v. Ratan Lal Singh*,⁴⁴ the Supreme Court has also held that the doctrine applies equally to orders of the higher court dismissing the appeals and affirming the lower court judgement as much as it applies to any modification or reversal of that. As a result, in affirmation also, the decision of lower court merges with that of the higher court, and it is the decision of the higher court alone that subsists and can be enforced.

Most of the Special Leave Petitions (SLPs) filed against the High Court decisions have been simply dismissed by non-speaking order at the admission stage. However, the order of the Supreme Court in *Avinash Mehrotra v. State of Rajasthan*⁴⁵ dismissing the SLP challenging the Rajasthan High Court judgement in Chandresh Sankhla, noted that the issue of legality of fantasy sports is no more res integra. The Court observed that the SLPs challenging the Punjab & Haryana High Court judgement in Varun Gumber and Bombay High Court judgement in Gurdeep Singh Sachar in similar issues had been dismissed by the Court earlier, and hence, the issue had been settled.

The dismissal order in Avinash Mehrotra case has been relied on by the Supreme Court in SLP(C)No(s). 15791/2022 to again dismiss an appeal against the *Chandresh Sankhla judgement*⁴⁶. The Rajasthan High Court in *Ravindra Singh Chaudhary*⁴⁷ also upheld the legality of fantasy sports while relying on orders of the Supreme Court dismissing the SLPs in Varun Gumber and Gurdeep Singh Sachar. Hence, by application of doctrine of merger the decisions of the Supreme Court affirming the High Court judgements remain as operative orders on the subject matter. The observation of the Apex Court in Avinash Mehrotra makes it clear that the issue of legality of fantasy sports is no more in dispute and they are protected under article 19(1)(g) of the Constitution as completely legal activity. The Apex Court as well as the High Courts have repeatedly relied on these orders, confirming it to be the settled law for the entire country by application of doctrine of merger.

This establishes a clear legal landscape for fantasy sports platforms, highlighting the importance of player's superior knowledge, training, attention, experience, and skill in these games. Consequently, fantasy sports are legally recognised as legitimate commercial activities, reinforced by judicial authority under Article 19(1)(g) of the Indian Constitution.

⁴³ CIT v. Amritlal Bhogilal & Co., 1959 SCR 713.

⁴⁴ Gojer Bros. (P) Ltd. v. Ratan Lal Singh, (1974) 2 SCC 453.

⁴⁵ Avinash Mehrotra v. State of Rajasthan, in SLP (Civil) No. 011794/2021.

⁴⁶ Avinash Mehrotra v. State of Rajasthan, in SLP (Civil) No. 015791/2022.

⁴⁷ Ravindra Singh Chaudhary v. Union of India and Ors., 2020 (4) RLW 3322 (Raj.).

2 REGULATORY LANDSCAPE IN THE USA

In the U.S, a prominent market for online fantasy sports, its genesis can be traced back to the 1920s.⁴⁸ This extensive history and substantial user base have shaped a comprehensive body of jurisprudence that distinguishes between games of skill and chance. The Federal government has also addressed the legality of fantasy sports. The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), passed by Congress on October 13, 2006, makes transactions from banks or similar institutions to online gambling sites illegal, with the notable exceptions of fantasy sports, online lotteries and horse or harness racing.

In the U.S, fantasy sports are subject to federal and state legal frameworks, with the categorisation of whether these games constitute gambling hinging upon the individual state's legal perspective. In contrast, in India, fantasy sports are legally recognised as games of skill, not as gambling or betting, and are offered online nationwide. and because of the tenets of constitutional federalism in India operate differently from USA⁴⁹ the subject matter of regulating fantasy sports will fall under Entry 31 of List I of the Seventh Schedule of the Constitution of India.

To determine whether fantasy sports are skill-based or chance-based, American Courts apply a series of tests: the chance test, the material element test, the predominance of skill test, and the gambling instinct test.

2.1 DEW-BECKER V. WU

The central issue of the case⁵⁰ was whether Daily Fantasy Sports (DFS) contests constitute illegal gambling under Illinois law.

Illinois law defines gambling as “knowingly playing a game of chance or skill for money or other thing of value” except for “bona fide contests for the determination of skill.” To determine if an activity is a game of skill, courts may consider the “predominance of skill test.”

This case stemmed from Colin Dew-Becker suing Andrew Wu after losing USD 100 in a DFS contest on FanDuel. Dew-Becker argued that DFS was gambling and sought to recover his money under the Illinois Loss Recovery Act. The trial court initially sided with Wu, finding the Act inapplicable to third-party platforms like FanDuel. The appellate court explained that the Act allowed recovery of gambling losses only if there was a direct connection between the people involved in the wager. Following this decision, Dew-Becker appealed. But, on appeal, the Illinois Supreme Court instead focused on characterising DFS as a game of chance or skill. While the Court acknowledged the inherent presence of the element of chance in all games, it rejected the ‘chance or material element test’ and adopted the ‘predominance of skill test’ to determine if DFS is a game of skill or chance. In adjudicating the nature of DFS, the Court considered several peer-reviewed studies that provided robust statistical evidence underscoring the significant influence of skill in DFS. Specifically, the study ‘Luck and the Law: Quantifying Chance in Fantasy Sports and Other Contests’ utilised data from FanDuel’s daily fantasy competitions and employed a novel metric alongside Monte Carlo simulations to mathematically affirm the dominance of skill over chance.⁵¹ Similarly, ‘Evidence of Skill and Strategy in Daily Fantasy Basketball’ analysed DraftKings.com’s daily fantasy basketball data, revealing through econometric analysis that successful strategies in these games

⁴⁸ David G. Roberts Jr., Note, The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got It Wrong, 58 CASE L. REV. 223, 231 (2007).

⁴⁹ Verney, D. V. (1995). Federalism, federative systems, and federations: the United States, Canada, and India. *Publius: The Journal of Federalism*, 25(2), 81-98.

⁵⁰ Dew-Becker v. Wu, 2020 IL 124472 (U.S.).

⁵¹ Daniel Getty et al., Luck and the Law: Quantifying Chance in Fantasy Sports and Other Contests, 60 SIAM REV. 869 (2018).

are distinctly skill-based and that the number of line-ups entered serves as a proxy for skill⁵². Another key study, 'Are Daily Fantasy Sports Gambling?', employed empirical analysis of FanDuel's NFL contests and an experimental approach with DraftKings MLB Double Up contests, conclusively demonstrating that daily fantasy sports are not mere games of chance.⁵³ This evidence led the Court to determine that DFS contests should not be categorised as gambling under Illinois law, thereby recognising them as games of skill.

The case is significant because it reflects the evolution of the judiciary in recognising the dominant role of skill in online games, in this case, fantasy sports, despite the presence of a chance element. The case also marks the recent judicial trend in the USA, where Courts rely on the "predominance of skill" test to evaluate online games.

2.2 WHITE V. CUOMO

The issue discussed in this case was on the constitutionality of New York's Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law, which authorised Interactive Fantasy Sports (IFS) in the state.

The case particularly revolved around the interpretation of the New York Constitution's anti-gambling provision and relevant state statutes, particularly Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law. This 2016 legislation was a result of extensive research and public hearings involving stakeholders such as Fantasy Sports operators and organisations opposed to gambling, authorised IFS in the state.

Despite initial challenges, the New York State Legislature enacted Article 14, affirming that Fantasy Sports are not considered gambling. However, the provision faced a legal challenge before the Supreme Court of New York (Albany County). Despite legislative approval and affirmation, the lower court ruled that the contested game fell under the category of 'gambling' and therefore prohibited Fantasy Sports with monetary prizes under the New York Constitution's anti-gambling provision⁵⁴. The parties appealed to the New York Supreme Court (Appellate Division, Third Department), which upheld the County Court's decision. The Court reasoned that although participants exercise skill in selecting their IFS teams, they do not have control over real-time sporting events, where factors like weather conditions and player injuries can significantly impact outcomes, thus highlighting the role of chance in IFS contests. In a landmark ruling the New York Court of Appeals validated the constitutionality of Article 14 regulating IFS. Drawing upon precedent from *Dew-Becker v. Wu*⁵⁵, the Court emphasised that skill outweighs chance in DFS. Notably, the Court rejected the penal code's definition of gambling, which relied on the 'material element test', and instead embraced the 'preponderance of skill test'. This decision reflects a broader trend in American judicial interpretation, favouring assessments of skill over chance in defining contests.

By rejecting the 'material element test' and adopting the 'preponderance of skill test,' the Court clarified the legal status of fantasy sports in New York, providing a framework for other jurisdictions to follow. This ruling also underscored the evolving nature of gambling law in response to technological advancements and changing social attitudes towards gaming activities. It reasserted the legality of fantasy sports, which is distinct from gambling.

2.3 HUMPHREY V. VIACOM, INC.

In *Humphrey v. Viacom, Inc.*, the issue pertained to the classification of online fantasy sports leagues under anti-gambling laws, specifically whether participation in these leagues constituted gambling activities. The plaintiff alleged that these leagues, where participants pay entry fees to manage fantasy teams of professional athletes, amounted to gambling activities. The plaintiff's contention was that these leagues involved bets or wagers and thus violated anti-gambling laws.

⁵² Brent A. Evans et al., Evidence of Skill and Strategy in Daily Fantasy Basketball, 34 J. Gambling Stud. 757 (2018).

⁵³ Todd Easton & Sarah Newell, Are Daily Fantasy Sports Gambling? 5 J. of Sports Analytics 35 (2019).

⁵⁴ The Constitution of the State of New York 1938, Article 1, Section 9. The word "gambling" has been defined as a contest of chance under the Penal Laws of New York, and a game of chance is defined as "a game where the outcome depends to a material degree on an element of chance".

⁵⁵ *Dew-Becker v. Wu*, 2020 IL 124472 (U.S.).

The relevant state anti-gambling statutes and federal laws such as the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) were the legal frameworks that the Court reviewed. Additionally, the court considered principles of contract law regarding the exchange of fees for services.

The Court disagreed with the Plaintiff's contention. It delved into the nature of these leagues, emphasising that participants paid entry fees for a package of services, including statistical analysis and team management tools. In its determination, the Court underscored that betting and wagering, which are subsets of gambling, were not inherent in the operational model of these leagues. Furthermore, the Court ruled that participants did not experience gambling losses as stipulated by the relevant statutes. It noted that the defendants, operators of these leagues, were not winners under the law, as they provided services in exchange for entry fees and did not compete for prizes. Crucially, the Court pointed out deficiencies in the plaintiff's complaint, highlighting the lack of specific details regarding participants who suffered losses.

This ruling reinforced the legality of online fantasy sports leagues, aligning with federal laws such as the UIGEA. The decision also highlights the distinction between gambling activities and services provided in exchange for fees from that provided by fantasy sports platforms, reinforcing the legality of fantasy sports participation. The Court looked at the fundamental difference between gambling and online gaming, like fantasy sports, wherein gambling wagering is done against the house and on external elements like a token, colour, or number. Meanwhile, in fantasy sports, the player competes against the skills of another player, and there is no platform participation in the competition. It is just a platform providing services and opportunities to participate in contests.

2.4 THE GROWING ACCEPTANCE OF FANTASY SPORTS

These illustrative cases from Illinois and New York resonate with global legal trends concerning the legitimisation of fantasy sports. Currently, a majority of American states have legalised fantasy sports, each with varying definitions and regulatory scopes.⁵⁶ The gradual judicial gravitation towards the "preponderance of skill" test aligns with these legislative actions and reinforces the global movement towards distinguishing fantasy sports as a distinct form of online game and independent of traditional forms of gambling.

⁵⁶ Petrella, S. (2024, February 19). Where Is DFS Legal? Tracking All 50 U.S. States and Canada for PrizePicks, FanDuel, Underdog, More, <https://www.actionnetwork.com/legal-online-sports-betting/where-is-daily-fantasy-sports-legal>.

3 QUANTITATIVE STUDIES CONDUCTED ON FANTASY SPORTS

While the Courts, both globally and in India have relied on the “preponderance of skill” test to determine the legality of fantasy sports, several quantitative analyses by eminent institutions and scholars have significantly contributed to the legal discourse, supporting the skill-based nature of fantasy sports. These studies statistically quantify whether a game involves skill or chance, providing objective evidence to satisfy the judicial test. Below are some key statistical studies that demonstrate this.

3.1 DECISION SUPPORT SYSTEM FOR POLICY-MAKING: QUANTIFYING SKILL AND CHANCE IN DAILY FANTASY SPORTS

This study, conducted by a team from IIM Bangalore and Information Management and Analytics Area, S.P. Jain Institute of Management and Research, Mumbai, analyses daily fantasy sports operators to understand the element of skill involved in the outcomes of the games offered by these platforms.⁵⁷

The study used Greene’s True Fixed Effects formulation of the stochastic frontier model to measure the contestant’s skill such as the impact of their previous performance, experience, recency, and contest choice on their winnability. This study not only measures the effect of skill and chance on contestants’ performance but also quantifies several other indicators of skill, like the effect of their past performance, experience, recent participation, and choice of contest, which have not been studied in the literature. The key outcomes of the report were three-fold:

- i. Skill plays a dominant role in determining winnability in cricket-based DFS contests;
- ii. consistent high performers in the past are likely to perform well in current contests
- iii. contestants who participated recently, tend to exhibit higher winnability
- iv. choice of the contest influences contestants’ winnability.;
- v. contestants with more experience with paid contests tend to exhibit higher winnability, while contestants with more experience with free contests do not show any additional winning capacity
- vi. the unobserved components of skill play a far greater role in determining winnability than pure random shocks.

Further, the hypothesis was tested using panel data for cricket based DFS contests from Dream11, which demonstrated that skill plays a dominant role in determining a contestant’s winnability. This study conclusively showed that a contestant’s performance in DFS is significantly influenced by their skill rather than the chance elements of the game.

⁵⁷ Aishvarya, N., Das, T., & Kumar, U. D. (2024). Decision support system for policy-making: Quantifying skill and chance in daily fantasy sports. *Decision Support Systems*, 182, 114237. <https://doi.org/10.1016/j.dss.2024.114237>

3.2 FANTASY SPORTS: A GAME OF SKILL OR CHANCE

This study, conducted by a team from IIM Bangalore and Cartesian Consulting Pvt. Ltd, analyses Indian online fantasy sports operators, such as Dream11, to understand the element of skill involved in the outcomes of the games offered by these platforms.⁵⁸

The experiment adopted statistical models such as linear regression, Chi-Square test, ANOVA, and the 2-sample t-test to analyse the existence of skill in the outcome of Online Fantasy Sports. The key outcomes of the report were three-fold:

- i. Users exhibited a positive impact on their success rate, thus affirming the presence of a learning effect.
- ii. The performance of the users was consistent which reflects their skill set.
- iii. Users employing thorough analysis and strategic decision-making based on a good understanding of the game outperformed the players who did not.

Further, the hypothesis was tested by a series of tests conducted on data provided by Dream 11 that showed that paid participants employing strategic tools outperformed the free-playing players, and strategic selection of the captain and the vice-captain also significantly improved the performance of the team. Thus, this study conclusively demonstrated the presence of skill in the outcome of the fantasy sports contests which is crucial in the current regulatory uncertainty of fantasy sports in India.

3.3 ARE DAILY FANTASY SPORTS GAMBLING?

This paper examined major fantasy sports league platforms like FanDuel and DraftKings to investigate the role of skill versus chance in the outcome of the games offered by these platforms. Two different methodologies were adopted to study the element of skill in the contests offered by FanDuel and DraftKings.⁵⁹

- i. **Statistical Analysis for FanDuel's NFL Contests:** This contrasted the performance of randomly generated teams against strategically selected teams using integer programming models. The study showed that skill-based teams consistently outperformed randomly generated teams, thereby underscoring the substantial role of skill in achieving success.
- ii. **Probabilistic Analysis of DraftKings MLB Contests:** This study involved participation in 35 MLB contests with randomly generated teams. The result was that the randomly generated teams uniformly lost which undermines the notion that fantasy sports contests are primarily dictated by chance and suggesting a predominant influence of skill in the outcomes.

The paper concluded that the element of skill plays a major role in the outcome of these contests and these contests fall within the scope of skill-based games rather than gambling

3.4 IS IT LUCK OR SKILL: ESTABLISHING ROLE OF SKILL IN MUTUAL FUND MANAGEMENT AND FANTASY SPORTS

This joint report by MIT and Columbia University explores the role of skill in Fantasy Sports and mutual fund management.⁶⁰ This study analysed data from Fantasy Sports platforms like Dream 11 (cricket) and FanDuel (baseball) and Mutual Funds to analyse the extent of the presence of the element of skill in Fantasy Sports and Mutual Fund Management. For the purposes of this paper, we shall only focus on the results pertaining to the presence of skill in Fantasy Sports.

⁵⁸ Fantasy Sports: a game of skill or chance. (2020) <https://fifs.in/wp-content/uploads/2022/03/IIMB-Cartesian-Report.pdf>.

⁵⁹ Todd Easton & Sarah Newell, Are Daily Fantasy Sports Gambling? 5 J. of Sports Analytics 35 (2019).

⁶⁰ Misra, V., Shah, D., and Ranganathan, V. S. (2020). Is it luck or skill: establishing role of skill in mutual fund management and fantasy sports. Massachusetts Institute of Technology.

This study introduces a robust statistical hypothesis to evaluate the influence of chance, meticulously examining data from both fantasy sports and mutual fund management. The findings are compelling: skill emerges as the predominant factor shaping outcomes in these domains. Detailed analyses of cricket data from Dream11 and basketball data from FanDuel demonstrate statistically significant evidence of skill's influence. Similarly, the study reveals that mutual funds are managed with discernible skill, impacting investment returns.

Acknowledging the presence of "survivor bias" in the data—where successful participants or funds tend to remain while less successful ones drop out—the researchers maintain that their statistical approach confirms skill's significant role in shaping outcomes. Consequently, they conclude that fantasy sports and mutual fund performances are primarily driven by skill, challenging the notion of classifying these activities strictly as forms of gambling.

3.5 LUCK AND THE LAW: QUANTIFYING CHANCE IN FANTASY SPORTS AND OTHER CONTESTS

In the paper the authors from MIT investigate the role of skill and chance in fantasy sports.⁶¹ This paper used data from both real competitions and Monte Carlo simulations to provide a statistical analysis to investigate the presence of skill in fantasy sports contests. For the purposes of this paper, data from FanDuel and Dream11 were statistically analysed. Two major outcomes came out of this statistical analysis that confirm the predominance of skill in the outcome of fantasy sports:

- i. **Survivor Bias:** Survivor bias is defined as a phenomenon where winners tend to play more contests compared to losers and losers tend to leave the game after losing multiple games. Data from Dream 11 clearly showed a trend where players who won a lot, kept playing and kept winning. This confirms the presence of skill as the players with superior skills kept winning and stayed on in the game.
- ii. **Element of Skill Compared to Mutual Funds:** The statistical analysis demonstrated a predominance of skill in the fantasy sports contests offered by Dream 11. A similar result was reached in the case of data from mutual funds as well. However, the element of skill is not as high as the one found in Dream 11.

The MIT study's comprehensive use of statistical tools, including Monte Carlo simulations, brings robust mathematical scrutiny to the debate on whether fantasy sports, particularly DFS competitions, are games of skill or chance. It concludes that skill significantly influences the outcomes in Fantasy Sports, positioning it predominantly on the skill end of a skill-luck spectrum.

3.6 STATISTICALLY INFORMING LEGAL OPINIONS

Quantitative analyses of fantasy sports have progressively underscored the skill-dominant aspect of these games, influencing legal perspectives globally and in India. The Supreme Court for the State of Illinois relied on the above studies⁶² that empirically analyses the skill-dominant nature of the game FanDuel while holding that fantasy sports are indeed games of skill.

Studies by professors from institutions like IIM Bangalore, MIT, and Columbia University have employed rigorous statistical methods, such as the 2-sample t-test, Chi-square test, ANOVA, and linear regression models, to dissect and quantify the role of skill in fantasy sports. Notably, studies scrutinising anonymised data from platforms like FanDuel and Dream11 have revealed that strategic, paid participants often outperform free contestants, highlighting a clear predominance of skill over chance. Additionally, studies analysing outcomes in NFL contests on FanDuel and MLB contests on DraftKings, through statistical comparisons between strategically created teams and randomly generated ones, have further cemented the argument that these are skill-based competitions.

⁶¹ Daniel Getty et al., Luck and the Law: Quantifying Chance in Fantasy Sports and Other Contests, 60 SIAM Rev. 869 (2018).

⁶² Dew-Becker v. Wu, 2020 IL 124472 (U.S.).

Upon examination, mutual fund management and fantasy sports exhibit a significant influence of skill, as detailed in the MIT and Columbia University reports. These comprehensive studies collectively assert the skill-centric nature of fantasy sports, challenging their classification as gambling and shaping the legal discourse around these popular games.

⁶¹ Daniel Getty et al., Luck and the Law: Quantifying Chance in Fantasy Sports and Other Contests, 60 SIAM Rev. 869 (2018).

⁶² Dew-Becker v. Wu, 2020 IL 124472 (U.S.).

4 NEED FOR REGULATORY CERTAINTY IN INDIA

The legal landscape of fantasy sports in India has evolved significantly, specially with judicial interpretations affirming these games as skill-based games. As the fantasy sports industry grows and its potential expands, establishing a clear, uniform, and stable regulatory framework becomes increasingly crucial. Such a regulatory framework must strive to balance consumer protection with the responsible growth of the online gaming industry, including fantasy sports.

While fantasy sports have gained legal certainty through judicial precedents, they still require formal codification under the law. The inclusion of online gaming companies as intermediaries under the IT Rules represents a significant step towards a uniform regulatory framework for the sector. Online Gaming Intermediaries (OGIs) are entities that facilitate user access to online games.⁶³ This regulatory regime distinguishes between two categories of online games: those that are free to play and Online Real Money Games (ORMGs). ORMGs must be verified by government-notified Self-Regulating Bodies (SRBs) to be classified as Permissible Online Real Money Games (PORMGs). For an ORMG to qualify as a PORMG, it must not involve wagering on any outcome and must comply with all applicable laws. PORMGs are required appoint key compliance officers and establish mechanisms for complaint redressal and user verification, similar to obligations imposed on significant social media intermediaries.⁶⁴ These PORMGs must also adhere to additional due diligence measures, including publishing policies for the deposit and withdrawal of money and implementing the Reserve Bank of India's mandated Know-Your-Customer process.

Moreover, upon notification by the Ministry of Electronics and Information Technology (MeitY), SRBs are tasked with developing mechanisms to safeguard users from potential harm while enabling online real money gaming companies to set benchmarks for responsible growth. The IT Rules further mandates SRBs to differentiate between permissible and non-permissible online real money games on receiving of the application from its members.⁶⁵ They must reinforce the adherence to ethical practices and enforce compliance among its members.⁶⁶ The amended IT Rules 2021 provide for a self-regulatory framework and obligates the OGIs at Tier 1 and the government-appointed SRBs at Tier 2 to ascertain safety and security standards. However, the implementation of the amended IT Rules 2021 faces challenges due to the pending notification of SRBs by MeitY.

This prevailing regulatory uncertainty significantly impedes the growth trajectory of the fantasy sports industry in India. Such uncertainty potentially limits the sector's ability to realise its full economic and employment generation potential. Additionally,, there is a noticeable lack of harmonisation between state-level legislations governing online gaming and the stipulations of the IT Rules 2021. This dichotomy raises concerns regarding the effectiveness of the regulatory mechanisms envisaged under the IT Rules 2021, particularly in assuaging the apprehensions of States inclined towards regulating online gaming under their respective betting and gambling statutes which is constitutionally beyond their legislative competence.

The lack of regulatory clarity contributes to the proliferation of illegal betting and gambling operations. Reports indicate that the illegal betting market in India is estimated to be worth approximately USD 150 billion or nearly 10 lakh crores, with offshore sports betting platforms receiving an estimated INR 8,20,000 crore (USD 100 billion)

⁶³ Rule 2(qb), IT Rules 2021.

⁶⁴ Rule 4, IT Rules 2021.

⁶⁵ Rule 3, IT Rules 2021.

⁶⁶ Rule 4A, IT Rules 2021

annually in deposits from India.⁶⁷ These offshore platforms have experienced a growth rate of 20% per year over the past three years, particularly since the onset of the pandemic. Numerous reports have noted that such illegal entities may be violating multiple laws in the country, including the Prevention of Money Laundering Act of 2002. Instances have arisen where the Enforcement Directorate has uncovered extensive use of illegal online betting apps for money laundering, many of which were operated by Chinese nationals or entities. The recent case involving the Mahadev Online Book Betting App serves as a significant example, illustrating how these apps facilitate money laundering and promote illegal betting activities within India.⁶⁸ It is evident that these apps not only contravene multiple laws in India but also engage in illicit or potentially anti-national activities. Recently, the GST authorities have asked MeitY to block around 60 platforms for failing to comply with India's registration laws. This is in addition to 110 such platforms previously notified by the authorities. However, such exercises are futile if there is no clear distinction between online gaming and gambling or betting through a harmonious regulatory approach.

Additionally, the concerns associated with this sector, such as addiction, consumer protection, and deceptive advertising,⁶⁹ cannot be addressed alone by a voluntary ethics code signed by gaming associations and will require a more coordinated response from the executive. To this end, the implementation of an overarching central regulation will not only protect consumers by addressing these concerns but also provide the necessary support to ensure the growth of this sector.

The rapid pace of technological advancements has ushered in increasingly sophisticated forms of online games, necessitating a nuanced understanding for their categorisation as games of skill or chance. In parallel, fantasy sports platforms are evolving, introducing novel formats and leveraging cutting-edge technology and algorithms to enhance user experience and carve a unique niche. This dynamic landscape demands a regulatory approach that is more refined and adaptive than the current modalities in place.

⁶⁷ Financial Express. (2024, March 13). Offshore betting platforms to mushroom in the absence of regulating authorities, reveals Think Change Forum report. Financial Express. Retrieved from <https://www.financialexpress.com/business/brandwagon-offshore-betting-platforms-to-mushroom-in-the-absence-of-regulating-authorities-reveals-think-change-forum-report-3280423/>

⁶⁸ Agarwal, N. (2024, March 18). Mahadev betting app scam: 19 smallcap stocks crash up to 37% this month. Economic Times. Retrieved from https://economictimes.indiatimes.com/markets/stocks/news/mahadev-betting-app-scam-19-smallcap-stocks-crash-up-to-37-this-month/articleshow/108512593.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

⁶⁹ Law and Technology Society, 'Panel I: Online Gaming Regulation in India', Consilience 2023: Event Report (2023), https://www.ijlt.in/_files/ugd/066049_54b16e8338464046a7c7a85b23efad31.pdf; See Varuni Khosla, "If a state bans e-games, its ability to enforce that ban is zero" (LiveMint.com, 2 May 2022) <https://www.livemint.com/companies/people/if-a-state-bans-e-games-its-ability-to-enforce-that-ban-is-zero-11651430322028.html>.

5 WAY FORWARD

Considering the prevailing jurisprudence and empirical evidence regarding the legal status of fantasy sports as skill-based games, it is essential for legislative and policy frameworks to effectively delineate between permissible games and those that are not. The following considerations are crucial in achieving this objective:

5.1 OPERATIONALISING THE IT RULES

Considering the fragmented regulatory approaches at the state level, coupled with the proliferation of illegal offshore betting and gambling websites, a centralised regulatory paradigm is imperative. This approach should address state concerns while maintaining the integrity of the online gaming sector. The Central Government, with its regulatory authority under the Information Technology Act, 2000, and other relevant legislations, is well-positioned to oversee and regulate these activities, ensuring effective control over unlawful internet practices. The Central Government may operationalise the IT Rules with a regulatory architecture aligned with its goals for consumer protection and the development of a trillion-dollar Digital Economy. Clear delineation is crucial, specifying that while games of chance fall under state jurisdiction, games of skill, such as fantasy sports, are under the exclusive purview of the Central Government.

5.2 LEVERAGING EXISTING JURISPRUDENCE

Drawing on existing jurisprudence is crucial for developing a robust regulatory framework. Judicial precedents, especially those affirming the legal recognition of fantasy sports, and best practices from the USA, offer valuable guidance. Additionally, integrating the principles outlined by NITI Aayog into the regulatory framework is crucial for ensuring comprehensive and effective regulation. Further, statistical studies shall guide in categorising a game as permissible or non-permissible. By amalgamating these sources of guidance, policymakers can construct a regulatory framework that not only acknowledges the legal status of fantasy sports but also promotes fairness, transparency, and responsible gaming practices. This approach will enable a more transparent and coherent regulatory environment that acknowledges and accommodates the unique characteristics of skill-based online games.

5.3 STATISTICAL SUPPORT TO LEGAL CLASSIFICATION

The key principles from the statistical studies conducted by academicians can provide valuable insights to the judiciary and regulators in India. Similar to how the U.S. courts have utilised such studies to classify fantasy sports as games of skill, these statistical analyses can serve as a quantitative extension to the 'preponderance of skill' test used by Indian courts. By incorporating these findings into their regulatory frameworks, Indian regulators can develop a forward-looking approach that balances regulation and innovation. This integration of legal and quantitative evidence will ensure that the regulatory environment effectively addresses the nuances of skill-based games while promoting fairness and transparency.

5.4 STRENGTHENING THE REGULATORY STRUCTURE THROUGH MULTI-STAKEHOLDER CONSULTATIONS

Comprehensive consultations with a diverse range of stakeholders is crucial. Engaging industry players, academics, civil society, and technical experts will contribute to the development of a well-rounded regulatory framework.

The way forward necessitates a multifaceted approach, combining legislative reform, central oversight, adherence to judicial precedents, and stakeholder engagement to establish a robust, coherent, and effective regulatory framework for fantasy sports and skill-based online gaming in India.

